



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 11 OF 2017

JAMES GITONGA MICHENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and judgment of an offence of defilement in O/S No. 5 of 2015 delivered on 2nd March 2017 by HON. M. SUDI - SRM at Chuka Law Courts.)

J U D G M E N T

1. **JAMES GITONGA MICHENI**, the appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8 (3)** of **Sexual Offences Act No. 3 of 2006** vide **Chuka PM's Court Sexual Offence No. 5 of 2015**.

The particulars of the offence as per the charge sheet are that on 13th January, 2015 at around 9 pm within Tharaka Nithi County, the appellant intentionally and unlawfully caused his male organ namely penis to penetrate the female genital organ namely vagina of one (name withheld) a girl aged 13 years old.

2. The appellant denied the offence and the prosecution called a total of 6 witnesses whereas the appellant called one witness in his defence.

Background of the prosecution's case:

A brief overview of the evidence in the trial court shows that on 13th January 2015 two girls, including the complainant in this case were picked up by one Zakayo with a motorcycle and later joined by the appellant. The two that is the appellant and the said Zakayo took their respective girls as their girlfriends to their respective cottages where they engaged in sex. The following day the girls went back home but afraid that they would be beaten, they took off until on 15th January, 2015 when they were found and taken to the police station on 16th January 2015 where a report regarding their disappearance had been booked. The girls were then escorted to the Chuka County Hospital and based on the medical findings, the appellant was charged. In his defence, the appellant denied the offence and blamed his uncle Phares Muchera (PW2) for fixing him due to a land dispute and connected him with the cutting of all trees on the disputed parcel. The learned trial magistrate upon evaluation of evidence found that the prosecution had proved its case beyond reasonable doubt as all the ingredients of the offence had been established. The appellant was convicted and sentenced to serve 20 years imprisonment.

Grounds of appeal

3. The appellant was aggrieved by both the conviction and sentence and filed this application raising the following 11 grounds of appeal namely:-

(i) That the trial learned magistrate erred in law and fact when she failed to note that there was no presence of spermatozoa in the victim's vagina during examination.

(ii) That the learned magistrate erred in law and fact by failing to note that the P3 form was filled 6 days after the incident and that the evidence found did not link the appellant.

(iii) That there was an error because the appellant was not subjected to medical examination.

(iv) That the prosecution was not proved beyond reasonable doubt.

(v) That the victim was not subjected to viore dire examination.

(vi) That the learned trial magistrate erred in applying Section 200 of the Criminal Procedure Code.

(vii) That there were witnesses mentioned who were not called as witnesses.

(viii) That the defence was not considered.

4. The appellant chose to proceed in this appeal through written submissions "**amended grounds of appeal**". Although in the written submissions he has raised new grounds on ground 4 thereof without leave pursuant to the provision of **Section 350** of the **Criminal Procedure Code** to introduce additional or new grounds.

5. The appellant has questioned the credibility of PW4 (A K) who was reported to have witnessed the appellant defiling the complainant as she stood at the door. The appellant has questioned why the PW4 could not run and seek for help if indeed she was standing at the door watching the events as they unfolded. The appellant has contended that the doctor's evidence revealed that the victim was not defiled as no evidence was noted to support the finding. In his view, the absence of a hymen is not sufficient proof that it is the appellant who was responsible. He has argued that hymen may be broken through other activities like games and not necessarily cause by penetrative sex.

6. The appellant has contended that PW1 and PW2 were coached to give false testimony against him owing to existence of a grudge amongst members of the family as both the victim and the appellant are related. He has pointed out the grandmother of the complainant had disapproved of the relationship as per the evidence tendered during trial.

7. The appellant has further submitted that the complainant's age was not clearly established as the birth certificate tendered in evidence showed that she was between the ages of 15 and 16 years and further to that he has also pointed out that the complainant could not be recalled for further cross-examination because she had gotten married. This according to the appellant showed that the complainant was not a minor and had had prior sexual relations prior to the incident relating to the charges he faced at the lower court.

8. The Respondent has countered the above submissions with its submissions where it contends that the prosecution managed to discharge its burden of proving the necessary ingredients in the offence for which the appellant was charged and convicted. Through learned counsel Mr. Machirah, the Respondent has pointed out that the prosecution successfully proved the following ingredients beyond reasonable doubt.

(i) Penetration - That the appellant had a sexual encounter with the complainant.

(ii) Age- That the age of the complainant was between 12-15 years at the time.

9. The Respondent has submitted that they tendered both oral and medical evidence at the trial that proved that the appellant committed the act. The state has pointed out at the evidence of the complaint (PW1) who testified that they had gone to the appellant's home after running away from their grandmother who they feared would beat them. It is submitted that PW1 positively testified that she had sex with the appellant albeit willingly and that the evidence of PW4 (A K) confirmed that fact. That evidence, it is submitted was corroborated by the evidence of Hillary Kangichu (PW5), the clinical officer who tendered the P3 form as P. Exhibit 4 as well as Post Rape Car Form as P. Exhibit 2 which according to the state proved that there was penetration.

10. The Respondent has also contended that the age of the victim was proved by the birth certificate tendered as P. Exhibit 1 by the investigating officer (PW6) and this justified the sentence meted out against the appellant.

11. On the question of defence, the state has submitted the evidence tendered by the defence was inconsistent and that the defence of alibi was so weak that no reasonable court could take it seriously because the timelines given by DW1 (Caroline Wanja) and the details was not corroborated by any independent evidence. The Respondent contends that the defence was duly considered by the trial court in its judgment and the appellant cannot fault the trial court for disregarding it.

12. This appeal in my view has raised three issues for determination namely:-

(i) Whether the evidence tendered by the prosecution met the standard of proof required to convict the appellant for the offence he was charge with.

(ii) Whether the trial court considered his defence.

(iii) Whether the trial court properly directed itself on the provision of **Section 200** of the **Criminal Procedure Code**.

13. On the first question of proof, is that this court agree with the prosecution that offences under **Section 8(1) (3)** of the **Sexual Offences Act** are proved by two necessary ingredients;

(i) Penetration

(ii) Age of the victim. These two ingredients are key and must be established and proved beyond reasonable doubt to sustain a

conviction.

14. The evidence of the complainant (PW1) before the trial court shows that the victim willingly went to the appellant's house after running away from her grandmother with whom she was staying with.

This is what she told the trial court;

"..... we went to Itugururu town and he called Gitonga (Appellant). Thereafter we all headed to Kaango. We went to their home and slept together. I had sex with Gitonga..... I was not forced to go. I went willingly."

The incident happened on 13th January, 2015. The evidence of the medical officer Hillary Kangichu (PW5) showed that the girl (complainant) was taken for medical examination on 16th January 2015 and according to him, **"3 days is too long to determine the period of sex occurrence."** He tendered P 3 as P. Exhibit 4, post rape form as P. Exhibit 2, and survivor express card as P. Exhibit 3. The medical officer (PW5) however failed to tell the court whether he was the author of those exhibits or if not, whether he was conversant with the medical expert (s) who authored them in order to render the such evidence admissible under the provisions of **Section 48** as read with the provisions of **Section 70** of the **Evidence Act** (Cap80 Laws of Kenya). This court has keenly looked at the signature appearing on the P3 (P Exhibit 4) and survivor express card from Chuka District Hospital (P.Exhibit 3.) and it is apparent that the two documents were signed by one J.M Mwenda and of course this court takes judicial notice of the fact that Dr. Kitili Mwenda is a doctor working at Chuka Referral Hospital at the moment but I am not sure whether he is the one who appended his signature to those documents tendered as exhibits with initials J.M Mwenda. That crucial evidence on who authored the three exhibits P Exhibits 2, 3 and 4 in my view is missing from the proceedings at the trial because Hillary Kangichu (PW5) simply failed to tell the trial magistrate whether he was the one who physically examined the complainant and noted the contents on the cited exhibits or whether the same were noted by his colleague (s) whose handwriting he was familiar with. That omission in my view rendered the evidence inadmissible in law and could not therefore be relied in law to corroborate the evidence of the complainant or to found a conviction.

15. Furthermore looking at the medical evidence tendered, it is clear that due to passage of time between when the incident took place and when the girl was taken for medical examination, much of the crucial evidence could have been lost. The medical officer who filled the P3 (P.Exhibit 4) indicated that there was no discharge, and no spermatozoa were seen. It is further indicated that pregnancy test, HIV and Syphilis test all turned negative and the only evidence indicating penetration was that,

"the hymen was not intact."

In any view even if I had found that the medical evidence was properly tendered, it would be unsafe to base a conviction solely on the absence of a hymen in victim's genitalia. This is because, of the fact that the hymen can be broken by a previous sexual encounter unrelated to an accused person, or through other non sexual activities like sports. The absence of a hymen is therefore on its own insufficient to found a conviction.

16. It is also important to note that under **Section 124** of the **Evidence Act**, a court can base a conviction on the evidence of the victim if that is the only evidence available but the court must be satisfied with reasons to be specified that the victim is telling the truth. The proceedings from the trial court in this instance does not indicate that the trial court had reasons to believe that the victim was telling the truth in order to solely rely on her evidence to render a conviction.

17. I have looked at the evidence of PW4 (A K), the other victim who was reported to have been together with the complainant at the material time. Her evidence however appears inconsistent - with the evidence of the complainant (PW1) in the sense that according to PW4 they were forced to have sex with their respective companions while PW1 maintained that they did so willingly. According to PW4 the two girls were threatened with a knife and silenced before being defiled but that is discounted by the evidence of PW1. So the question is why would there be such glaring inconsistency? of course given the legal position on the statutory age of consent to engage in sex, it really matters not whether the complainant (PW1) at the case facing the appellant willingly chose to engage in sex with the appellant. When the victim is under 18 years of age like was the case in this instance any sexual encounter is a crime or a sexual offence punishable under Sexual Offences Act. But this court has considered the evidence tendered during trial by the appellant particularly on the fact of existence of bad blood owing to matters to do with land. The trial court in its evaluation of evidence did not direct its mind to the issue raised by the defence particularly in regard to the conflicting evidence of both PW1 and PW2. A trial court should always evaluate evidence from both sides in order to arrive at an informed decision. I agree with the appellant that there is no way PW4 should have been taken seriously when stating that she witness the sexual act while standing on an open door. The question posed is why would she just stand there and not scream or even run for help if it is true that they were being coerced into an act which they were against? PW4 was a cousin to PW1 and were residing together with their grandmother, T C. One would therefore expect that ordinarily she could not have just stood and watched as her cousin who was like a sister to her being molested if that is true. Had the trial court directed its mind to this question, then perhaps its finding on the question of penetration would have been different. This court finds upon re- evaluation of the evidence tendered by PW4 and the appellant that the trial court fell into error when it found that the evidence of PW4 had corroborated the evidence of PW1 on the question of penetration. The issue of penetration was not conclusive in as far as the evidence tendered is concern particularly discounting the medical evidence by PW5 for the reasons aforesaid.

18. The appellant has also raised an important question on the application of **Section 200** of the **Criminal Procedure Code**. The record of the proceedings shows that the trial court made an order on 14th April 2016 for the recall of PW1, PW2, and PW3 for purposes of cross-examination. Although the reasons or basis for recalling of the witnesses one not given this court believes that the trial court made the orders pursuant to the provisions of **Section 146 (4)** of the **Evidence Act**. What is however clear is that on 28th April 2016 a new magistrate took over the case in accordance with the provisions of **Section 200** when the trial magistrate was transferred. Upon assuming the trial, the new trial magistrate was informed that PW1 could not be traced as she had gotten married. That trial court then directed the matter to proceed notwithstanding the absence of PW1 (who was said to have gotten married) and PW2 and PW3 whose reasons for absence in court was not explained. That directive in my view posed questions which have been raised in this appeal. The first question is whether the succeeding magistrate properly applied the provisions of **Section 200(3)** of the **Criminal Procedure Code**. **Section 200(3)** provides as follows;-

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

19. The proceedings show that the trial magistrate duly complied with that provision by informing the accused about that right but going by the earlier orders given by the predecessor on 14th April, 2016, where the predecessor had ordered that PW1, PW2 and PW3 to be recalled, it does appear that the rights of the appellant were not adhered to because after directing that the witnesses who had come were to proceed to testify, the question of recalling of the witnesses was never revisited again contrary to the clear provisions of the law. The trial court in doing so fell into error and subjected the appellant into mistrial because after directing the investigating officer to trace the complainant (PW1) for purposes of further cross-examination, there was no foreclosure on the issue thereafter.

20. Secondly when the prosecutor informed the trial court that PW1 could not be traced on 30th June, 2016 because she had gotten married, one begins to ponder about the actual age of the complainant. According to the charge sheet, the complainant was 13 years when she was defiled on 13th January, 2015. However the birth certificate tendered as P. Exhibit1 shows that the complainant was born on 2nd December, 1999 meaning that at the material time (13th January, 2015) she was aged 15 years and one month meaning that when she was reported to have been married, she was still a minor aged 16 years and six months. In Kenya a girl can only legally get married at the age of 18 years. Of course there are instances where girls below 18 years get married secretly but that does not mean that such unions are legal. The trial court should have therefore be more inquisitive to know from the investigating officer the circumstances leading to the disappearance of PW1 and interrogate more to find out or rule out any mischief that any person may have tried to carry out in the face of the orders issued on 14th April 2016 (recalling witnesses PW1, PW2 and PW3). There is also the other question as to why PW2 and PW3 were never re-summoned to testify when an order to that effect had been issued.

21. The appellant has contended that in view of the fact that complainant was married soon after he was arrested, it was likely that the complainant may have been sexually active even before the material date. Although that contention may be speculative in my view it raises doubts when considering whether the absence of the hymen noted from the medical examination could only be connected to the event of 13th January, 2015. This is the reason that informs the findings of this court that penetration (which is a crucial) element in (sexual offence) was not proved and connected with the appellant to the required standard in criminal law. In my view upon re-evaluation of evidence taking into account the fact that medical evidence was not properly tendered and therefore inadmissible, the trial magistrate erred to find that prosecution had proved their case beyond reasonable doubt.

22. I have also noted that the sentence handed to the appellant may be termed excessive because as I have observed above the complainant was aged 15 years and one month. There is a *leguna* in law on victims of sexual offence aged between 15 years and 16 years. Under **Section 8(3)**, a person who is found is guilty of defiling a minor aged between 12 years and 15 years is liable to imprisonment of not less than 20 years while under **Section 8(4)** a person who is found guilty of defiling a minor aged between 16 years and 18 years is liable upon conviction to an imprisonment for a term not less than 15 years. The law is silent on victims aged between 15 years and 16 years. This court has been constructively determining that for those people found guilty of defiling minors aged 15 and 16 years, the appropriate punishment should be not less than 15 years as provided for under **Section 8(4)** of the **Sexual Offences Act**. This therefore means that even if I was to find that conviction of the appellant herein was safe, I would still have found out that the sentence meted out against him may have been excessive given the mitigating circumstances. But on account of the findings aforesaid that is now purely academic.

23. As observed above I have for reasons aforestated find that the trial magistrate erred in law when applying the provisions of **Section 200(3)** upon taking over the criminal proceedings after Hon A. Nyoike Senior Resident Magistrate was transferred when three witnesses had testified. The right of the appellant was not protected and no clear reasons were advanced or recorded in that regard. This prejudiced the appellant and I could have ordered for fresh trial but given the circumstances of the case and what the prosecution told the trial court on the apparent difficulties of tracing the complainant and other witnesses that option now is not viable, fair or in the interest of justice.

24. In the premises, this court finds that the appeal is merited. This court has reassessed and re-evaluated the evidence and finds that based on the evidence tendered it was not safe to convict the appellant. The evidence presented minus the medical evidence tendered was insufficient to found a conviction. The prosecution should have presented the doctor who filled the P3 form and other medical documents tendered as exhibits and in the absence of that they should have sought for any medical officer, who was conversant with his handwriting to competently tender the evidence as provided by law. The omission by the prosecution to do so was fatal and the omission is not one of those defects curable under **Section 382** of the **Criminal Procedure Code** because the omission occasioned failure of justice to the appellant. The medical evidence tendered at the trial was not admissible in evidence as aforestated. The long and short of this is that this Appeal is allowed. The conviction and the sentence imposed on the appellant is hereby reversed and set aside. The appellant shall be set free forthwith unless lawfully held.

Dated, signed and delivered at Chuka this 25th day of July, 2018.

R.K. LIMO

JUDGE

25/7/2018

Judgment dated, signed and delivered in the open court in presence of appellant in person and Machirah for state.

R.K. LIMO

JUDGE

25/7/2018