



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 36 OF 2017

S C M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 351 of 2015 of the Chief Magistrate's Court at Malindi – Y.I. Khatambi, SRM)

JUDGEMENT

1. The Appellant S C M was in the main count charged before the Chief Magistrate's Court at Malindi with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006. The particulars of the offence disclosed that on 5th July, 2014 at [particulars withheld] village, Watamu Location within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of F.M. a child aged 9 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars of the offence being that if the Appellant did not defile the child as charged in the main count then he intentionally and unlawfully touched her vagina with his penis.
3. The matter initially proceeded before Shikanda, Senior Resident Magistrate and the mother of the complainant testified as PW1 before him. When Khatambi, Senior Resident Magistrate took over the matter she complied with Section 200(3) of the Criminal Procedure Code and the Appellant opted for the matter to proceed from where it had reached before the previous magistrate. Nevertheless, the new magistrate stated that the record was not clear and it would be in the interest of justice that the matter starts *de novo*. There was nothing wrong with this decision as the Appellant was not prejudiced.
4. In ordering the matter to start afresh, it meant that the first witness appearing before the new magistrate should have been indicated as PW1. This was, however, not the case as the complainant who was the first witness to appear before Khatambi, SRM was indicated as PW2. The mother of the complainant who had testified before Shikanda, SRM as PW1 testified before Khatambi, SRM as PW3. The investigating officer Corporal Nancy Ayuma testified as PW4 and Ibrahim Abudullahi, a Senior Clinical Officer testified as PW5. The Appellant gave evidence in his defence as DW1.
5. At the conclusion of the trial, the Appellant was found guilty in respect of the main count and sentenced to life imprisonment.
6. Aggrieved by both conviction and sentence the Appellant now appeals to this court based on the grounds amended on 11th April, 2018. In summary, his case is that his conviction was based on insufficient evidence and he ought to have been acquitted considering the defence he had provided.
7. In a first appeal, like this one, the appellant is entitled to a fresh review of the evidence in order for the appellate court to arrive at its own independent conclusion on the same. In doing so, the appellate court should be alive to the fact that, unlike the trial court, it did not have the opportunity of observing the demeanour of the witnesses as they testified.
8. It is the Appellant's case that the prosecution did not discharge its burden of proof as required by the law. In support of this assertion, he points out that L W who reported the defilement to the mother of the complainant was never availed as a witness.
9. The Appellant analysed the testimony of the mother of the complainant and urged this court to find that the child was coerced to name him as the defiler even when the child herself had not said anything.

10. According to the Appellant, the mother of the child testified that neighbours had witnessed the defilement but none of those neighbours had been called to testify. The Appellant pointed out that the mother of the complainant had clearly stated that she had not noticed anything untoward with her daughter before she was alerted by L W.
11. The Appellant wondered why he was never subjected to medical examination despite the medical officer stating that the child was H.I.V. positive. The Appellant submitted that in the circumstances of this case it was necessary for a D.N.A. test to be conducted considering the complainant's testimony that she did not know the date of the incident.
12. The Appellant submitted that there was no evidence to connect him with the alleged defilement as the investigating officer did not visit the scene of crime in order to establish if it was practicable for such a crime to be committed at such a scene.
13. The Appellant submitted that the conclusion by PW5 that the victim's vaginal wall had bruises was not supported by treatment notes. Further, that the complainant never testified of bleeding after the alleged incident. The Appellant therefore urged this court to find that the opinion of PW5 as captured in the P3 form was without basis.
14. The Appellant concluded by urging this court to find that his conviction was without basis and that the same was as a result of a conspiracy.
15. The Respondent opposed the appeal. According to the Respondent, all the ingredients of the charge of defilement had been proved. Further, that the sentence imposed was provided by the law.
16. In a charge of defilement the prosecution must establish penetration, the age of the victim and the identity of the perpetrator. The evidence on the age of the victim will assist the court in establishing whether a crime was committed and if so, the appropriate sentence for such a crime.
17. Although the Appellant in his submissions gave the impression that PW1 L K and PW3 M K were different people, the record shows that the person who testified as PW1 is the same person who later testified as PW3. In her judgement dated and signed on 3rd November, 2017 and delivered on 20th November, 2017 by Dr. Julie Oseko, CM, the trial magistrate Khatambi, SRM acknowledged that PW1 and PW3 was one and the same person.
18. After conducting a *voir dire* examination on the complainant, the trial magistrate formed the opinion that the child understood the importance of telling the truth and appreciated the meaning of an oath. The complainant who testified as PW2 therefore gave sworn testimony.
19. The evidence of the complainant was that she was born on 6th August, 2004. On 5th May, 2014 she was playing when C a neighbor called her. C who was their neighbor was standing outside his house. On reaching where C was, he led her behind the house where upon he removed his clothes. He also asked her to remove her clothes. C who had remained with his underwear removed it and also removed her panties. He then lay on top of her and inserted his penis in her vagina. She felt pain as he was inserting his penis in her vagina. She wept quietly. He told her not to make any sound otherwise he would kill her. She went home after the incident and never revealed the ordeal to anybody. Her mother was later informed of the incident by L W who had been informed by neighbours who had witnessed the incident.
20. The complainant testified that upon receiving the information her mother took her to Watamu Police Station where she recorded a statement before being taken to Gede Hospital for treatment. She was also taken to Malindi Sub-County Hospital where she was examined by a doctor who filled a P3 form for her. The complainant identified the Appellant in court as the person who defiled her.
21. Cross-examined by the Appellant, the complainant stated that she knew the Appellant. She told the court that she was not aware that the Appellant had previously committed any wrong. The complainant insisted that her evidence was true that the Appellant had held her by force and defiled her.
22. PW3 M K testified that on 12th July, 2014 at around 7.00 p.m. she was at her home at **[particulars withheld]** when a neighbor called L W informed her that her daughter F.M. had been defiled by one C. Her daughter had been defiled with another girl. She immediately called her daughter and asked her what had happened. The complainant did not say anything but instead started crying.
23. The next day when preparing to go to church PW3 again asked the complainant to tell her what had happened. It was then that the complainant told her that the Appellant had called her and touched her body. In the afternoon they proceeded to Watamu Police Station. She was accompanied by the complainant, a child called M and the mother of M. M was also said to have been defiled. They recorded statements at the police station after which they were sent to Gede Hospital for examination and treatment of the children.
24. PW3 told the court that she did not accompany the children to Gede but she was later told by L who had gone with the children to the hospital that the children had been defiled. They went back to the police station and they were referred to Malindi General Hospital where a doctor confirmed that the children had indeed been defiled. A P3 form was filled for the complainant.
25. PW3 testified that when they took the P3 form to the police station they were told that the Appellant would be arrested. The Appellant disappeared and resurfaced in 2015 when he was arrested. The witness told the court that the Appellant was her neighbor and they had no differences prior to the incident.
26. Replying to questions put to her by the Appellant during cross-examination, PW3 stated that the incident was reported to her by the mother of M and she did not know if the Appellant had any dispute with the mother of M.

27. PW4 Corporal Nancy Ayuma's testimony was that on 13th July, 2014 at about 1.00 p.m. she was at Watamu Police Station when she received two women by the names L and L W. They were accompanied by their girls, F.M. and M.A. The women informed them that the girls had been defiled.

28. PW4 testified that she took the girls aside and interviewed them separately. F.M. informed her that C defiled her on 5th July, 2014. After the incident C threatened to harm her if she disclosed the incident to anybody. The girl did not tell her mother immediately but her mother received information from neighbours. Upon asking the child, the child disclosed what had happened and that is when they went to the police station.

29. PW4 testified that she sent the mother and the child to Gede Hospital where the defilement was confirmed. She then issued them with a P3 form and sent them to Malindi Sub-County Hospital where the P3 form was filled. She later recorded the statements of the witnesses.

30. It was PW4's testimony that she could not arrest the Appellant immediately as she was informed that he had run away and his family members did not know his whereabouts. She opened a file pending the Appellant's arrest. On 26th June, 2016 she was informed by one of the ladies that the Appellant had been spotted. She went and arrested the Appellant.

31. PW5 Ibrahim Abudullahi produced a P3 form that he filled for the complainant. He also produced the complainant's treatment notes. He stated that upon examination of the complainant the hymen was broken and the vaginal wall had bruises.

32. In his defence the Appellant who testified as DW1 denied committing the offence. He stated that he indeed knew F.M. as a neighbour at Turtle Bay in Watamu. His evidence was that on the material day he took his mobile phone to the home of the complainant for charging. When he went back for it he found the screen broken. The issue was discussed and Kshs.1,500 was paid to him. There was an agreement that the balance of Kshs.3,500 be paid later. According to him, he thought the matter was settled.

33. Cross-examined, the Appellant revealed that the dispute over the damaged phone was between him and the mother of F.M. He denied defiling F.M. on 5th July, 2014. His evidence was that on that day he was at the farm with other people.

34. A perusal of the judgement of the trial magistrate shows that she clearly identified the issues for determination in the matter. She also correctly identified the facts that the prosecution needed to establish in order for a conviction to be entered in a charge of defilement.

35. There is no dispute that the complainant was born on 6th August, 2004 as per the certificate of birth produced as an exhibit. The offence was said to have been committed on 5th July, 2014 meaning that she was nine years at the time of the defilement. She was therefore a human being under the age of 18 years and thus a child at the time the offence was committed.

36. As to whether the complainant was penetrated, she clearly narrated how the Appellant called her before proceeding to defile her. He then warned her not to report the incident to anybody. This is the narrative she later gave her mother and the investigating officer.

37. When the complainant was taken for medical examination on 14th July, 2014, the person who checked her observed that there were bruises on the vaginal wall and there was no hymen. The same observation was made by PW5 when he filled the P3 form.

38. The evidence taken in its entirety points to the fact that the complainant was sexually assaulted. The perpetrator was clearly identified by the complainant and her mother. Indeed the Appellant admitted that the complainant was her neighbour.

39. The trial magistrate considered the defence offered by the Appellant and correctly found it to be an afterthought. At no time did the Appellant ask the prosecution witnesses about a damaged mobile phone. He only made up the story at the defence stage. His defence was therefore correctly rejected.

40. I have perused the Appellant's submissions and I do not find anything therein to make me fault his trial. He, for example, claimed that the complainant was found to be H.I.V. positive but the record and the treatment notes show that she was tested and she turned out to be H.I.V. negative.

41. It is unfortunate that L W who first alerted the mother of the complainant of the assault did not testify. The record shows that on 2nd June, 2016 L W was prepared to testify but her evidence was not taken after the Appellant asked to be supplied with the statement of the witness and requested for time to study the same. Thereafter the witness never came back to testify and no explanation was offered as to why this witness was not called to testify. Failure to call the witness did not however dent the prosecution case. Indeed the record confirms the existence of such a witness.

42. Having reviewed the evidence that was adduced at the trial, I arrive at the same conclusion with the trial court that the Appellant was guilty as charged in the main count. I find his conviction safe and I confirm it. As for the sentence, the same is what is provided by the law. It is therefore the correct sentence. The result is that the appeal fails in its entirety and the same is dismissed.

Dated, signed and delivered in Malindi this 27th day of Sept., 2018.

W. KORIR,

JUDGE OF THE HIGH COURT