



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
HCCRA NO. 106 OF 2017

ALEX MULI KINYILI APPELLANT

-VERSUS-

REPUBLIC PROSECUTION

JUDGEMENT

1. The Appellant **Alex Muli Kinyili** was charged with offence of:-

MAIN CHARGE: DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

Particulars are that on the **22nd** day of **December 2011** at [particulars withheld] Estate, Sultan Hamud Market, Kiu Location, in Makueni District within the Eastern Province intentionally and unlawfully caused his male organ namely a penis to penetrate the vagina of **MK**, a girl aged seven **(7) years**.

ALTERNATIVE CHARGE: COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION II (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

Particulars are that on the **22nd** day of **December 2011** at [particulars withheld] Estate, Sultan Hamud Market, Kiu Location, in Makueni District within the Eastern Province intentionally and unlawfully touched the vagina of **MK**, a girl aged seven **(7) years** with his penis.

2. The Appellant pleaded not guilty and the matter was fully heard. The Appellant was convicted and sentenced to life imprisonment.

3. Being aggrieved by the above decision, the Appellant lodged the appeal and set out the following grounds:-

***-That** the learned trial magistrate erred in law by basing his conviction on the evidence which was not sufficiently trustworthy to have established as to his part of participation into the commission of the offence charged.*

***-That** the case for the prosecution was not proved beyond reasonable doubt as required in law.*

***-That** the Appellant's defence was not properly considered.*

***-That** the Appellant to apply for a copy of the court proceedings and wish to appear in court*

during the hearing date of this appeal.

4. When the matter came for hearing, the Appellant lodged amended/supplementary grounds of appeal namely:-

***-THAT** the burden of prove was not discharged.*

***-THAT** the age of the victim was not ascertained.*

***-THAT** the learned magistrate made an error in both law and facts and misdirected himself by failing to observe that, medical evidence established an offence of attempted defilement, but not as charged.*

***-THAT** the learned trial magistrate made an error in both law and facts by failing to note that, the initial medical examination report from Sultan Hamud Sub-district hospital was never produced in court as an exhibit, yet the evidence was essential for the just decision of the case.*

***-THAT** the learned trial magistrate made an error in both law and facts by filing gaps on the prosecution's case through creation of his own theories, not canvassed in the evidence adduced.*

***-THAT** the learned trial magistrate made an error in both law and facts and misdirected himself by failing to observe that, the provision of **Section 179(2) of the CPC** was applicable as medical evidence established an offence of attempted defilement.*

5. The parties opted to canvass the appeal via written submissions which they filed and exchanged.

6. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

7. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

8. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364**. See also **OKENO – VS- REPUBLIC**.

9. The prosecution called 5 witnesses. The same narrated as below:-

PW1 stated that the complainant informed her that the accused had defiled her in his house.

She also stated that she and PW2 later took the complainant to Sultan Hamud health centre for medical examination. She further stated that she examined the complainant and noticed that her hymen was torn.

PW2 stated that the PW1 informed her that the accused had defiled the complainant and added that she later met the complainant who confirmed the same to her. She also stated that she later took the complainant to Sultan Hamud health centre and Makindu district hospital for medical examination.

The **Complainant (PW3)** stated that the accused defiled her in his house and added that she later reported the matter to PW1. She also stated that she bled from her vagina after the incident.

PW4 stated that he carried out investigations into the matter and later charged the accused with the present offences.

PW5 stated that medical examination of the patient revealed that her vagina was swollen and tender and

that her vaginal wall was bruised. He also stated that pus cells were noticed in the complainant's urine and that clinical examination of the complainant showed that she had been defiled. He produced a P3 form which was filled in respect of the complainant as Exhibit 3.

1. The accused on the other hand gave unsworn evidence and did not call any witness. In his evidence, the accused (**DW1**) stated that he did not know anything about the charges facing him but did not deny committing the offences.

11. The Appellant submitted that, the burden of prove was not discharged, going by the basis of the evidence on record. First and foremost, the prosecution set up to prove that, on the 22nd day of December 2011, the Appellant intentionally and unlawfully caused his genital to penetrate the genitalia of victim a girl aged 7 years.

12. The prosecution was in law duty bound to prove by way of evidence beyond reasonable doubt as to how the Appellant caused his genitalia to penetrate the genital of the victim.

13. The medical evidence produced by the prosecution, did not establish the element of penetration. Indeed in his testimony (PW5), Dr. Patrick Kibwana Musyoki testified:-

“.....he noticed that the patient's vagina was swollen and tender when he examined her. He also noticed that her vaginal wall was bruised. No discharge was noticed from the patient's vagina.”

14. PW5 testified on behalf of Dr. Makali who actually examined the complainant pursuant to **Section 77 and 33(b) of the Evidence Act**, there was no explanation offered by the prosecution as to the where about of Dr. Makali. He referred the case of **MUSIKIRI –VS- REPUBLIC (1987) KLR** where it was held:-

“Medical evidence, if sought to be adduced ought to be so done with propriety and not in slips hold manner. The doctor who examined the complainant should have been called to adduce proper evidence.”

15. The said P3 form was issued on 27/12/2011 (5 days) after the commission of the offence, why? Whatever is filled on the said P3 form (exhibit-3) was secondary evidence. The court was duty bound to rely on the initial medical examination report from Makindu sub-district hospital which was conducted soon after the commission of the offence charged.

16. The appellant contended that the medical evidence relied upon by the trial magistrate was not admitted with propriety but in a slipshod manner, and was in total violation of **Article 50(4) of the constitution** which provides:-

“Evidence obtained in a manner that violates any right or fundamental freedom in the bill of right, shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

17. There was a gap on the prosecution's case and no one is entitled or has jurisdiction to fill this gap on the prosecution's case. He referred to the case of: - **OKETH OKALE –VS- REP. (1965) E.A. 555** where it was held: - ***“A conviction can only be based on the weight of the actual evidence adduced.....”***

18. And in regards to such gaps on the prosecution's case see the case of: - **RICHARD NDERITU KARIUKI –VS-REPUBLIC (2009) EKLR**, whereby the prosecution failed to call the watchman whose evidence was essential for the just decision of the case, and no explanation was offered in this regards, more so that he would explain what he heard going on in the room where the victim was raped.

19. In regards to the appellants defence, the trial magistrate stated that, his defence may or may not have been true but, nevertheless convicted the appellant. On appeal, the court of appeal said: - ***“But in a***

criminal prosecution, an accused person is not to be convicted because his or her case is weak. A conviction must be based on the strength of the prosecution evidence. In this case, the prosecution's evidence left such yawning gaps and none of the prosecution's evidence left such yawning gaps and none of the courts below ever referred to them, let alone dealing with them. The conviction of the appellant was unsafe and we cannot allow it to stand."

20. In the absence of clear prove of penetration as defined by **Section 2 of the Sexual Offences Act No. 3 of 2006**, the appropriate conviction then, if there was any to result, ought to have been attempted defilement contrary to **Section (1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006**.

21. A case similar to present case has been recently settled by the Hon. Lady justice G.W. Ngenye Macharia at Nairobi in **HCR A NO. 326 OF 2012, BENSON MUHIA MUIGAI –VS- REPUBLIC**, whereby the appellant was convicted for an offence of defilement contrary to **Section 8(1) (2) of the Sexual Offences Act**, hence sentenced to life imprisonment.

22. Upon appeal, and upon evaluating the evidence on record, the learned judge had this to say: - ***"I find that the prosecution proved beyond reasonable doubt that the appellant committed the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the sexual offences Act, in the result the appeal partially succeeds. The same on conviction is dismissed. However, I set aside the life imprisonment sentence. I substitute it with an order that the appellant be and is hereby sentenced to serve ten years imprisonment effective of the date of sentencing by the trial magistrate."***

23. The respondent replied to the same submissions as follows:-

Whether the case was proved beyond any reasonable doubt.

24. In defilement case the critical ingredients forming the offence are the age of the complainant, proof of penetration and positive identification of assault.

25. On **identification** this is a case of recognition as opposed to that of identification of a stranger, the complainant knew the Appellant in person and by name prior to the occurrence of the incident; hence the question of wrong identification does not arise.

26. The second ingredient is that of **penetration** by a particular assailant at a particular time. PW3 testified that the Appellant had sex with her on the 22/12/2011; her evidence was corroborated by that of PW5 the doctor who produced the P3 report on behalf of the doctor who examined her when she went to hospital. The findings in the report were that PW3 had swollen vagina and bruises on her vagina wall thus concluded that she had been defiled.

27. On the last ingredient, that of **Age** of the complainant, it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence. However it is only the doctor who can professionally determine the age of the victim in absence of any other evidence.

28. In the present case the P3 form produced by PW5 indicated the age of the victim to be 7 years. (*Refer to the case of RWG –VS- REPUBLIC, CA NO. 198 OF 2012 at page 5 the court referred to the case of Francis Omuroni – Versus - Uganda.*) It is prosecution submission that this ingredient was properly proved.

29. Thus it is submitted that prosecution proved its case beyond any reasonable doubt and such this ground of appeal is misplaced and should be dismissed.

b. Whether it was proper for the Dr. Kibwana to produce the P3 form on behalf of the doctor who filled it.

30. The trial prosecutor tried to secure the attendance of Dr. Makali who had filled the P3 form but they were not successful (*page 15 and 17 of the proceedings*) thus they called another doctor (Dr. Kibwana)

who had worked with him.

31. PW5 Dr. Kibwana who produced the P3 form in court stated that he had worked with Dr. Makali for one year and therefore he was familiar with his handwriting and signature. He read out in court Dr. Makali notes from the P3 form which he filled after examining the complainant.

32. It is prosecution submission that this ground of appeal lacks merit and is misplaced because under **section 77** of the Evidence Act such document need not to be produced by the maker where his attendance in court cannot be secured without undue delay.

33. After going through the material before me, I find the issue arising is;

Whether the prosecution case was proved beyond reasonable doubt?

34. The ingredient of offence of defilement was set out in the case of **NGUI –VS- REPUBLIC HCRA 296 of 2010 MKS** thus the same are penetration of genitalia of a complainant, age of the child, identity of person who penetrated complainant’s genitalia.

35. The evidence on record shows that the accused defiled her is corroborated by that of PW1, PW2 and PW5. PW5 who examined the complainant confirmed in his evidence that she was defiled.

36. Indeed, the P3 form (exhibit 3) produced in evidence herein by PW5 shows that the complainant’s vagina was swollen and tender and that her vaginal wall was bruised, facts which clearly show that she was defiled. The P3 form (exhibit 3) also shows that the complainant was seven (7) years old at the time of the incident.

37. The complainant’s evidence also shows that she positively identified the accused as the person who defiled her. The complainant, though very young, was very consistent in her testimony. There is no evidence on record to show that the complainant, PW1 and PW2 had a grudge against the accused which could make them frame him.

38. The accused never even denied defiling the complainant. Therefore complainant’s evidence was found to be truthful and reliable and her evidence is believed that the accused defiled her. The accused’s action in defiling the complainant was unlawful.

39. The prosecution case was thus proved beyond reasonable doubt and thus court makes the following orders:-

- 1. The appeal is dismissed, conviction affirmed and sentence confirmed.**

SIGNED, DATED AND DELIVERED THIS 27TH DAY OF JULY, 2017.

C. KARIUKI

JUDGE

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