



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 25 OF 2017**

**MOSES MUDAVADI KADENGE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From the Original Conviction and Sentence in Criminal Case No. 544 of 2012 of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma, RM)**

**JUDGEMENT**

1. The Appellant, Moses Mudavadi Kadenge was in the 1<sup>st</sup> count charged with shopbreaking and stealing contrary to Section 306(a) of the Penal Code. The particulars of the charge stated that on 1<sup>st</sup> June, 2012 at Rea Vipingo Sisal Plantation Company in Kilifi County the Appellant broke and entered a building namely the shop of Ajose Matunga and stole from therein Kshs. 15,000 the property of Ajose Matunga.
2. In the 2<sup>nd</sup> count the Appellant was charged with defilement contrary to Section 8(1) and Section 8(2) of the Sexual Offences Act, 2006. The particulars of the charge being that on the date and place mentioned in the 1<sup>st</sup> count, the Appellant caused his penis to penetrate the vagina of P.E.O. an eleven year old girl.
3. The Appellant was in the alternative to the 2<sup>nd</sup> count charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars of the charge being that he intentionally touched P.E.O's vagina using his penis.
4. At the conclusion of the trial, the Appellant was found guilty on both counts and sentenced to serve seven years imprisonment for count one and life imprisonment for count two. Aggrieved by both conviction and sentence he has appealed to this court.
5. Through amended grounds of appeal filed on 10<sup>th</sup> April, 2018, the Appellant faulted the trial magistrate for convicting him on weak and unreliable evidence based on poor investigations. He also accused the trial magistrate for failing to consider his defence.
6. Submitting in support of his appeal, the Appellant pointed out that it is the duty of the prosecution to prove its case beyond reasonable doubt. The Appellant submitted that the prosecution never adduced any evidence to show that the padlock of the door was broken. Further, that no evidence was adduced to confirm that the shop actually belonged to PW1 Ajose Matunga. It was the Appellant's case that at least some photographs ought to have been produced to support the evidence on the break-in and documents ought to have been produced to demonstrate that the shop belonged to PW1. The Appellant's case was that even the investigating officer never visited the scene of crime in order to confirm that the shop was indeed broken into.
7. The Appellant asserted that all the prosecution witnesses stated that they received information about the break-in from a third party but the third party was never availed in court as a witness.
8. According to the Appellant, the evidence of P.E.O. as to how she found herself in the shop of PW1 cannot be believed as her mother never testified in court. Further, that mama Vera in whose house the complainant had left the maize she was allegedly carrying to the posho mill was also not availed as a witness.
9. Turning to the issue of defilement, the Appellant submitted that the P3 form produced as exhibit by PW5 Dr. Busra Ahmed did not support the allegation that there was defilement. The Appellant pointed out that although the doctor had noticed a whitish discharge from the complainant's vagina she never carried out any analysis of the discharge in order to find out what the discharge was. Further, that there was no evidence adduced as to whether the complainant had been treated earlier or not.

10. Still submitting on the issue of defilement, the Appellant stated that the age of the complainant was never established.
11. The Appellant concluded his submissions by urging the court to find that the prosecution never proved its case beyond reasonable doubt.
12. The Respondent opposed the appeal. Counsel for the Director of Public Prosecutions submitted at length as to why the charges were not defective. I note that this was indeed one of the initial grounds of appeal. The same was however abandoned when the amended grounds of appeal were filed. I therefore need not consider this ground of appeal.
13. As for the Appellant's submission that the medical evidence did not support the charge of defilement, it was submitted for the Respondent that a P3 form filled by Dr. Malik of Kilifi District Hospital, and which was produced as an exhibit, showed that the complainant's hymen was broken and she had a white discharge from her vagina. Further, that the doctor had noted in the form that the general medical history of the patient was defilement. It was thus the Respondent's case that the medical evidence proved defilement.
14. It was submitted for the Respondent that the evidence adduced established that the Appellant committed the offences with which he was charged. Further, that the prosecution witnesses' evidence was not contradictory.
15. As for the age of the complainant, the Respondent submitted that the complainant testified that she was eleven years old at the time of the alleged offence. This, according to the Respondent, was sufficient proof of the age of the complainant. In support of this submission, reliance was placed on the decision of the Court of Appeal in **Jackson Mwanzia Musembi v Republic, Criminal Appeal No. 42 of 2016**.
16. In conclusion, it was urged for the Respondent that in light of the evidence that was adduced in support of the prosecution case, the Appellant's defence was rightly rejected by the trial court.
17. From the testimony on record, the evidence that connects the Appellant to the offences with which he was charged is that of P.E.O., the 2<sup>nd</sup> complainant who testified as PW3. Her evidence was that on 1<sup>st</sup> June, 2012 at about 3.00 p.m. her mother sent her to the posho mill. When she arrived at the posho mill she discovered that the Kshs. 1,000 which her mother had given her was missing. Fearing the reaction of her mother, she took the maize to the house of a neighbor, one mama Vera and embarked on a journey to her aunt's place with a view of pleading with her to tell her mother not to punish her.
18. On the way to her aunt's place she met the Appellant who was a neighbor. It was about 4.00 p.m. She informed him of her mission and he told her to wait so that he could get her the cash. He left her at the back of Ajose's shop at Vipingo trading centre and went away. He came back at 7.00 p.m. and told her he wanted to do a bad thing to her before giving her the cash. The Appellant who was armed with a knife threatened to harm her if she screamed. He undressed her and hid her clothes leaving her with her panties. He forcefully had sex with her and left promising to go and get her the money.
19. The Appellant came back after a while and told her he was going to break into the shop and get her the money. After breaking into the shop the Appellant told her to get in. He took cash from a drawer, blindfolded her and told her to stand behind a fridge. He then left.
20. The 2<sup>nd</sup> complainant later managed to free herself. She raised alarm. Guards went and asked her what she was doing in the shop and she told them what had happened. The owner of the shop was called. Her mother was also called and she came. The 2<sup>nd</sup> complainant told them she knew where the Appellant lived. She led those present to the house of the Appellant from where he was arrested and taken to Kijipwa Police Station. She was taken to hospital and attended to. A P3 form was later filled for her at Kilifi District Hospital.
21. When the 2<sup>nd</sup> complainant was cross-examined by the Appellant, she disclosed that the Appellant was single and lived not far from the shop. Further, that the Appellant had blindfolded her using her blouse and had tied her hands with sisal rope. She also disclosed that the shop owner had taken the blouse and the sisal rope and handed them to the police.
22. PW1 Ajose Matunga the owner of the shop told the court that on 1<sup>st</sup> June, 2012 he closed his shop at 9.00 p.m. and proceeded home leaving behind Kshs.16,500. At about 11.00 p.m. a guard by the name Samuel Ochieng woke him up and informed him that his shop had been broken into.
23. When PW1 arrived at the shop he found the padlock of the rear door broken. Inside the shop they found the 2<sup>nd</sup> complainant who informed them that they had gone to the shop with the Appellant who took the money and left. He found Kshs.15,000 missing. Kshs.1,500 had been dropped on the floor. They proceeded to the home of the Appellant where they found him. He denied taking the cash. The Appellant was taken to Kijipwa Police Station where he was locked up.
24. Samuel Ochieng testified as PW2 and told the court that he works for Rea Vipingo company as a guard. On 1<sup>st</sup> June, 2012 he was on duty when he received information through the radio call that the shop of Ajose had been broken into. They proceeded to the scene and upon entering the shop they found the 2<sup>nd</sup> complainant dressed in her panties. She was shaken and refused to talk. Her clothes were near the door. They called the owner of the shop and the mother of the 2<sup>nd</sup> complainant. When the mother of the girl arrived she was asked where the girl was and she told them she had sent her to the shop but she had not come back. The girl told them that the Appellant is the one who had taken her to the shop. The girl led them to the house of the Appellant where upon search they did not recover anything. The Appellant was arrested and escorted to Kijipwa Police Station where he was rearrested and later charged.
25. PW2's evidence was that the girl told them she lost the money her mother had given her and decided to look for the Appellant who was her friend to give her money. When she found him they had sex before the Appellant opened the padlock using a wire and asked her to get money from the shop. He left after being given the money.

26. PW4 Patrick Ndunda a guard at Rea Vipingo company told the court that on 1<sup>st</sup> June, 2012 he was on duty. At around 9.30 p.m. the Appellant passed by his place of work and asked him whether he had seen a lady who appeared insane walking around the premises. PW4 denied seeing such a person. At about 11.00 p.m. an alarm was raised that Matunga's shop had been broken into. He rushed there in the company of PW2 and found a girl inside the shop. She told them that the Appellant had taken her to the shop. The witness stated that he did not accompany those who went to arrest the Appellant.

27. PW5 Dr. Busra Ahmed produced a P3 form filled for the 2<sup>nd</sup> complainant by Dr. Malik on 7<sup>th</sup> June, 2012. Her testimony was that the patient presented herself to hospital with a history of defilement. Upon examining her genitalia Dr. Malik noted that the patient's hymen was broken and there was a whitish discharge from her vagina. The age of the patient was estimated to be 16 years. PW5 stated that it was not indicated in the P3 form whether the patient had received any treatment. The approximate age of the injury, the degree of the injury and the weapon used to cause the injury were never disclosed.

28. PW6 Police Constable Aron Chebii took over the police file from Police Constable Keti who had in turn taken over the file from the investigating officer Corporal Walumbwa.

29. In his defence the Appellant denied committing the offence with which he was charged.

30. The Appellant's case is that his conviction was based on unreliable evidence. A perusal of the evidence adduced by the prosecution witnesses appear to weave a consistent narrative on how the Appellant took the 2<sup>nd</sup> complainant hostage, defiled her, broke into the 1<sup>st</sup> complainant's shop, stole money from the shop before abandoning the 2<sup>nd</sup> complainant therein.

31. However, as pointed out by the Appellant in his submissions, several gaps were left unfilled. How was the door broken? Where are the blouse and sisal rope allegedly taken to the police by PW1? Why did the 2<sup>nd</sup> complainant not escape even after being left alone by the Appellant outside the shop before the break-in? Why was the mother of the 2<sup>nd</sup> complainant not called as a witness? These are some of the questions that were left unanswered in the narrative presented to the trial court by the prosecution.

32. In a charge of defilement, penetration, the age of the victim and the identity of the perpetrator must be proved by the prosecution. In the case at hand, the evidence on the age of the 2<sup>nd</sup> complainant was contradictory. The 2<sup>nd</sup> complainant told the court that she was 12 years old when she testified and that she was 11 years old the previous year when the offence was committed. PW1 also talked of the 2<sup>nd</sup> complainant being 12 years old and in Standard 4. The source of PW1's knowledge of the 2<sup>nd</sup> complainant's age was never disclosed. The record does not show that he was related to the 2<sup>nd</sup> complainant in any way. PW5 the medical officer told the court that the estimated age of 2<sup>nd</sup> complainant at the time of her examination was 16 years. This observation by Dr. Malik was made in Section C of the P3 form despite the fact that Part I of the P3 form had indicated that she was 11 years old. I do not even think that the issue of the 2<sup>nd</sup> complainant's age is actually important in determining this appeal.

33. The Appellant's case was that the medical evidence did not support the charge of defilement. He has a point. The medical evidence did not in any way show that the 2<sup>nd</sup> complainant was penetrated. The P3 form only talked of a broken hymen and whitish discharge without elaborating. The doctor never gave an opinion on the examination. It cannot therefore be said that the P3 form confirmed that the 2<sup>nd</sup> complainant was defiled.

34. Looking at the evidence adduced by the 2<sup>nd</sup> complainant, it is difficult to understand why she never made any attempt to escape even after the Appellant had allegedly defiled her at 7.00 p.m. and left her unguarded.

35. This is a case that revolved around the evidence of the 2<sup>nd</sup> complainant and that of the Appellant. The proviso to Section 124 of the Evidence Act needed to be invoked before convicting the Appellant. This is a case in which the convicting magistrate did not hear testimony of the 2<sup>nd</sup> complainant. Section 124 of the Evidence Act, Cap. 80 requires corroboration of evidence of children but the proviso therein states 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."**

36. In order for the proviso to Section 124 to be successfully activated, the trial magistrate must state the reasons why he/she believes a child who is the victim of a sexual assault is telling the truth. Those reasons should be found in the judgement. In the instant case the reasons for believing that the 2<sup>nd</sup> complainant was telling the truth were never captured by the magistrate who recorded her evidence. The convicting magistrate did not also state why she concluded that the victim was truthful.

37. Looking at the evidence of the 2<sup>nd</sup> complainant, it is possible that she may not have been telling the truth. It must be considered that she was most likely an accomplice to the shop-breaking and her evidence needed to be treated with caution. In fact PW2 testified that the 2<sup>nd</sup> complainant told them she had gone out to look for the Appellant who was her friend to give her money after she lost the money given to her by her mother. The testimony of PW2 therefore contradicted that of the 2<sup>nd</sup> complainant who testified that she met the Appellant accidentally when going to the house of her aunt. The trial magistrate ought to have taken these contradictions into consideration when arriving at the decision to convict the Appellant.

38. In summary, I find that the evidence that was adduced in support of the prosecution case was unreliable. The Appellant ought to have been given the benefit of doubt. In the circumstances I give the Appellant the benefit of doubt. His appeal succeeds in its entirety. His conviction on both counts is quashed and the sentences imposed set aside. He is thus set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of Sept., 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**