



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 131 FO 2017

H M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in criminal case No 488 of 2015

at Mariakani Law Courts delivered by Hon. LUTTA, SPM, on 30th March, 2017)

JUDGMENT

1. The appellant, H M was charged with the offence of defilement contrary to section 8 (4) of the Sexual Offences Act No 3 of 2006 in the main count. The particulars were that;

“ On 11th day of September, 2015 in Kwale county, the appellant intentionally caused his penis to penetrate the vagina of F.K., a child aged 17 years”

In the alternative charge, the appellant was charged with the offence of indecent act contrary to section 11 (1) of the Sexual Offences Act No 3 of 2006.

The facts being that;

“On the 11th day of September, 2015 in Kwale County, the appellant intentionally caused his penis to touch the vagina of F. K. a child aged 17 year”

2. The case proceeded to full trial and the appellant was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement. And it is upon being aggrieved by the said conviction and sentence, that the appellant filed a petition of appeal on 31st July, 2017 on the following grounds (amended);

1. THAT the learned trial magistrate erred in law and fact by finding the appellant’s conviction and sentence without considering that, the AGE of the complainant herein was not proved beyond any reasonable doubt hence the conviction and sentence of 15 years imposed upon him by the trial court was unsafe.

2. THAT the learned trial magistrate erred in law and fact by convicting the appellant to 15 years imprisonment without considering that, section 36 (1) of the Sexual Offences Act No 3 of 2006 was not put into consideration.

3. THAT the learned trial magistrate erred in law and fact by convicting the appellant to 15 years imprisonment without considering that, section 8 (7) of the Sexual Offences Act No 3 of 2006 was not put into consideration so the conviction and sentence imposed upon him was unsafe.

4. THAT the learned trial magistrate erred in law and fact by convicting the appellant to 15 years imprisonment without considering his reasonable doubt defence statement.

For these reasons, the appellant prayed that the conviction be quashed and the sentence set aside.

3. As a first appellate court, I have subjected the entire evidence that was adduced before the trial court to a fresh evaluation and scrutinizing, while bearing in mind that I had no opportunity to see and hear the witnesses testify as per the principles laid down in the celebrated court of appeal case of OKENO VRS REPUBLIC (1972) E . A 32.

4. Briefly, the prosecution's evidence was adduced by five (5) witnesses who testified that on 11.9.2015, the complainant, F .K who was aged 17 years old was found with the appellant who she said was her husband and it was found that she was pregnant. She said that it was the appellant who impregnated her.

5. Pw3, on realizing that the complainant (Pw1) who is her daughter had been defiled and was pregnant , reported the matter to Kaloleni police station. She said that she learnt that the complainant had been defiled by the appellant who she had gone to stay with. That the police went and found her there.

6. She was taken to hospital where she was examined by PN2, MWANGOLO CHIGULU, a senior clinical officer at Mariakani Sub – County hospital on 12.9.2015. According to Pw2, he examined and found the complainant, who was alleged to have been defiled, had no hymen but there was no evidence of bruises. He also found that she was pregnant. He concluded she had been defiled because she was aged 17 years old at the time. He filled the P3 form in this regard on 13.9.2015 which he produced as exhibit P1 and an age assessment report as exhibit P2.

7. Pw4, No 81061259 APC DAVID KEINO told court that on 12.7.2016 he was told where the suspect, (appellant) was and he proceeded to arrest him. He escorted him to Meriakani police station, from where he was collected by No 55017 Sergeant ROBY KEBERENGE who investigated the matter by recording witnesses statements and taking possession of the P3 form. She said that she established that the complainant and appellant had a relationship and had been arrested while living together. She also said that she proceeded to charge the appellant. She said that she charged the complainant for being a child in need of care and protection.

8. At the time of the prosecution case, the appellant was placed on defence and he opted to give unsworn statement in defence. He called no witness.

According to the appellant, H M, he is a welder and on 13.9.2015, he was in a rental house when he heard a knock on the door. That the complainant's mother came in with the police and he was assaulted and taken to Kaloleni police post from where he was transferred to Samburu police station and charged with the offence in court. He denied committing the offence.

9. In his judgment the trial magistrate had this to say;

“The complainant came out as a truthful witness when she testified . I found that the evidence by the prosecution's witnesses is consistent and corroborated. The defence by the accused does not shake the prosecution's case and convict him in respect of the principal charge under section 215 of the Criminal Procedure Code”.

10. As the first appellate court, I have a duty to re-consider and evaluate the evidence in totality as to arrive at my own conclusion while bearing in mind that unlike the trial magistrate, I did not have the benefit of seeing the witnesses testify and observe their demeanor. I have done this in consideration of the petition of appeal, grounds thereof, rival submissions, cited authorities and the law.

11. The appellant, in his written submissions consolidated his grounds of appeal and argued them together on one issue of whether the prosecution had proved the case against the appellate beyond any reasonable doubt .

12. According to the appellant, the prosecution had totally failed to prove the case against him to the required standard of proof being that of “beyond any reasonable doubt”.

13. The appellant was charged with the offence of defilement contrary to section 8 (1) as reads with section 8 (4) of the Sexual Offences Act.

To prove the offence of defilement, three material ingredients require to be proved. These ingredients are;

1. the age of the victim;
2. penetration of victim;
3. identification of culprit.

14. On the issue of age of the victim, it was the complainant's evidence (Pw1 herein) that she was 19 years old at the time of testifying on 12.4.2016. The particulars of the charge show that the complainant was defiled on 11 day of September, 2015. She maintained this position when she was cross examined.

15. Pw2, a Senior Clinical officer produced a P3 form (Exhibit P1) which indicated that the complainant was 17 years old at the time of the offence. He also produced an age assessment report as Exhibit P2, and this also showed that the complainant was assessed and found to be 17 years old on 14.9.2015.

16. Pw3, mother to the complainant, K K did not make any reference to the complainant's age in her evidence.

Pw 4, also did not make any reference to complainant's age although he is the one who escorted her for medical examination.

Pw5, the investigating officer stated that;

“ It was alleged he had defiled a 17 year old girl!”.

17. According to the appellant, he did not commit the alleged offence. It is trite that the exact age of the complainant is a crucial fact which must be proved by the prosecution as it determines the sentence in the event of a conviction.

18. In this case, from the evidence of the complainant, it appears she was 18 years old at the time of the offence, which would then mean that she was not in the category of a child as defined by the Children's Act, Cap 141 Laws of Kenya, but Pw2, the clinical officer produced a P3 form and age assessment report showing that the complainant was 17 years at the time hence she would be categorized as a child.

19. It will be noted that the indicated age of the complainant in the P3 form (Exhibit P1) is an estimate which cannot be relied on. The age assessment report (Exhibit P2) was produced by Pw2 but he did not confirm that he conducted the said assessment. It was not in the prosecution's evidence who conducted the age assessment of the complainant. I find it necessary for the person who assessed the complainant's age to have been called to testify so as to explain the methodology and factors he may have used to determine the same. And if it was not possible to call the said person, a disclosure of who it was also necessary because it would assist the court to determine the authenticity of the said report (Exhibit P2).

20. It is worth noting that in this case Pw2 produced the age assessment report when he was not its author without the prosecution laying a foundation for this. For this reason, I find that the age assessment report ought not have been relied on by the trial magistrate in determining the complainant's age and arriving at the decision he did. Her mother did not make reference to her age and the other witnesses gave basing evidence with regard to the complainant's age at the time of the alleged offence.

21. From the above findings, it is not clear what the exact age of the complainant was at the time of the alleged offence hence a doubt has been raised in the prosecution's evidence in this regard whose benefit should go to the appellant. Faced with almost similar circumstances, the court of appeal had this to say in the ALFAYO GOMBE OKELLO VRS REPUBLIC (2010) e KLR,

“We must therefore take the construction which is favorable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence, the onus was on the prosecution to clear such doubt, failure to which the benefit would go to the appellant. We so find”.

22. And in the case of CHIROTO NYAMAWI MUMBA VRS REPUBLIC CRIMINAL APPEAL NO 373 of 2010 (un-repealed), the court of appeal Judges held;

“.....it was not sufficient for it to be said that she was 16 years old. Her age had to be established. The age of the complainant not having been proved, the offence of defilement cannot be said to have been proved. For the foregoing reason we are satisfied that the prosecution failed to discharge the onus of proof to the required standards.”

23. With regard to the issue of penetration, it was the complainant's evidence that prior to the arrest of the appellant they were living together as husband and wife and he impregnated her. Pw2, the clinical officer told court that on examining complainant he found her hymen was missing but there was no evidence of bruises. He also testified that it was found that she was pregnant. Pw3 told court that the appellant used to go for the complainant and she left school. And so from the evidence of missing hymen and evidence of pregnancy, it was found that the complainant had been penetrated. This was not challenged by the appellant. What the appellant challenged is that he was the one who penetrated the complainant.

24. It is the appellant's argument that if he used to defile the complainant, why was she not found with evidence of recent penetration? This argument cannot lie especially since there was no evidence that the complainant was forced into sexual activity. Defilement is not about forced sexual activity in most cases. It is about one having sexual activity with a child even if it is with consent. Evidence of bruising, I believe would be in a case where the sexual act was forced. In this case, there was no evidence that the complainant was forced into sexual activity.

25. As for the issue of the complainant's pregnancy not having been established to be the appellant's vide a DNA test, I find that he has relied on the provisions of section 36 (1) of the Sexual Offences Act No 3 of 2016 which provides'

“Notwithstanding the provisions of section 26 of this Act, or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence”.

26. Like the trial magistrate, I find that the complainant appeared to be a truthful witness when she testified that the complainant and herself were living together as husband and wife. She also said that it was because of this pregnancy that the case was initiated and the appellant did not rebut this evidence. His defence was first a mere denial. And so this being the case, I find there was no need for a DNA test. And even then, the requirement under section 36 of the Sexual offences Act is not mandatory.

27. In the course of hearing the appeal, the appellant alleged that he was 17 years old at the time of the offence. He was sent for an age

assessment report and a report dated 23.3.2018 filed, confirming he was now 18 years old. This then confirms that he was 17 years old at the time of trial.

28. In the circumstances, having established that the appellant was 17 years old at the trial and the complainant's exact age at the time of the offence, not established, the charge of defilement fails.

The appellant appeal is hence found meritable and I proceed to quash his conviction and set aside the sentence.

The appellant is set at liberty forthwith unless lawfully held.

Orders accordingly.

Judgment delivered, signed and dated this 28th day of May, 2018.

LADY JUSTICE D. O. CHEPKWONY

In the presence of:

M/s Ocholla , counsel for the state

Appellant in person– Present

C/clerk- Beja