



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 160 OF 2017

BETWEEN

ALEX KYALO MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in SO case no. 1 of 2017

in the Senior Resident Magistrate's Court at Nkubu delivered on 5th December, 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was charged with the offence of ***defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, number 3 of 2006 (The Act)***. The particulars thereof being that on the 30th day of December, 2016 at around 7.00pm at [particulars withheld] Village, Chure Location in Imenti South District within Meru County, he unlawfully and intentionally caused his penis to penetrate the vagina of S.K.K, a child aged 14 years
2. The appellant was charged with an alternative count of committing an ***indecent act with a child contrary to section 11(1) of the Act***, where it was alleged that on the 30th day of December, 2016 at [particulars withheld] Village, Chure Location in Imenti South District within Meru County, he intentionally touched the vagina of S.K.K, a child aged 14 years.
3. The appellant pleaded not guilty to both the main and the alternative charge. The prosecution called five witnesses: the complainant, S.K.K testified as PW1, her mother D.K was PW2, while number 246268 IP Richard Limba of Abogota West Police Post testified as PW3. Number 68859 PC Amos Kitilit testified as PW4. The last witness for the prosecution was the Clinical Officer attached to Kanyakine Sub-District Hospital, one Seberina Kaimathire, who testified as PW5.
4. The appellant gave sworn evidence when he was put on his defense. He did not call nay witnesses.

The Prosecution Case

5. From the record, the prosecution case is that on 30th December, 2016 at about 5.00pm the complainant herein left home for the tea buying centre. She was in the company of her friend named D.K. On arrival at the centre, the complainant and her friend saw the appellant who was selling tea leaves. After exchanging pleasantries, the appellant asked the complainant to move near to where he was doing his business and once there the appellant asked the complainant whether she could accompany him to his house. The two of them left, leaving DK behind. The time was approaching 7.00pm.

6. Once at the house, the complainant and the appellant were all by themselves after entering the building through the back door. There were other people in the front part of the house which was separated from the rear side by a partition. The appellant then led the complainant to his bedroom and once inside, the complainant was asked to remove the skirt and blouse she was wearing. She complied and also removed

her underpart. The appellant also undressed and they then had sex after the appellant put his penis in complainant's vagina. The complainant did not offer any resistance because the appellant was her boyfriend. The complainant and appellant spent that night together until 6.00am the next day when the complainant asked to be shown the way home.

7. As the appellant and the complainant walked together that morning they met with complainant's father who took the complainant home. Upon confirming where the complainant had been, the complainant's father beat her and soon after that the police arrived at the home and took the complainant to hospital. The complainant told the police that the appellant had defiled her during the night. The appellant was subsequently arrested and charged.

8. The report to Murungurune police Station was received by number 68859 PC Amos Kitilit at about 1.25pm on 31st December, 2016. After booking the report, PC Kitilit recorded statements of the witnesses and also issued the complainant with a letter referring her to hospital. PC, Kitilit also received the appellant from IP Richard Lumba. After the complainant was treated, the appellant was charged with defiling the complainant who was aged 13 years at time of at the alleged offence.

9. On 31st December 2016, the complainant was seen by the Kanyakine Clinical Officer, Seberina Kaimatheri, PW5. PW5 established that the complainant was 14 years and 8 months old, having been born on 25th April, 2002. According to the physical examination it was established that the complainant's private parts were reddish and tender. Her hymen was broken and she also had a whitish discharge. The presence of epithelial cells was noted, but no spermatozoa was seen. The HIV and pregnancy tests posted negative results. In the opinion of PW5, which was premised on the redness and tenderness of the complainant's genitalia and presence of epithelial cells, there had been penetration. PW5 produced the P3 form as Pexhibit 1, the PRC form as Pexhibit 3 while the treatment notes were produced as Pexhibit 4. The complainant's clinical card record was produced as Pexhibit 2.

The Defence Case

10. The appellant gave sworn evidence and spoke of his arrest at Mikumune. He testified that the complainant's mother, D.K. had planted this case on him because he had declined to take up a job at her (D.K's) hotel. The appellant also told the court that D.K had a grudge with the appellant's employer and always urged him (appellant) to quit working for his employer so he could go and work for her. The appellant stated that he could not have committed such an offence since he was his family's breadwinner. The appellant denied any knowledge of the complainant.

Judgment of the Trial Court

11. Upon a careful analysis of all the evidence on record, the learned trial magistrate reached the conclusion that the prosecution had proved its case against the appellant on the main count beyond any reasonable doubt. The appellant was therefore found guilty as charged, convicted and sentenced to twenty (20) years imprisonment.

The Appeal

12. The appellant felt aggrieved by both conviction and sentence and preferred his appeal on the basis of the following grounds.

1. That, the learned trial magistrate erred in matters of law and facts by failing to note that the mother of the victim had a grudge with the appellant. (**sic**).
2. That the learned trial magistrate faulted in matters of law and fact by failing to note that the expert (doctor) testified that she examined the victim after five days which makes his finding to be null. (**sic**)
3. That the learned trial magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witnesses were uncollaborating and inconsistency (**sic**)
4. That the learned trial magistrate erred in both law and facts by failing to note that the prosecution case was not proved beyond reasonable doubts (**sic**).
5. That the learned trial magistrate erred in both law and facts by failing to note that no independent witnesses (were called) in this matter to clear doubts.
6. That the learned trial magistrate erred in law and fact by rejecting the appellant[s] defense without giving any cogent reason.
7. That the learned magistrate erred in both matters of law and fact by failing to note that no exhibit [was] adduced by the prosecution to prove the allegations.

13. It is the appellant's plea that his appeal be allowed, conviction quashed and sentence set aside to enable him get his liberty back.

The Submissions

14. The appellant made oral submissions and stated that his failure to put questions to the witnesses was due to ignorance of court processes. He also submitted that D.K planted this case on him because he had refused to dump his former employer for a job offer at her hotel. The appellant also complained that some potential witness, namely one Doreen who was said to have been with the complainant on the evening the complainant allegedly went to appellant's home was not called to testify.

15. The appeal was opposed on grounds that the prosecution had proved all the ingredients pertaining to the offence of defilement. Prosecution counsel urged this court to dismiss the appeal.

Issues for Determination

16. From an analysis of the evidence on record, and for consideration of the grounds set out in the petition of appeal, coupled with the provisions of **section 8(1) and 8(3) of the Act**, the issues of determination are:-

- a. Whether the age of the complainant was proved; and
- b. Whether there was penetration and
- c. Whether the prosecution proved that it was the appellant who did the deed.

Analysis and Determination

17. The record herein shows that the complainant was the only witness in this case. It also appears from the complainant's testimony that she was a willing participant in the commission of the offence, and this court must therefore determine whether her conduct of agreeing to accompany the appellant to his house and her subsequent willingness to undress and engage in sex with the appellant nullified the appellant's criminality and whether the conduct amounted to consent on the complainant's part. I now proceed to consider the issues as framed under paragraph 16 above:-

a. Age of the complainant

18. Proof of age of a complainant in a sexual offence case is central to the success of the prosecution's case because the sentence meted out to a convict depends on the age of the victim. In the instant case, the complainant told the court in her evidence in chief that she was born on 25th April, 2002. The complainant's mother D.K also testified on 12th June, 2017 and told the court that the complainant was 13 years old, having been born on 25th April, 2002 as per the clinical records card – PMFI – 1 produced as Pexhibit 2. There is therefore no doubt in this case that the prosecution proved beyond any reasonable doubt that the complainant was 12 years old when the incident occurred.

b. Whether there was penetration

19. **Section 2 of the SOA** defines penetration to mean "**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**" In this regard therefore, there need not have been complete insertion of the appellant's penis into the complainant's vagina. The evidence from the complainant is to the effect that after the appellant removed all his clothes, "**He then put his penis into my vagina. I did not stop him. The accused was my boyfriend.**" There is no doubt from the complainant's description of the act that there was penetration.

20. In addition to the complainant's testimony, Seberina, the Clinical Officer at Kanyakine Sub-District Hospital, confirmed that complainant who was born on 25th April 2002 exhibited reddish and tender private parts on examination and her hymen was also broken. She had whitish discharge and epithelium cells were seen on laboratory test. There were no spermatozoa. In the opinion of Seberina, the redness and tenderness of the genitalia, coupled with the presence of epithelium cells were indicative of penetration. The P3 form which contained all these details together with the Post Rape Care (PRC) form as well as the treatment notes were produced in court as Pexhibits 1, 3 and 4 respectively. In light of the above, I am satisfied that the second ingredient of the offence of defilement was proved.

c. Whether the prosecution proved that it was the appellant who did the deed

21. As mentioned elsewhere in this judgment, the only eye witness to this incident was the complainant. The complainant was a child because she was under 18 years of age. This means that in any ordinary criminal case, the provisions of **section 124 of the Evidence Act** would apply namely that there would be need for corroboration of her evidence. The proviso to the said section however offers some relief to the prosecution in the sense that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.

22. Before the hearing commenced before the trial court, the complainant was taken through a *voir dire* examination in which she told the trial court that she would always tell the truth as taught by her church the PCEA in her local area. She also told the court that being aware that whoever swears by the Bible is meant to tell the truth, she was ready to swear by the Bible and to tell the truth. The trial court was satisfied that the complainant was capable of understanding the nature of an oath and accordingly allowed her to give sworn evidence.

23. I note from the judgment of the learned trial court that no mention was made of the fact that the only witness in this case was the complainant. It is also not indicated what, apart from the *voir dire* examination the trial court made of the complainant as a witness. I have myself read through the complainant's evidence and I am satisfied that she was a very truthful witness in accordance with the oath she had taken. She freely admitted to having accompanied the appellant to his home, to having freely taken part in the sexual intercourse. She also freely told the Court that the appellant was her boyfriend. I therefore have no reason to doubt the testimony that she gave to the court.

24. I also have carefully reconsidered the appellant's defense which in my view did not shake the prosecution's case against him. The allegation of a frame up was not supported by any questions put to the complainant's mother D.K. That allegation was an afterthought which I wholly reject.

25. Finally, there is the issue of whether by accepting to go to appellant's home and having sex thereat with the appellant and staying the whole night together, the complainant can be said to have consented to the act. As rightly pointed out by the learned trial magistrate in his judgment, the complainant who was a child at the material time could not have consented to the defilement, and I so find.

Conclusion

26. In light of all the above, I find that the appellant's appeal on all the grounds lacks merit. The respondent's counsel was well guided in opposing the same. The appeal must therefore fail.

Final Orders

27. I now make the following final order in this appeal:-

1. The appeal herein be and is hereby dismissed in its entirety.
2. The judgment of the learned trial magistrate be and is hereby confirmed.
3. The appellant still has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Meru on this 24th day of July, 2018.

ALFRED MABEYA

JUDGE