



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 136 OF 2016**

**JOHN GACOKI NZILU.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(An appeal from the Judgment of Hon. A. Ndung'u, Resident Magistrate in Shanzu Principal Magistrate's Court Criminal Case No. 268 of 2014 delivered on 28<sup>th</sup> October, 2016)**

**JUDGMENT**

1. The appellant was arraigned in the lower court on 17th March, 2014 and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 15<sup>th</sup> day of March, 2014 within Mombasa County, intentionally caused his penis to penetrate the vagina of H.S. [name withheld] a child aged 1 year 9 months.

2. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the 15<sup>th</sup> day of March, 2014 within Mombasa County, intentionally touched the vagina of H.S. [name withheld] a child aged 1 year 9 months with his penis.

3. The Hon. Magistrate found the appellant guilty of the main charge of defilement and convicted him accordingly. She sentenced him to serve life imprisonment. The appellant being aggrieved by the said conviction and sentence filed a petition of appeal on 9th November, 2016. On 19<sup>th</sup> December, 2017 he filed an amended petition of appeal with leave of the court, which was granted on 18<sup>th</sup> October, 2017.

4. The appellant raises the following grounds of appeal:-

(i) That the Honourable court erred in law and fact to have convicted the appellant of the offence of defilement even though the prosecution did not prove the case beyond any reasonable doubt;

(ii) That the lower court erred in law and fact in convicting the appellant purely on circumstantial evidence while ignoring the principles governing circumstantial evidence;

(iii) That the lower court erred in law and fact in convicting the appellant without considering the contradictions in the evidence given by the prosecution witnesses and also the contradiction between the oral evidence and the documentary evidence produced by the prosecution;

(iv) That the lower court erred in law and fact in convicting the appellant while ignoring the medical report that exonerated the appellant from the offence of defilement;

(v) That the lower court erred in law and fact in shifting the burden of proof from the prosecution to the appellant and thus required the appellant to prove his innocence instead of the prosecution proving his guilt;

(vi) That the Learned Magistrate proceeded on the wrong basis of law as regards conviction and the sentence of life imprisonment was too harsh in the circumstances;

(vii) That the Learned Magistrate erred in law and fact in failing to resolve the contradictions in the evidence of the prosecution in favour of the appellant; and

(viii) That the judgment was against the weight of the evidence on record.

5. In highlighting the appellant's submission's filed on 19th December, 2017, Mr. P. Magolo, Learned Counsel submitted that the case was not proved beyond reasonable doubt as no specimen was taken from the vagina of the alleged victim to test for spermatozoa. He stated that the alleged victim's mother heard her child crying from the appellant's house but saw the appellant outside his house and as such, he could not have committed the offence. Mr. Magolo cited the case of **Abanga alias Onyango vs Republic**, Criminal Appeal No. 32 of 1990 where the court laid down the principles to be considered in a case based on circumstantial evidence. He stated that the evidence was to the effect that the child's hymen was broken but there was no direct evidence linking the appellant to the commission of the offence.

6. It was submitted that the Hon. Magistrate shifted the burden of proof and that the appellant was required to prove his innocence. Counsel stated that the Hon. Magistrate erred in failing to consider the defence raised.

7. It was the appellant's Counsel's argument that PW1 testified that when she heard her child crying, the appellant was at the door and he told her that the child had hurt herself with the door latch. It was argued that the Hon. Magistrate did not consider the mitigation by the appellant.

8. In concluding his submissions, Mr. Magolo stated that the entire Judgment was erroneous and prayed for it to be set aside and for the appellant to be set at liberty.

9. Ms. Ogweni, Learned Counsel for the respondent opposed the appeal by submitting that the evidence tendered against the appellant was cogent. She stated that there was penetrative sexual intercourse as proved by the medical report which was produced as exhibit 1, the post rape care form which was produced as exhibit 2 and the P3 form that was produced as exhibit 3.

10. Counsel submitted that PW1 corroborated the evidence of the Doctor who examined the child. PW1 found her child's genital parts soiled with blood. The Doctor found that blood was oozing from the victim's vagina, there was a tear of the vagina and the labia majora was swollen. The Doctor also found that the hymen was perforated and there were abrasions around the victim's vagina.

11. She further submitted that in this case, there was complete penetration. On the issue of age, it was submitted that the court relied on the child's immunization card produced as exhibit 6 which showed that she was 1 year and 9 months old. She made reference to rule 4 of the Sexual Offences Rules that states that a birth certificate, any school documents or any similar document can be used to prove the age of a child. She urged the court to construe the meaning of the words "any other document" to include the immunization card.

12. Counsel further recounted that PW1 found her child in the appellant's house. The appellant was standing at the door combing his hair and the child was touching her private parts as she cried. PW1 stated that the appellant told her that the child was electrocuted but changed the story to say that the child was hit by a door latch but PW3 gave evidence that the door latch was located at a higher level than the height of the child. It was further submitted that the appellant was placed at the scene of crime as he was the only one in the house. His cousin had gone to work. She stated that the prosecution proved its case beyond reasonable doubt and prayed for the conviction and sentence to be upheld.

13. Mr. Magolo responded by stating that the prosecution's case had contradictions as PW1 said that her child's panty was white and the shorts were blue in colour but she later on said that her child's panty was pink in colour. He indicated that the said contradiction was not taken into account. He submitted that there was no direct evidence linking the appellant to the offence of defilement as PW1 testified that the appellant was at the door to his house holding a mirror as he combed his hair and the child was crying in his house.

14. Counsel prayed for the Judgment to be set aside due to lack of direct evidence. He urged the court to consider the authorities they had cited in their written submissions.

#### **ANALYSIS AND DETERMINATION**

15. The duty of the first appellate court is to analyze and re-examine the evidence tendered before the lower court and come to its own conclusion, bearing in mind that it neither saw nor heard the witnesses testify. In **Okeno vs Republic**, [1972] EA 32 it was held that:-

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

16. The issues for determination are:-

- (i) If the age of the child was proved;
- (ii) If there was penetration of the child's vagina;
- (iii) If the appellant was the perpetrator of the offence; and
- (iv) If the charge of defilement was proved beyond reasonable doubt.

17. The conviction of the appellant was based on circumstantial evidence. The test to be met in a case whose reliance is based on circumstantial evidence was laid out in the case **Sawe vs Republic** [2003] KLR 364, where the Court of Appeal stated thus:-

***“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”***

18. The set up in which the offence is said to have occurred was a Swahili type house. According to the evidence of PW4, it was on a Saturday and most tenants, including the appellant's cousin had gone to work. The time of the incident was given as 11:00 a.m., by PW1. She was washing clothes outside her house as her child was playing with other children. The child was one year and 9 months old as per the child clinic card that was produced by PW3 as exhibit 6. PW1 then heard her child crying from the house the appellant was living in (appellant's house) which was the 3<sup>rd</sup> house from hers. As at that time, the appellant was standing outside the door of his house, holding a mirror and a comb. PW1 gave evidence that the child came out of the appellant's house crying as she held her private parts. On PW1 checking the child, she noticed that her panty was soiled with blood.

19. PW1 took the child to St. Paul's Medical Health Centre, where it was established that she had a tear on her vaginal orifice and blood was oozing therefrom. The said observation was made on 15<sup>th</sup> March, 2014 being the day she was sexually assaulted. The child was taken to Coast General Provincial Hospital on 17<sup>th</sup> March, 2014. The P3 form shows that her hymen was perforated, her labia majora was inflamed and the vagina was red and bruised. A high vaginal swab revealed red blood cells which was indicative of vaginal bleeding. The Doctor confirmed that the child had been defiled. The Post Rape Care (PRC) form dated 17<sup>th</sup> March, 2014 indicated that the child sustained the above injuries and that the hymen was freshly perforated.

20. The foregoing evidence of the injuries sustained by the child was adduced by PW2, Dr. Mathla A. Mohamed on behalf of Dr. Ngone who examined the child at CGPH. There is therefore no doubt that the child was defiled. The question that needs to be settled is whether the appellant was the perpetrator of the offence. The appellant's Counsel argued that the appellant could not have committed the offence for the reason that at the time PW1 heard her child crying in the appellant's house, he was standing outside the door of his house holding a mirror and a comb. As such, he could not have had the opportunity to defile the child.

21. He relied on the case of **Abanga alias Onyango vs Republic**, Criminal Appeal No. 32 of 1990 (unreported) wherein the Court of Appeal outlined the tests to be satisfied for a person to be convicted of an offence based entirely on circumstantial evidence. He also relied on the case of **Moses Kabue Karuoya vs Republic** [2016] eKLR on what constitutes circumstantial evidence.

22. In the case of **Abanga alias Onyango vs Republic** (supra), the Court of Appeal stated as follows in regard to circumstantial evidence:-

***“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”***

23. In this case, the evidence tendered before the trial court indicated that PW1 was busy washing clothes and the last she saw of her child before she heard her cries, was when she was playing along the corridor of the Swahili type house with other children. She was alarmed to hear her child crying from the appellant's house. Inasmuch as the appellant was standing outside his house holding a mirror and comb, an analysis of the evidence tendered shows that he had the opportunity to commit the offence as PW1 was engrossed in the washing of clothes and could not have kept an eye on her child at the same time. It is obvious from the evidence adduced before the lower court that PW1's child entered the appellant's house as her mother was washing clothes. Based on the evidence on record, the appellant had the opportunity to defile the child, dress her up in her panty and pair of shorts, after which he went outside the door of his house to pose as someone who was innocently combing his hair.

24. PW4 whose house was next to the appellant's said that she did not hear PW1's child screaming in the said house. It will never be known why the child did not scream as there were no eyewitnesses to the incident, who could recount what went on in the appellant's house.

25. PW1 took the child to St. Paul's Medical Health Centre Clinic within 30 minutes of the incident. The examination revealed a tear to the child's vaginal orifice with blood oozing. The foregoing was indicative of the fact that the child had been freshly defiled. Penetration was proved through the P3 form which showed that the child's hymen was perforated, the labia majora was inflamed and vagina bruised. Bleeding in the vagina was proved through the presence of red blood cells after a high vagina swab that was done.

26. The appellant gave a sworn defence to the effect that on 15<sup>th</sup> March, 2014 he was standing outside the door when a child entered their house. He indicated that the child then started crying and on checking her, he noted that she had been hurt by a door latch. He stated that PW1 was washing clothes and that a neighbour went into the house and screamed because the child had been injured. He told her that the child had been hurt by the latch. They took the child and locked him in the house. He denied having committed the offence.

27. DW 2 was Julius Matanga who is the appellant's cousin. He informed the court that the appellant was living with him and on the evening of 15<sup>th</sup> March, 2014 he went to his house and found it in a state of disarray. He inquired from the Landlord what had happened. He was told that the appellant had defiled a child. He went to see the appellant at Nyali Police Station the following day. The appellant told him that he was at the door combing his hair when he heard the child crying and when he went to check, he found that the child had fallen down on the floor. He assisted her to get up and that the child's mother called her.

28. Taking into account the defence put forth by the appellant, it was inconsistent with his innocence. He gave conflicting information to PW1 and PW4 on how the child allegedly injured herself. The theory that she was injured by the door latch in the appellant's house was

discounted by PW3, the Investigating Officer who said that the injuries sustained by the child could not have been inflicted by a door latch which was positioned at a higher level than the height of the child. The narrative that the child was electrocuted was also dismissed by the Investigating Officer who said electrocution could have led to the child becoming stiff and could not have led to her to bleed in her private parts. PW4 who was the appellant's neighbour also checked the door latch in his house and concluded that it could not have injured the child. It is also worth noting that the appellant informed PW1 that her child had been electrocuted and then changed the said version and told her that the child was injured by a door latch.

29. The appellant's cousin, DW2, exposed the lie told by the appellant in his defence that there were exposed electric wires in an electric socket which had no cover near the door frame, which could have electrocuted PW1's child. DW2 in regard to the said socket said that *"there is no live socket at the door frame.....the socket is far away from the door frame. It is also high from the ground. The socket is the one near the door. It cannot electrocute anyone."*

30. On analyzing the defence raised by the appellant that the child was injured by a door latch in his house, I find the same to be untruthful and farfetched due to the nature of the injuries sustained by the child. Perforation of the child's hymen and the presence of blood in her vagina was not consistent with injuries that were inflicted by a door latch. Furthermore, the child had her panty and shorts on, at the time her mother heard her crying in the appellant's house. It would therefore have been impossible for a door latch to perforate the child's hymen and leave her shorts and panty intact. It is therefore my finding that the Hon. Magistrate's rejection of the appellant's defence was grounded on solid reasoning.

31. The contradiction as to whether PW1's child was wearing a pink or white panty or a blue or purple  $\frac{3}{4}$  shorts are in my view, inconsequential. The bloodstained panty and shorts that the child was wearing was handed over to PC Wanjiru at Nyali Police Station, who in turn handed them over to PW3, who produced them in court as exhibits 4 and 5, respectively. The contradiction does not weaken the prosecution case.

32. In **Twehangane Alfred vs Uganda**, Criminal Appeal No. 139 of 2001, [2003] U GCA 6, the court stated as follows:-

***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

33. With regard to the contradiction referred to by the appellant's Counsel, in the evidence of the PW2 that the child was referred to CGPH on 5<sup>th</sup> March, 2014, I have perused the handwritten proceedings which indicate that PW2 stated that the medical report from St. Paul's Medical Health Clinic was dated 15<sup>th</sup> March, 2014. Reference to the original treatment notes from the said Health clinic that were produced as exhibit 1, show that the child was taken to the clinic for treatment on 15<sup>th</sup> March, 2014.

34. The child Health Card produced in court as exhibit No. 6 shows that the child who was defiled was born on 23<sup>rd</sup> May, 2012. PW1 in her evidence in chief stated that the child was born on 23<sup>rd</sup> May, 2012. The handwritten proceedings indicate that PW1, in cross-examination stated that the child was born on 23<sup>rd</sup> May, 2014. Such an error in my view, cannot be resolved in favour of the appellant. At the time PW1's child was defiled on 15<sup>th</sup> March, 2014, she was 1 year and 9 months old. PW1 testified in court on 15<sup>th</sup> October, 2014. Therefore, if the child was born on 23<sup>rd</sup> May, 2014, she would have been about 4 and  $\frac{1}{2}$  months old at the time she was defiled. It is common knowledge that such a child would be an infant and would not be capable of walking into people's houses or playing along a corridor with other children. I therefore decline to resolve that contradiction in favour of the appellant who seems to be clutching onto straws to exonerate himself from blame.

35. Nothing turns on the submissions of the inconsistency in the evidence of PW1 on whether the appellant was outside the door of his house or inside his house when she heard her child crying. This court made a finding earlier in this Judgment that the appellant had the opportunity to commit the offence inside his house and had sufficient time to move outside the door of the said house.

36. Contrary to the submission of the appellant's Counsel that the medical report exonerated the appellant, the absence of spermatozoa did not mean that the appellant did not penetrate the child's vagina. PW3 testified that the appellant was not medically examined. In the absence of him having been so examined, the court relies on the other evidence on record.

37. Further, with regard to the dates reflected on the PRC form, I have perused the original report and noted that it gives the date of defilement as 15<sup>th</sup> March, 2014 and the date of examination as 17<sup>th</sup> March, 2014. With regard to the P3 form, PW2 testified that it was filled on 24<sup>th</sup> March, 2014 but PW1's child was sent at CGPH on 17<sup>th</sup> March, 2014. The appellant was represented by an Advocate before the lower court and the issue of the injuries on the child being 10 days old could have been resolved through cross-examination in the trial court. PW2 in his evidence stated that they relied on the Doctor's notes based on the child's examination at St. Paul's Medical Health Clinic and the PRC form to fill the P3 form. The evidence is clear that PW1's child was defiled on 15<sup>th</sup> March, 2014 as per the medical notes from the said Clinic which showed that the vaginal injuries were fresh. The PRC form was reflective of the fact that as at 17<sup>th</sup> March, 2014, the child's hymen was freshly perforated.

38. Having gone through the evidence tendered by the prosecution and the defence, I am left with no doubt that the circumstantial evidence unerringly points to the appellant as the person who defiled PW1's child. No evidence was tendered of any other person within the scene of crime who could have had the opportunity to commit the offence. I have tested and tried each and every link in the chain of circumstances for steadfastness. There is no escape for the appellant from the inevitable conclusion that he was culpable in the commission of the offence. It is therefore my finding that the circumstantial evidence tendered in the lower court met the test laid out in the case of **Abanga alias Onyango vs Republic** (supra) and that the case against the appellant was proved beyond reasonable doubt. I am therefore in agreement with Ms Ogweni for the respondent that the appellant was properly convicted.

39. The child who was defiled was 1 year and 9 months old. Under the provisions of Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006, the only sentence provided for is life imprisonment. The appellant is therefore serving a lawful sentence.

40. The result is that the appeal is hereby dismissed in its entirety. The appellant has 14 days right of appeal, from the date of this Judgment.

**DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of August, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Anangwe holding brief for P. Magolo for the Appellant

Ms Ogweno for the respondent

Oliver Musundi - Court Assistant