



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 70 of 2017.

PETER MUTISYA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 953 of 2015 delivered by Hon. E. S. Olwande, SPM on 2nd June, 2017).

JUDGMENT.

Background.

1. Peter Mutisya, hereafter the Appellant was charged in the main count with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 23rd February, 2015 at Eastleigh in Shauri Moyo within Nairobi Area County, intentionally and unlawfully caused his penis to penetrate the vagina of S.M., a girl aged 10 years. In the alternative he was charged with an indecent act with a child contrary to section 11(1) of the Sexual offences Act in that he intentionally and unlawfully committed an indecent act with S.M., a girl aged 10 years old, by using his hand to touch her private parts, namely vagina. The Appellant was found guilty of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act and sentenced to life imprisonment.

2. He was dissatisfied with that court's decision and decided to lodge this appeal against the conviction and sentence. His grounds of appeal are contained in an Amended Memorandum of Appeal dated 16th April, 2018. They are; (i) that his right to a fair hearing was violated, (ii) that his identification by the complainant was not corroboration, (iii) that Section 150 of the Criminal Procedure Code was violated, (iv) that the case was not proved beyond a reasonable doubt, (v) that the burden of proof to was shifted (vi) that his defence was not considered.

Submissions.

3. The Appellant relied on written submissions whilst Miss Sigei for the Respondent made oral submission. The Appellant submitted that his constitutional right to a fair hearing was violated because he was not supplied with the prosecution witness statements.

4. The Appellant also questioned his identification. He cited the failure by the complainant to give his description to the person she met soon after the offence. And that therefore any identification premised on

the complainant's identification of him was not safe. He relied on **Maitanyi v. Republic [1986] KLR** and **Norman Ambich Miero & Another v. Republic [2012] eKLR** to buttress the submission.

5. His next submission related to penetration that the essential ingredients were not proved beyond a reasonable doubt. He pointed to the evidence of PW4 who stated that the medical evidence pointed to the complainant being sexually active and she could therefore not reach a conclusion that the child was defiled in the incident. He then pointed out that there were doubts surrounding his arrest and questioned the failure to summon the old man who led to his arrest to verify the complainant's claims. He submitted that this was contrary to the provisions of Section 150 of the Criminal Procedure Code.

6. His final submission related to his defence which he submitted was not taken into account by the trial magistrate and that the learned magistrate shifted the burden of proof onto him obliging him to prove his innocence which was a grave miscarriage of justice. He concluded by urging the court to allow the appeal.

7. Ms. Sigei opposed the appeal. She submitted that the complainant was a reliable witness and that her evidence was consistent and that the trial court did not err in relying on her sole testimony. She submitted that the Appellant was properly identified as the complainant led the police to the scene one week after the incident and pointed him out as her assailant. She added that the complainant's age was proved to be 10 years and that although no age assessment was done there was ample evidence to reach this conclusion. She submitted that the Appellant merely denied committing the offence. She pointed out that although the prosecution failed to call the investigating officer there was no doubt that the offence was established by the witnesses who testified. She concluded by submitting that the conviction was safe and the sentence legal.

8. In reply, the Appellant submitted that the complainant's age was not proved as a birth certificate was never produced. Further, that the person who led to his arrest was never called to testify.

Evidence.

9. The prosecution's case was that the complainant, (**PW1**) S.M. on 23rd February, 2015 differed with her mother over the use of a mobile phone. She decided to escape as she anticipated a beating. She found herself in Eastleigh and given that it was late she approached an old man who was packing books and asked to use his mobile phone. The man said he had no credit and the Appellant who overheard their conversation offered to take her home. That they walked a distance and after crossing a bridge the Appellant dragged her into a thicket near the bridge. When she raised alarm he strangled her and threatened her before forcing her to lie on the grass and defiling her. He later released her and she ran towards the road where a matatu driver saved her and took her to the police post where her mother was contacted. She was taken to the hospital where she was treated and discharged. She recalled that they later tried to locate the scene and on the first occasion she was unable to do so but on the second occasion she found the old man who she had met on the material day. The old man took police officers to where the Appellant was and she was able to identify him. In cross examination she said that she would recall the Appellant well as the Kshs. 20 she received from the old man she gave it to him (Appellant) to pay her fare.

10. **PW2**, B.W.M., PW1's mother confirmed that the PW1 left home after a quarrel between them. She looked for her and also reported the matter to the police. At 11.00 p.m. she received a called from an officer from Ngara AP Camp who informed her that PW1 was there. On arrival, she was informed that the child had been defiled. After a week they went back to the place where they found the man who was selling books and she informed the man that she wanted to reward the man who had escorted her child home. The old man agreed to trace the man. On the following day she went to the police and a plan to arrest the Appellant was organized. The Appellant had then been called by the bookseller and the police arrested him.

11. **PW3, Dr. Joseph Maundu** a police surgeon examined PW1 on 18th March, 2015. He found no physical injuries on her but her hymen was not intact. There was an old tear at 3 o'clock position and

thick white discharge. PW1 had earlier been treated at MSF Hospital. He filled a P3 detailing his findings. He also examined the Appellant on 18th March, 2015 and found no injuries in his genital areas. **PW4**, Irene Nyagwachi a clinical officer with MSF Juja road produce a medical report made by her former colleague Suhalya. The report was made pursuant to an examination carried out on 24th February, 2015 at 1.30 a.m. on PW1. No physical injuries were noted and a genital examination showed that there was no hymen but the external genitalia was normal. A whitish discharge and an old tear were noted. A medical certificate and Post Rape Care form were filed. She testified that it was difficult to tell if there was any recent sexual activity.

12. The Appellant gave an unsworn statement of defence in which he said that on the material date he left his house in the morning to go to work and was arrested on his way to work and taken to Shauri Moyo Police Station where he was detained for a week. He stated that he learnt of the reasons for his arrest when he was charged in court.

Determination.

13. After considering the submissions and the evidence on record, I have deduced that the following issues arise for determination: whether the Appellant's right to a fair hearing was violated, whether crucial witnesses failed to testify, whether the trial magistrate shifted the burden of proof upon the Appellant, whether the Appellant's defence was considered and whether the offence was proved beyond a reasonable doubt.

14. The Appellant's submission that his right to a fair trial was violated was based on the assertion that prosecution failed to disclose its evidence to him. He submitted that he was never supplied with witness statements before the matter was heard which meant that his right to a fair hearing was infringed. The Appellant took plea on 19th March, 2015 when the court ordered that witness statements should issue at his cost. When the matter first came up for hearing on 12th June, 2015 he did not bring out the issue of the witness statements and given his ability to cross examine witnesses throughout is a testament that he was supplied with the witness statements. This ground of appeal fails.

15. The next issue relates to the failure of the prosecution to call the investigating officer who would have laid the basis for charging the Appellant. The court agrees that an investigating officer's evidence is crucial in stitching together the prosecution's evidence. But where the evidence is sufficiently adduced by other witnesses, the failure to call the investigating officer cannot render the prosecution case fatal. In this case, the book seller was a sufficient witness who accounted that the Appellant took away PW1 after which the defilement complaint was raised. He was privy to the initial meeting between the complainant and the Appellant and was therefore in a position to corroborate the complainant's evidence that the Appellant offered to take her home before defiling her. This witness was crucial in the identification of the Appellant as he was unwittingly a part of PW2's ploy when he organized for her to meet him. He was in possession of some crucial evidence and was therefore an important witness in this matter. The effect of the failure to call him as a witness was that the prosecution's evidence was disjointed and further a crucial piece of corroborative evidence was overlooked. I make a conclusion that the failure to call him created an inference that his evidence, if adduced, would have been adverse to the prosecution. See **Bukenya & others v. Uganda[1972] EA549** where it was held that:

"...the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the court has the right and the duty to call witnesses whose evidence appears essential to the prosecution of the case, and lastly that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

16. The Appellant submitted that the trial magistrate shifted the burden of proof upon him. This was in relation to his submission that his defence was not considered in the judgment. At page 10, paragraph 1 the court considered the Appellant's defence before finding the same to be of no probative value. This submission then fails.

17. With regard to proof of the offence, the prosecution was enjoined to prove age of the victim, penetration and identification of the Appellant. With regards to age the complainant testified that she was 10 years old. The *voire dire* examination also pointed to PW1 as a minor. See: **Evans Wamalwa Simiyu v. Republic [2016] eKLR.**

18. With regards to penetration, although the complainant gave evidence which indicated that penetration had occurred, the evidence of the medical experts, PW3 and PW4, was non-conclusive on this end. PW4 who produced a report pursuant to an examination carried out hours after the ordeal testified that no physical injuries were noted on the complainant and that a genital examination disclosed a missing hymen and white discharge. The tear on the hymen was old and no fresh tear was noted. That the old tear was an indicator that the child had been sexually active before the incident and it was therefore difficult to tell if there was recent sexual activity. The evidence of PW3, who filled the P3 form, mirrored that of PW4.

19. The medical evidence does not therefore corroborate the complainant's evidence to the extent that she was defiled once by the Appellant. More so that the defilement was a recent incident. I conclude that in the circumstances, penetration was not proved.

20. The final ingredient is that of identification. The offence occurred at night with the report from MSF hospital indicating the time as 9.00 p.m. The offence occurred on 23rd February, 2015 and the Appellant was arrested, according to the charge sheet, on 16th March, 2015. The length of time between the two was explained by PW2 who testified that after the incident she was advised not to stress the complainant and she therefore only asked her questions a week after the offence. The complainant agreed to take her to where she had gone. She testified that this was on 12th March, 2015. They found no one there. That a week later they returned to the scene and this time the complainant showed them a book seller who she had met on the fateful night. That they approached the book seller and asked if he knew the man who had escorted the complainant home as they wanted to reward him for escorting the child. The bookseller asked her to come the following day when the suspect would be present. On the following day she got two police officers who assisted in the arrest.

21. The failure to call the bookseller meant that the identification was of a single witness. The court needed to treat it with caution particularly when one considers that the identification took place three weeks after the incident. The court must also consider the fact that the offence took place at night when conditions for a positive identification were difficult. I am of the view that the identification evidence is not watertight and a possibility of mistaken identity may have occurred. I am unable to conclude that the Appellant was the perpetrator of the offence.

22. In the end, I find that the case was not proved beyond a reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 29th day of **May, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*
2. *Miss Atina for the Respondent.*