



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 22 OF 2017

PAUL KIKUMBU MUTINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Mutomo Senior Principal Magistrate's Court

Criminal Case (S.O.) No. 20 of 2016 by Zachariah J. Nyakundi S P M on 25/04/17)

J U D G M E N T

1. **Paul Kikumbu Mutinda**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **2nd September, 2016**, at night, in [**particulars withheld**] **Village, Simisi Location, Ikutha Sub-County** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the anus of **S M L**, a boy aged 2 (two) years.

2. In the alternative, he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **2nd September, 2016**, at night, in [**particulars withheld**] **Village, Simisi Location, Ikutha Sub-County** within **Kitui County**, intentionally and unlawfully touched the anus of **S M L**, aged 2 (two) years using his penis.

3. Facts of the case were that on the **2nd** day of **September, 2014** the Appellant visited **R K PW2**, who lived with her grandchildren **PW1, S M S** and the victim herein. **PW2** was unwell and the Appellant insisted on sleeping with the victim. In the morning the Appellant told **PW2** that the victim was not breathing properly at night but he could not explain why he did not notify her at night. **PW2** realized the child was not well. She made him sit in a basin and he diarrhoead. The stool had visible mucus. She took him for treatment. A medical report was availed. The police arrested the Appellant and charged him.

4. When put on his defence the Appellant denied having committed the offence. He stated that he went to **PW2's** home because he got information that her son wanted to see him. He slept and woke up at **6.00 a.m.** He requested **PW2** for some beans that he was given and he went back to his home. Four (4) days later the lad who wanted a parcel of land went to his home. They went to **Mutomo** where he bought him tea. He excused himself to go and get a book only to return followed by the police who arrested him.

5. The learned trial Magistrate considered evidence adduced and opined that the Appellant slept on the same bed with the victim and on examination the anal hole had two (2) tears and was indicative of an act of defilement. He convicted him and sentenced him to **life imprisonment**.

6. Aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- The conviction was unsafe, bad in law and void as the charge sheet was defective.
- The Appellant was prejudiced as he could not prepare his defence following the defect in the charge sheet.
- Medical evidence (P3) was signed two (2) days prior to examination.
- The learned trial Magistrate failed to appreciate that there was need for an intermediary because of the age of the victim.

- The case was not proved to the required standard.

7. The State through learned Prosecuting Counsel, **Mr. Mamba** opposed the Appeal. He reiterated facts as presented by the Prosecution in the Lower Court and added that the sentence meted out was correct.

8. This being the first Appeal, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (**See Okeno vs. Republic (1973) EA 32**).

9. It is urged by the Appellant that the charge was defective such that he was prejudiced. **Section 134** of the **Criminal Procedure Code** provides thus:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

In the case of **Sigilani vs. Republic (2004) 2 KLR Kimaru, J.** was of the view that a charge sheet can only be fatally defective if it does not allege an essential ingredient of the offence.

10. The Appellant was charged and convicted of the offence of **Defilement** which is defined by **Section 8** of the **Sexual Offences Act** thus:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

The statement of the offence is disclosed.

Particulars of the offence are outlined. The act the Appellant was alleged to have done was stated. The date when the offence was committed is also stated and even the age of the child. All the ingredients of the offence of defilement have been captured, the charge cannot be defective.

11. The Appellant has questioned the document (P3) relied upon by the trial Court. He faults it on the ground that if the victim was examined on the 7th day of **September, 2016** as indicated, the age of injuries having been indicated as three (3) days then the act should have been committed on the 4th **September, 2016**. This is a case where the victim was taken to hospital on the 5th day of **September, 2016**. Per the allegation noted on the treatment notes that were adduced in evidence the victim was defiled on the 2nd day of **September, 2016**. Looking at the Medical Examination Report (P3) the part that was filled by the police indicates that the offence was alleged to have been committed on the night of 2nd **September, 2014**. The date indicated as to when the matter was reported to the police is the 7th day of **September, 2016** while the P3 was filled on the 5th day of **September, 2016** by then the age of injuries was estimated to be three (3) days old. Had the issue of entry on the date been raised at trial then the officer who made the entry would have tendered an explanation. However this was not done. PW3 **Teresia Mbula** was not the author of the document. She produced it on behalf of the **David Mulwa**. It was alleged that the person was on transfer. The learned Magistrate failed to guide the parties on how such a document could be tendered in evidence. The Prosecution was duty bound to lay a basis of having the document produced pursuant to the law in the absence of the maker. The Appellant would, then, have been given an opportunity of stating whether it was acceptable to him for the document to be produced by a person other than the maker. This would also give him the opportunity of declaring whether he could be having specific questions to be answered by the person. PW3 stated that the colleague was on transfer but it was not stated whether or not he could be found to enable the Prosecution to have it produced by PW3.

12. The victim was a child of 2 years, a vulnerable person who could not even adduce evidence. **Section 31(1) and (2)** of the **Sexual Offences Act** provides thus:

“(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of—

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.”

The provision of the law is not couched in mandatory terms. It is discretionary therefore failure to declare and record that the victim was vulnerable was not prejudicial to the Appellant.

13. PW1 and PW2 told the Court that the victim slept on the same day with the Appellant. According to PW2, the Appellant told her that the child had discomfort of the abdomen on the material night. PW1 heard the child crying that night but did not do anything. The following morning she found the child naked. She dressed him up and took him to where PW2 was. Thereafter the child was washed and he diarrhoead. PW2 stated that she realized the child was shaking at the back and one leg could not touch down. She made the child sit on the basin and he diarrhoead. She noted the stool had whitish discharge like mucus.

14. On examination three (3) days later the victim was found with two (2) tears oozing pus on the anal orifice. The person who filled the P3 stated that the tears were indicative of defilement. It is common knowledge that hard stool would overstretch the anal opening and cause tears. The child was taken to hospital three (3) days later which could explain the presence of pus. This being the case it would have been imperative for the clinician to explain further the conclusion that the tears were indicative of defilement. In her evidence, PW4 on cross examination stated that on examination the child was found to be having semen on the anal region. But a perusal of the treatment notes shows that when the anal swab was carried out showed no pus cells/yeast cells and no spermatozoa was seen. Had semen without spermatozoa been seen it could have been noted. According to the entry on part 11(2) of the P3 form it is the guardian of the victim that complained that the child was passing semen. It is alleged there was mucus like discharge following the diarrhoea but the anal swab done is what should have established the presence of semen. This was not the case.

15. From the foregoing, the investigation carried out failed to prove beyond doubt that there was penetration of the child by a male genitalia. In the premises the conviction was unsafe. Therefore the Appeal is meritorious and is allowed. The conviction is quashed and the sentence imposed is set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of August, 2018.

L. N. MUTENDE

JUDGE