



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 152 OF 2016

KINGI NYANJE MWADORE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An Appeal from conviction sentence of 15 years imprisonment for defilement by Hon. P.K Mutai (RM) on 18/3/2016 at Kwale Law Court)

JUDGMENT

1. The Appellant was convicted and sentenced to 15 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the sexual offences Act No 3 of 2006.

2. The particulars of the charge were that on diverse dates between 6th January and 8th March 2014 in KWALE COUNT within Coast Region, the Appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of M.W.M a child aged 16 years.

3. The prosecution evidence in summary was that on 6th January 2014 at 2.pm the Appellant in this case went to the home of the complainant and took complainant to his home. The complainant attempted to resist but the Appellant insisted and they went to his home where he introduced her to his mother as his wife.

The complainant said she slept in the house of the Appellant. He told her to remove her clothes and he also removed his clothes and they had sex. The complainant stayed there for two months before village Elders went there to see them.

The Appellant was hand cuffed and the complainant was also put under arrest.

In cross-examination, the complainant said she was 15 years old and in class 6 at that time and she told Appellant the same. She denied that she told the Appellant that she was 19 years old at the time.

4. The Appellant said in his defence that on 6/1/2014 he was at his home and he started his work as a boda boda rider at 7.30am.

The Appellant said he took a client to Burani area and on his way home two people signaled him and he stopped. They asked him if he was Kingi. The two people who introduced themselves as police officers arrested him and took him to Mwaluvamba. The Appellant said he was informed it was a case of defilement. The Appellant said the allegations were strange. He said the complainant appeared confused and he was not taken for medical examination with her.

5. The trial court found the Appellant guilty as charged and convicted him and sentenced him to 15 years imprisonment. The Appellant has now appealed against both conviction and sentence on the following grounds:-

AMENDED GROUNDS OF APPEAL

(i) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the charge sheet which was relied upon to convict the appellant was fatally defective contrary to section 89(5) 134, 137 (a) (i) (ii) 214(i) of the criminal procedure code.

(ii) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the AGE of the complainant was not ascertained to the requirement of section 8 (4) of the sexual offences Act to warrant the conviction of the

appellant.

(iii) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the evidence adduced by PW4 (Clinical Office) and the P3 form which would have formed an integral part in proving the present case had no substantial evidence to warrant the conviction of the appellant contrary to section 107 as read together with section 109 of the evidence Act.

(iv) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that there was massive invariances and contradictions in the prosecution evidence that did not corroborate contravening section 153 as read together with section 154 of the criminal procedure code.

(v) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the KEY WITNESSES who were mentioned and subsequently put in the committal proceedings were never compelled to appear in court to clear the doubt upon the prosecution evidence thus contravening section 144 as read together with section 150 of the criminal procedure code.

(vi) That the learned trial magistrate erred in law and fact in convicting the appellant without giving due weight to the ALIBI DEFENCE advanced by the appellant which was substantial enough to vindicate the appellant thus contravening section 212 as read together with 235 of the criminal procedure code.

6. The Appellant submitted in writing as follows:-

(i) That the charge the trial court relied on was fatally defective as it did not specify whether the defilement was committed on a boy or a girl the time defilement was committed.

(ii) That the age of the complainant was not established beyond reasonable doubt. The evidence put the age at 16 years, the complainant said she was 15 years old and the Doctor said she was 17 years old.

(iii) The prosecution did not prove the case beyond reasonable doubts as required by law. The Appellant submitted that there was no medical evidence that the complainant was defiled as the Doctor stated that her vulva was normal and no spermatozoa was found or recorded in the P3 form.

(iv) The Appellant also submitted that the name of the complainant was indicated as M N M in the charge sheet and yet the chairman of the community policing (PW3) said her name was M N.

(v) The Appellant submitted that several people were mentioned but they were not called including the brothers of the complainant whom she said were with her when the Appellant took her from her home. The Appellant stated that the inference was that their evidence would have been adverse to prosecution case as it was held in the case of *BUKENYA VS UGANDA*.

(vi) Finally, the Appellant submitted his alibi defence was not considered by the court. The Appellant said the alibi evidence was sufficient to create a doubt as he said he was arrested on 6/1/2014. The charge sheet states the offence was committed between 6/1/2014 and 8/3/2014 and the P3 form is dated 8/1/2014.

7. The respondent opposed the Appeal and submitted as follows:-

(i) On the first ground that the charge sheet is defective is as it did not state whether the complainant is a boy or a girl, that the said defect is not fatal as the particulars of the charge sheet were sufficient to enable the Appellant prepare his defence. The error is also curable under section 382 of the criminal

procedure code.

(ii) On the record ground that the age of the complainant was not proved, the respondent submitted that the register of birth produced shows that the complainant was born on 23/3/1998 and therefore she was 16 years old on 6/1/2014.

(iii) On the ground that the prosecution did not prove its case, the respondent submitted that all the three ingredients of defilement i.e penetration, the identity of the perpetrator and the age were proved to the required standard.

(iv) On the issue of crucial witness were not called, the respondent submitted that the state was able to prove the offence of defilement with the witnesses who were called. The respondent relied on section 143 of the evidence Act.

(v) Finally the respondent submitted that the trial court considered the defence by the Appellant and that no alibi defence was raised by the appellant as he only stated that he was arrested on 6/1/2014.

8. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs**

Republic the court citing **Okeno v. R** held:-

“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 to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings 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. ”.

9. My findings are as follows:-

(i) The prosecution has proved the three ingredients of defilement to the required standard. The three are penetration, the identity of the perpetrator and the age of the victim.

(ii) The complainant testified that the Appellant took her as a wife and defiled her. There is evidence that the complainant was removed from the house of the Appellant by PW3 after two months. The two lived together as husband and wife. The testimony of the complainant was corroborated by the Doctor

(PW4) who said her hymen was missing. The Doctor confirmed the defilement.

(iii) The Appellant was properly identified by the complainant. Section 124 of the evidence Act states that the court can rely on the testimony of the complainant alone to convict in criminal cases involving a sexual offence where the only evidence is that of the alleged victim of the offence.

(iv) The age of the complainant was 16 years according to the Register of Birth produced as an Exhibit and therefore the complainant was a minor.

(v) Finally I find that no alibi defence was raised in this case. The Appellant merely said he was arrested on 6/1/2014. That is not an alibi. In the case of **Elias Kiamati Njeru v Director of Public Prosecution [2015] eKLR**

The High Court held as follows:-

“In the case of KIARIE VS REPUBLIC [1984] KLR the Court of Appeal held:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable”.

I find that in this case, the evidence of PW1 and PW3 places the Appellant at the scene of crime.

(vi) I find that the prosecution proved the guilt of the Appellant to the required standard. The conviction herein is safe and the sentence lawful.

(vii) The Appeal is accordingly dismissed and the sentence confirmed.

Dated, Delivered and signed at Mombasa this 19th day of June 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE