



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 26 OF 2016

KAZUNGU KARISA MUSUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 535 of 2014 of the Senior Principal Magistrate's Court at Kilifi – D.W. Nyambu, SPM)

JUDGEMENT

1. The Appellant, Kazungu Karisa Musungu, is serving ten years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006. It was alleged that on 17th December, 2014 within Kilifi County, the Appellant jointly with another not before court intentionally and unlawfully penetrated the vagina of R.B.K., a child aged 17 years.
2. The Appellant was faced with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The alternative charge was, as was the norm, not considered after the Appellant was convicted on the main count.
3. The Appellant was also charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars being that on the date of the alleged defilement he also assaulted R.B.K. and caused her actual bodily harm.
4. The Appellant has appealed against both conviction and sentence on the grounds that the trial magistrate erred as the offence was not proved; that the age of the complainant was not proved to the required standard; and that his defence was not considered.
5. This being a first appeal, the Appellant is entitled to a fresh review and analysis of the evidence adduced in order for this court to reach its own conclusion as to the guilt or otherwise of the Appellant. In doing so, I must bear in mind that I did not have the opportunity of seeing and hearing the witnesses as they testified – see **Okeno v Republic [1972] E.A. 32** and **Peters v Sunday Post [1958] E.A. 424**.
6. R.B.K. who testified as PW1 told the court that she was seventeen years on the date of the alleged offence. On 16th December, 2014 at about 10 p.m. she went to a fundraiser with her brother, B. He later escorted her back home where she locked the house and went to sleep. At about 1.00 a.m. she heard a knock on the door and on enquiring who the person was, the visitor introduced himself as Amani. She refused to open the door but the person persisted on knocking the door before forcing it open. The person

strangled her, tore her clothes and had carnal knowledge of her. Somebody called out to her defiler using the name Kazungu alerting him to get out because the sun had risen. The attacker had a torch and using the light from the torch she identified him. She raised alarm and her brother and his friend responded. They gave chase and found the Appellant, whom she had injured on the forehead. He was found with her lessa and her clothes plus a knife. She went and reported the incident to the village elder, PW3 Hamisi Ali Mbwalane who told her that he knew where the rapist was. They searched for him and arrested him at a shop. He was escorted to Kilifi Police Station and charged.

7. According to the complainant, the Appellant's accomplice by the name Buda later scalded her with hot water for reporting the Appellant to the police.

8. PW3 testified that the complainant identified the Appellant when he arrested him. He told the court that the Appellant had a bruise on the forehead confirming the evidence that the complainant had given him.

9. PW4 Dr. Sumaiya Adhamani produced a P3 form showing that the complainant had cuts on her inner upper lip and left side of the neck. High vaginal swab revealed blood, pus and yeast cells but no semen.

10. In his defence, the Appellant denied defiling the complainant stating that he was framed by PW3 after he refused to work for him. He stated that he was arrested at a shop where he had gone to do shopping.

11. On the question of age, the Appellant submitted that the actual age of the complainant was not proved. He asserted that the trial court relied on assumptions in convicting him. In support of his submission the Appellant referred to the Judgement of the trial court where it was held that:

“PW1 stated that she was 17 years old at the time of the alleged offence. An age assessment report dated 18th December, 2014 (P. Exhibit 3) confirms that she was 17 years as at that date. In the PRC form (P. Exhibit 2) the complainant's age is 15. Her date of birth was written as 24th May 1999. Be that as it may she was under 18 years at the time of the alleged offence. The age assessment report will guide the court as to the age of the complainant at the time of the alleged offence.”

12. According to the Appellant the evidence on the age of the complainant was not clear and the trial magistrate just assumed that the complainant was under eighteen years. It is the Appellant's case that the complainant had told the court that her birth certificate was damaged. He stressed the contradiction in the complainant's testimony pointing out that the complainant testified that she was seventeen years and at the same time gave her date of birth as 24th December, 1999 making her fourteen years at her date of the alleged offence.

13. The Appellant relied on the decision of the Court of Appeal in the case of **Alfayo Gembe Okello v Republic [2010] eKLR** in support of his submission that the prosecution has a duty to establish the age of the victim in a sexual offence case.

14. On the issue of identification, the Appellant submitted that the incident occurred at night and the complainant testified that the torch light was directed at her. His view is that there was no way that the Appellant could have identified him in such a scenario. Further, that the complainant had stated that she did not know his name and neither knew him prior to the alleged defilement.

15. Referring to the complainant's testimony that one Buda had called her assailant by the name Kazungu, the Appellant submitted that the complainant did not identify him to PW3 and it cannot be explained how PW3 concluded that he was the named Kazungu. He dismissed his alleged identification by the complainant in the streets asserting that an identification parade ought to have been held.

16. The Appellant concluded his submissions by stating that the case against him was not proved to the required standards. The Appellant wonders why his accomplice by the name Buda was never arrested even after allegedly scalding the complainant with hot water. Referring to the evidence that the

complainant was pregnant some months prior to the alleged defilement, the Appellant urged the court to find that it was somebody else who defiled the complainant.

17. The Respondent urged the court to confirm the conviction and sentence stating that the ingredients of defilement being the age of the victim, penetration and identification of the assailant had been established. Reliance was placed on the decision in the case of **Josphat Muoki v republic [2016] eKLR** in support of the submission.

18. Where an accused person is charged with defilement, the prosecution has a responsibility to establish that the victim who was a child at the time of the commission of the alleged offence was penetrated by the accused person.

19. On the question of identification, the complainant stated that the Appellant had a torch and he directed the torch light at her. Using the torch light, she identified him. This is doubtful considering that the complainant's evidence on how the Appellant was arrested is confusing. In her evidence-in-chief, she testified that when she raised alarm her brother and his friend responded to her distress calls. She proceeded to testify that:

“They chased the rapist. He was found lying on my lessa while armed with the knife in an unfinished house. He also had my clothes beside him. The clothes he had tied on his vest.”

20. She does not explain what happened after the Appellant was arrested but proceeded to state:

“I then went to my brother's house and I explained to him what happened. I went back home. It was around 7.00 a.m. I then went and reported to the village elder, Hamisi Mwanjiwa. That was after I changed clothes.

Hamisi said he knew who the rapist was. We searched for him and we found him at a shop. He was arrested by the elder. The rapist refused to admit the offence.”

21. Much later in her evidence the complainant stated that:

“Hamisi Mwanjiwa, the village elder brought the suspect to me at a shop in Msufini. It was at Hussein's shop. I then identified him.”

22. The evidence of the complainant was not clear as to the place of the arrest of the Appellant. She was not clear as to the circumstances under which she identified the Appellant at the time of his arrest.

23. Her evidence could have received clarification from her brother and the friend of his brother. These two crucial witnesses were never called to testify and no reason was advanced for the failure to call the witnesses.

24. The issue of identification was crucial in this matter and the evidence of the brother of the complainant and his friend was necessary in order to tie the Appellant to the scene of crime. Failure to call these two witnesses greatly undermined the prosecution case.

25. Another serious mistake on the part of prosecution is the fact that the clothes of the complainant and the knife that was used by the assailant to threaten the complainant were not produced as exhibits.

26. As for penetration, the medical evidence noted pus, epithelial cells, yeast cells and blood. The hymen was not intact and there was no discharge or blood in the genitalia. This medical evidence was neutral in that it did not establish penetration on the date of the alleged defilement. It is important to note that although a high vaginal swab was done, no semen was detected. The complainant did not testify that the Appellant used a condom during the alleged sexual ordeal. It is therefore difficult to say that penetration occurred.

27. On the question of age, I agree with the trial court that the evidence adduced pointed to the fact that the complainant was below eighteen years on the date of the alleged defilement. The Appellant's complaint that the age of the complainant was not established was therefore unfounded.

28. Considering the evidence adduced in support of identification of the Appellant and penetration of the complainant, I find that the same was too shaky and could not be relied upon to arrive at a conviction. In the circumstances, I find that the appeal has merit as the prosecution's case was not proved to the required standard. I allow the appeal, quash the conviction and set aside the sentence, meaning that the Appellant is set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 12th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT