



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 85 OF 2014

MWAGHAI ALONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 339 of 2008

in the Senior Principal Magistrate's Court at Wundanyi delivered

by Hon F. K. Munyi (RM) on 6th November 2009)

JUDGMENT

1. The Appellant herein, Mwaghai Alongo, was tried and convicted by Hon F. K. Munyi, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act No 3 of 2006. He was sentenced to life imprisonment. He had also been charged with the offence of sexual assault contrary to Section 5(a)(i) of the Sexual Offences Act. The alternative charge related to the offence of indecent assault of a girl contrary to Section 11(1) of the Sexual Offences Act.

COUNT I

“On the 31st day of August 2008 at [particulars withheld] in Taita Taveta District, within Coast Province had unlawful carnal knowledge of C M a girl of the age of six years.”

COUNT II

“On the 31st day of August 2008 at [particulars withheld] in Taita Taveta District, within Coast Province using part of his body namely fingers penetrated the genital organs (vagina) of C M.”

ALTERNATIVE CHARGE

“On the 31st day of August 2008 at [particulars withheld] in Taita Taveta District, within Coast Province unlawfully and indecently using his genital organ namely penis touched the genital organ namely vagina of C M.”

2. Being dissatisfied with the said judgment, on 23rd November 2009, the Appellant filed **HCCRA No**

223 of 2009 at Mombasa. The High Court of Kenya Voi received the Trial Court file on 10th January 2017. On 5th April 2017, he filed his Written Submissions and a Notice of Motion application seeking to amend his Grounds of Appeal. On 10th April 2017, M/S Muthami & Co Advocates came on record on his behalf and filed a Notice of Motion application seeking leave to file an Amended Petition of Appeal, which application was granted by this court on 11th April 2017. The Appellant relied on five (5) grounds of appeal.

3. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

4. After perusing the Appellant’s Petition of Appeal and his Written Submissions as well as those of the State, this court was of the view that the issues that had been placed before it for determination were:-

a. **Whether or not the Charge Sheet was defective;**

b. **Whether or not the trial was a mistrial or a nullity;**

c. **Whether or not the Prosecution had proved its case beyond reasonable doubt?**

5. On perusing the proceedings of the Trial Court, the circumstances of the case herein were that on 31st August 2008, the Complainant, C M (hereinafter referred to as “PW 1”), who was aged six (6) years was coming from Church when she went to a home to “borrow” a pawpaw from “another man.”The Appellant used to work in that man’s farm.

6. However, he called her on the pretext of sending her then ran after her, grabbed her and took her to his house where he undressed her and inserted his penis into her vagina. He only released her when PW 1’s sister, M M (hereinafter referred to as “PW 2”) who was following her from behind, came. He gave them paw paws and asked them not to tell anyone what had happened.

7. PW 1’s mother, J M (hereinafter referred to as “PW 3”) took PW 1 to Voi Hospital a day after the aforesaid incident. On being examined, it was found that although PW 1 did not have any injuries on the head, neck, chest, abdomen, upper and lower limbs, she was walking with difficulty. Her underwear was also torn and bloodstained. Her hymen was broken evidencing penetration by a blunt object or penis. Although she had a smelly discharge from her vagina, there were no spermatozoa.

8. In his unsworn evidence, the Appellant stated that on the material date, he spent the whole day at the forest cutting trees for charcoal. Later on in the day, he went to PW 3’s house to borrow water. The following day, he went to fetch water from the river.

9. Later that day, PW 3’s child came to his house and called him. When they got to the children’s house, he found a big crowd of people who accused him of having been a criminal. PW 3’s complaint at the material time was that he had injured her child with his head. He was then charged with an offence he was not aware of.

10. Notably, the Appellant did not submit on the issue of a nullity and mistrial of the case on the ground that the sentence was unlawful as it was imposed by a Resident Magistrate without jurisdiction on 23rd October 2009. This court did not therefore analyse the said Ground of Appeal as it was unable to follow his argument in this respect.

11. He, however, submitted that the Charge Sheet was defective as at the date of inception, he ought to have been charged under Section 8(1) as read with Section 8(2) of the Sexual offences and not under Section 8(2) of the Sexual Offences, which he submitted was the penalty clause for the offence of defiling a child up to the age of eleven (11) years.

12. Further, he pointed out that he was charged with the offence of having carnal knowledge with PW 1 contrary to an offence under Section 8(1) of the Sexual Offences Act, which section entails penetration of the victim by the perpetrator either in the vagina or anus.

13. He placed reliance on the case of Arthur Mshila Manga vs Republic [2016] eKLR where the Court of Appeal held that the appellant herein could not have been charged with the offence of having carnal knowledge the complainant therein as the offence of carnal knowledge had been repealed before the Sexual Offences Act.

14. On its part, the State argued that the Charge was read out to the Appellant in Kiswahili, a language it stated he understood. It submitted that the words “carnal knowledge” depicted “sexual offence” which is what was interpreted to the Appellant herein at the time he was taking plea. It referred this court to the case of Alexander Likoye Malika vs Republic [2015] eKLR where the Court of Appeal held that “carnal knowledge” was an all-encompassing term that included the ingredients of defilement.

15. It further placed reliance on the case of Willie (William) Slaney vs State of Madhya Pradesh (A.I.R. 1956 Madras Weekly Notes 391) where the court therein held as follows:-

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count (sic) and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

16. Appreciably, proceedings cannot be found to be irregular merely because a charge sheet is defective as is clearly stipulated in Section 382 of the Criminal Procedure Act Cap 75(Laws of Kenya) that states as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

17. Having said so, this court agreed with the Appellant that the section under which he was charged was a penalty clause and as there is no offence under Section 8(2) of the Sexual offences Act, this rendered the Charge Sheet defective. It was the view of this court that the irregularity of the charge occasioned the Appellant injustice as there was a conflict between the offence of defilement contained in the Sexual Offences Act and particulars of an offence that had already been repealed by the said Sexual Offences Act.

18. The Appellant was a lay person in matters of law and could not have been expected to have raised the issue. Appreciably, the use of the words “carnal knowledge” in an offence of defilement is an issue that has not been resolved by great legal minds in our jurisdiction.

19. On one hand, in the case of Arthur Mshila Manga vs Republic (Supra), the Court of Appeal at Malindi held that an accused person could not be charged with having carnal knowledge with another under the Sexual Offences Act as no such offence existed therein having been repealed by the said Sexual

Offences Act.

20. On the other hand, in the case of **Alexander Likoye Malika vs Republic** (Supra), the Court of Appeal at Kisumu held that the use of the words carnal knowledge where a person had been charged under Sexual Offences Act was an issue of semantics and that the words referred to sexual intercourse.

21. Conflicting decisions from two (2) equal Courts of Appeal always put a court that is bound by such decisions in a difficult position as such court is unable to determine which decision is *per incuriam*. Such lower court is normally left to consider the decision it finds to be more persuasive.

22. **Appreciably, Section 134 of the Criminal Procedure Code provides as follows:-**

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

23. A close scrutiny of the offences in the Penal Code shows that a trial court finds the offence to have been proven if the ingredients of the offence therein have been proven. It was therefore the view of this court that the ingredients of an offence ought to be determined from the face of the charge sheet.

24. For instance, where a person has been charged with the offence of robbery with violence under Section 296(2) of the Penal Code, the prosecution is required to prove the following ingredients:-

a. **The offender must be armed with a dangerous or offensive weapon or instrument; or**

b. **The offender must be in the company of one or more persons; or**

c. **Immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

25. If none of the aforesaid ingredients exist in a charge, then the offence of robbery with violence would not be said to have been committed. Similarly, the Sexual Offences Act was drafted in such a way that the ingredients of the sexual offences are easily discernible from the charge sheet. The setting out of the ingredients in the offence leaves no doubt in the mind of the trial court as to what the prosecution is required to prove.

26. However, in view of the specificity of the Sexual Offences Act, the word “carnal knowledge” would need further interpretation as the ingredients of the offences are not clearly discernible. The difficulty in determining the ingredients of the offence of “having carnal knowledge” may have led the legislators in having repealed the said offence altogether. The use of the words “carnal knowledge” in a charge where the offence is under the Sexual Offences Act is respectfully, not mere semantics. Rather, it is an incurable defect.

27. As was stated by the Court of Appeal in the case of **Arthur Mshila Manga vs Republic** (Supra), charging the Appellant with the offence of carnal knowledge after the said offence had been repealed by the Sexual Offences Act was improper as it was non-existent. Indeed, the Appellant ought to have been charged with the offence of defilement as is provided for in the Sexual Offences Act.

28. If the drafters of the Sexual Offences Act had intended that the words “having carnal knowledge” referred to the same thing as defilement, then nothing would have been easier for the said drafters to have said so. The fact that the said words did not find themselves when the Sexual Offences Act was being enacted meant that the offence of “having carnal knowledge” was non-existent and could not be preferred against an accused person.

29. For the offence of defilement, the prosecution has to prove the following ingredients which are clear

to any layman:-

- a. **That there must be penetration of the vagina or anus of a victim by a perpetrator;**
- b. **That the victim must be under the age of eighteen (18) years.**

30. Appreciably, the holding in the case of Willie (William) Slaney vs State of Madhya Pradesh (Supra) holds to date as seen from the principle underlined in Section 382 of the Criminal Procedure Code. However, bearing in mind that sexual offences in Kenya have their specific Act and that the case of Arthur Mshila Manga vs Republic (Supra) is from the Kenyan jurisdiction and therefore binding on this court, the case of Willie (William) Slaney vs State of Madhya Pradesh (Supra) was therefore merely persuasive to this court.

31. In this respect, this court found and held that the defectiveness in the Charge Sheet on account of it having indicated the penalty section only and the use of the word “carnal knowledge” therein was incurable. Although the re-trial of this case was an option of remedying the said defect, this would have been prejudicial to the Appellant as he had been incarcerated 2009. Restarting a case afresh after almost nine (9) years would be a miscarriage and travesty of justice against him. In addition, if PW 1 and PW 2 were recalled to testify, it is unlikely that they would remember events that occurred nine (9) years ago with clarity as they children of tender years.

32. Having appreciated that the aforesaid technicalities tainted the trial herein and the fact that Appellant did not address the merits or otherwise of the Prosecution’s case, this court nonetheless analysed the evidence to establish whether or not the Prosecution proved its case beyond reasonable doubt as the State submitted on the same and further because it may have proceeded on the wrong principles regarding the use of the words “carnal knowledge” in the charge that was preferred against the Appellant herein.

33. The State was emphatic that PW 1’s age was proven by the P3 Form which was corroborated by PW 3 and PW 4. PW 3 testified that PW 1 was aged six (6) years. PW 1 had also told the Trial Court that she was aged six (6) years. Appreciably, the P3 Form was not the best proof of PW 1’s age. A birth certificate, clinic card or an Age Assessment Report would have been more appropriate to prove her age. However, the Appellant did not adduce any evidence to rebut or reject PW 1’s, PW 3’s and PW 4’s evidence in this regard. This court therefore accepted the State’s submissions that PW 1’s age at the material time was six (6) years as the Appellant may have appreciated that fact.

34. This court noted the State’s argument that the incident occurred during the day and that PW 1 was therefore able to identify the Appellant as her assailant. That notwithstanding, both PW 1 and PW 2 adduced unsworn evidence. This meant that PW 1’s evidence had to be corroborated by material evidence as the Appellant could not have been found liable for having defiled her as she adduced unsworn evidence.

35. According to PW 3, she took PW 1 to Mwatate Hospital whereafter they were referred to Voi Hospital on 1st September 2008. The P3 Form that was dated 9th September 2008 showed that PW 1 had difficulties walking. It was not clear to this court whether it was on that date that she had difficulties in walking or whether the difficulties in walking were noted on 1st September 2008 when PW 3 took her to hospital. As there were no other medical records that were adduced in evidence save for the P3 Form, it could only be assumed that PW 1 was seen for the first time on 9th September 2008.

36. Further, it was also not clear to this court if the difficulty in walking was as a result of infection in PW 1’s vagina as the P3 Form had indicated that she had a foul smelling discharge from her vagina. This concern could not be ignored that, save for the broken hymen, PW 1 did not have any injuries on her genitalia. Indeed, no evidence was adduced to show that the smelly whitish discharge that PW 1 presented with when she went to hospital on 9th September 2008 was as a result of having been defiled by the Appellant herein and not because of any other infection.

37. There was no explanation that was proffered to show why the Appellant who was arrested the following day after the alleged incident was not taken to hospital for a medical examination. This could have either connected and/or linked him to PW 1's smelly whitish discharge in the event he may have had an infection or exonerated him from the offence he had been charged with.

38. In particular, no documentary evidence was adduced before the Trial Court evidencing that PW 1 was taken to hospital on 1st September 2008. In fact according to PW 6, PW 1 was examined after twenty seven (27) hours of the said incident. This was on 2nd September 2008. If indeed PW 1 was examined twenty seven (27) hours after the said incident as PW 6 testified, this contradicted PW 3's evidence to the effect that she took PW 1 to hospital on 1st September 2008.

39. Further, if PW 1 was taken to hospital on 1st September 2008 as PW 3 contended in her testimony, there was no documentary evidence to show that she was indeed taken to hospital on the said date. If PW 1 was first seen on 9th September 2008 as was evidenced in the P3 Form, no reason was advanced by the Prosecution to explain the delay.

40. This court was also concerned that the bloodstained underwear that was referred in the P3 Form was not adduced in evidence. The Village elder who both PW 3 and PW 5 referred to was not called as a witness in this case. He was a crucial witness as PW 3 said that he established that PW 1 had been defiled by the Appellant and then arrested him.

41. In **Alex Lichua Lichodo vs Republic [2015] eKLR**, the Court of Appeal rendered itself as follows:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”.

42. The omission to adduce in evidence the bloodstained underwear, the failure to call the said Village elder to testify and the unexplained gaps in the Prosecution's case were a clear manifestation of poor presentation of the case and poor investigations by the police.

43. As was held in the case of **Arthur Mshila Manga vs Republic** (Supra), the fact that there is a broken hymen is not proof of the offence of defilement. The said case was on all fours with the present one as the appellant therein had been charged under the Sexual Offences Act for having had carnal knowledge with the complainant therein.

44. Notably, PW 1's unsworn evidence had to be corroborated by material evidence that was missing in this case. The Appellant was under no obligation to assist the Prosecution in proving its case. It was the view of this court that the gaps in the Prosecution's evidence raised doubts in the mind of this court as to what really transpired on the material date. For the foregoing reasons, this court found and held that the Prosecution did not prove its case to the required standard, being proof beyond reasonable doubt.

DISPOSITION

45. Accordingly, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 23rd November 2009 was successful and the same is hereby allowed.

46. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

47. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of JULY 2017

J. KAMAU

JUDGE

In the presence of:-

Muthami for Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk