REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 36 OF 2017

P K M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant P K M was charged with **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.**

2. On 9th October 2013 at [particulars withheld] within Makueni County, intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of M W a child aged 15 years.

3. **ALTERNATIVE CHARGE WAS INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**.

4. On the 9th day of October 2013 at [particulars withheld] within Makueni County intentionally and unlawfully touched the vagina of M W a child aged 15 years.

5. After hearing of the case he was convicted and jailed to 20years imprisonment. Being aggrieved by the above decision, he appealed and set out the following grounds:-

***i. That** the Learned Trial Magistrate erred in law and fact in not properly directing her mind to the degree, standard of proof and law relating to the burden of proof.*

***ii. That** the Learned Magistrate did not properly analyze all the evidence on record and in his selective analysis failed to form the necessary balanced view and this prejudiced the appellant's case.*

***iii. That** the Learned Magistrate was speculative in her findings and did not take into account all the facts, circumstances and lack of crucial evidence relating to the case which formed the basis of her decision.*

***iv. That** the learned Trial Magistrate failed to consider the obvious discrepancies, contradictions and inconsistencies in the prosecution case.*

***v. That** the Learned Trial Magistrate erred in law and facts by failing to properly direct her mind in considering the appellant's defense.*

vi. <u>That</u> *the conviction was against the weight of evidence on record.*

6. The appellant further filed supplementary grounds as follows:-

i. <u>That,</u> *the evidence of the prosecution witnesses was deficient in credibility and competence and consequently should not have been employed as a basis for convicting the appellant.*

ii. <u>That,</u> *vital and/or crucial witness (s) did not testify in vindication or otherwise of the alleged prosecution's claims.*

iii. <u>That,</u> *the Trial Magistrate erred in law and substance by canvassing of opinion not adduced in evidence during trial.*

iv. <u>That,</u> *the trial court erred further by not informing the appellant of his constitutional right to opt for legal representation pursuant to* ***Article 50(2)(j)*** *of the Constitution of Kenya 2010.*

v. <u>That,</u> *the admission of written submissions prejudiced appellant's right to a fair trial.*

7. When the matter came for hearing, the parties relied on their submissions. The appellant filed and served and the state responded orally.

8. 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.

9. In reaching its decision, this court has to 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.

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

11. The prosecution called four (4) witnesses. The evidence in summary was as follows:-

12. PW1 was the complainant M W who testified that on 09/10/2013 at about 6:00 a.m. she was at home and was going to school when the accused person came to the house and had sex with her. She indicated that she told her teacher and the teacher told her if the accused person does the same thing again she should tell.

13. It was her testimony that the accused person had sex with her again and she therefore told the teacher who reported the incident at Kibwezi police station. She was then taken to hospital and also issued with a P3 form.

14. She informed the court that she was 14 years old. She informed the court that the accused person was staying with her mother but he is not her father and hence they all lived together.

15. Upon cross examination by the accused the complainant stated that her small brother was present when the accused had sex with her. She stated that on 09/10/2013 was the second time the accused had sex with her. She informed the court that she informed her mother but not on the date of the incident. She denied having sex with another person.

16. PW2 was D M who informed the court that she was the deputy head teacher at [particulars withheld] Primary School. She testified that on 09/10/2013 she was at the school and after assembly M told her that she wanted to study but did not have uniform and she told her that they would look in to it. She however noted that she did not seem satisfied and she thus asked her if there was anything else.

17. She then said that her mother's husband had defiled her. It was her testimony that she proceeded to Machinery AP post in the company of the child and they made a report and the accused was arrested. The witness stated that the child told her that she had been defiled three times. The child was taken to hospital and treated. She identified the accused person as the one before the court.

18. Upon cross examination the witness stated that the child did not report to her the first time. She further stated that she did not know the accused before until the child directed them to the hotel where he worked.

19. PW3 was the investigation Officer, Sargent Alice Kioko attached at Kibwezi police station. She testified that on 09/10/2013 in the morning she was at the office when the complainant was brought by her teacher and the child alleged that she had been defiled by the suspect who was living with her mother.

20. She booked the report and took the complainant to hospital where she was treated and discharged. It was her testimony that the accused person had been brought together with the complainant. She produced the complainant's clinic card as Exhibit No. 2. She stated that the same illustrated that the girl was born in the year 2000 and thus she was 13 years old when she was defiled.

21. Upon cross examination, the investigation officer stated that when she took the girl to hospital nothing was seen to warrant the accused person to also be taken to hospital.

22. The investigation officer stated that the child identified the accused as her assailant and he was her step-father.

23. PW4 was Doctor Maweu Kelvin attached at Kibwezi Sub-County Hospital. He testified that on 09/10/2013 he examined the complainant and her inner wear was stained with a foul smelling discharge. She had bruises on the *labia majora* and *minora* and a high vaginal swab carried out was negative, pregnancy test was negative and STI negative. He however informed the court that there was evidence of virginal penetration. He classified the degree of injury as harm. He produced the P3 form as Exhibit No. 1.

24. Upon cross examination the doctor stated that from his examination of the complainant he can confirm that she was sexually assaulted. He averred that he did not examine the accused person because he was not brought to the hospital.

25. The prosecution closed its case and the accused was put to his defence whereby he opted to give an unsworn testimony.

26. He informed the court that on 09/10/2013, he woke up at 4.00 a.m. as usual and went to his place of work and proceeded to cook until 7.00 p.m. in the evening when he saw two police officers come to the kitchen and they took him to machinery AP post and he was locked in. He stated that he found the child's father there also locked in. It was his testimony that on 10/10/2013 the father was released and he was left. Later in the day he was taken to Kibwezi police station and was brought to court on 11/10/2013 and charged with the offence before the court which he did not know.

27. On submission, the appellant submitted that Firstly, the age of the victim is both variant and inconsistent. The charge sheet states a figure of 15 years, whereas the alleged victim testified on 04/02/2015 on page 5 line 18 to being 14 years of age. Later still, the investigating officer PW3 submitted documentary evidence vide Exhibit No.2 that denoted the victims age as 13 years.

28. The complainant, PW1 testified that when the appellant purportedly first had sex with her on 09/10/2013, she reported the matter to her teacher the following day (see page 5 lines 12-14). Incredibly, the said teacher i.e. PW2 took no action and instead advised the complainant to report in case the act was repeated!

29. And when the purported act was repeated, it was still on the same date i.e. 09/10/2013 (see page 6

lines 5-6 and line 20 PW1 and PW2 respectively). If as alleged by PW2 that appellant had sex with PW1 on at least three different occasions, how is it that all occasions fell on the same date 09/10/2013?

30. The P3 form submitted as exhibit no. 1(attached) was substantially incomplete, thus rendering the purported medical evidence adduced by PW4 suspect as well as questionable. At section B", the following details are not indicated and/or filled as required.

- No. 2 Approximate age of injuries (hours, days weeks) ……

- No. 3. Probable type of weapon (s) weapons (s) causing injury ……

- No. 4. Treatment, if any, received prior to examination ……

- The signature of medical officer/practioner is missing and so is the date.

31. If as stated at No. 5 of the same section "B", that the assessed degree of injury sustained amounted to "harm", why then was no treatment prescribed? And assuming that treatment was discharged, why was the P3 form not filled accordingly? Quite clearly there were no conclusive details pertaining the said P3 form to sustain the purported diagnosis of penetration as alleged by PW4.

32. Finally, yet very significant is the comments by police on the first page of the P3 form to the effect that as regards" brief details of the alleged offence – she alleges to have been defiled by her father …" And PW 1 is very categorical as regards appellant's status vis-à-vis herself on page 5, line 20; "the accused was staying with my mother. He is not my father."

B. vital witness(s) not called and opinion analysis

33. Indeed, more often than not, sexual offences are by and largely witnessed.

34. However, the instant case most fortunately had an eyewitness going by PW1's testimony on page 6 lines 2-3. *"**My brother was also present when the incident took place but he is small.**"*

35. It goes without saying that the evidence of this said younger brother would have proved invaluable in deciding this case cogently as said testimony would have corroborated that of PW 1 or alternatively cast doubts on it.

36. Added to this, PW1 had also earlier testified on page 5 lines 20-22. ***"The accused was staying with my mother. He is not my father. I also used to stay with my mother so we were all living in one house".***

37. Now, the purported incident apparently took place at about 6:00 a.m. on 09/10/2013 (see page 5 line 9) hence going by the earlier statement that they all resided in one house. It is incredulous that the alleged victim's mother had nothing useful to submit to the trial court one way or another. The trial judge noted this omission during judgement but preferred to infer a dereliction of parental responsibility on the part of the victim's mother as recorded at page 3 of the court judgement document lines 37-39.

> ***"It is noteworthy, that the girl's mother never featured at all in these proceedings and it is evident that the girl could not even report to her what the accused was doing to her and she had no option but to confide in her in her teachers. It is an unfortunate situation that a mother would not endeavor to ensure that her child is safe."***

38. However, the appellant submit that the court should have invoked either section 150 of the criminal procedure code which provides that the trial court is to summon or call all essential witnesses to enable it make an informed decision; or section 146 of the evidence act that stipulates amongst others that the court should avail or summon all witnesses, information and/or evidence necessary or essential for a just decision to be arrived at so long as the defence and/or prosecution is allowed or accorded a chance to

cross-examine the so called witnesses.

39. The appellant cites the precedent case of **OKETH OKALE and OTHERS –VS- REPUBLIC (1965)** where it was stated:-

> ***"…… in every criminal trial, conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for trial judge to put forward a theory not canvassed in evidence or in counsel's speeches ……"***

40. And as regards uncalled witness(s), the appellant relies on the precedent case of **BUKENYA –VS- UGANDA (1972 EA 549** which held that;

- The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- The court has the right and duty to call the witnesses whose evidence appears essential to the just and fair conclusion of the case.
- Where the evidence called is barely adequate, the court may infer that the evidence called is barely adequate, the court may infer that the evidence of the uncalled witnesses would have tendered to be adverse to the prosecution.

C. THE CASE FOR LEGAL REPRESENTATION

41. Offences falling under the sexual offences act no. 3 of 2006 are by their very nature serious indictments whose consequences upon conviction are grave.

42. This severity is further compounded by naivety and ignorance of the legalities at stake, thus it is imperative that courts of law should at all times invoke constitutional Article 50(2b), an integral part the fundamental rights and freedoms of all citizens that states inter-alias-:

> ***"50(2) every accused person has the right to a fair trial, which includes the right- to have an advocate assigned to the accused person by the state and at states expense, if substantial injustice would otherwise result, and to be informed of this right promptly".***

43. Ignorance of the law can only culminate in substantial injustice and as such, it was incumbent upon the trial court to invoke and uphold the said constitutional proclamation to ensure a fair hearing. It is moreover salient that the prosecution counsel is well versed and skilled in the art of litigation and thus a superior contestant in an obviously unmatched contest.

D. ADMISSION OF WRITTEN SUBMISSIONS

44 The precedent case of **ABDALLA KITENGO –VS- REPUBLIC CR A NO.175 OF 2002 (KISUMU) C.A** in regards to the aspect of written submissions during trial is most illuminating –

> ***"The admission of written submissions in a criminal trial denied the appellants their right to participate in all aspects of their trial. On our part we say this-the C.PC provides a procedure for the making of submissions to court. In no part of the legislation is there mention of written submissions. A presiding officer of a court is expected to orally hear such submissions as both sides in a criminals case wish to make and seek clarification of submissions found necessary in order to appreciate each side's case before delivering his opinion. The accused person is also supposed to hear those submissions and has a right to clarify any point raised or object to it being raised, where he considers it necessary for his benefit. Written submissions deny accused that fundamental right."***

45. The state replied orally in opposing the appeal. Mr. Orinda ADPP submitted that the prosecution proved case via 4 prosecution witnesses. The medical evidence confirmed defilement of the pw1.The defence was mere denial. On issue of Article 50(2) (j), the same was not raised during trial nor is

substantial injustice demonstrated.

46. After going through the evidence on record, I find the following issues arise.

a. Whether the prosecution was proved beyond reasonable ground?

b. Whether the appellants rights under article 50(2)(j) of the constitution were violated?

47. The ingredients of an offence under Section 8(1) and (3) Sexual Offence Act are that: - **The penetration of complainant genitalia and the age of the child. And finally whether the penetration was done by the accused person.**

48. In defilement case , the ingredients to be proved are;

- Penetration of complainant genitalia,

- Age of the complainant,

- Identity of the appellant as the perpetrator of the penetration of the complainant genitalia.

49. See **FAPPYTON MUTUKU NGUI –VS- REPUBLIC MACHAKOS HCRA 296/2010.**

50. The complainant testified that the appellant defiled her at the material date and further that he had previously defiled her. She reported incident to the teacher who made report to the police. She was taken to the hospital.

51. PW4 who produced P3 indicated that on examination the complainant was found to have bruises on *labia minora* and *labia majora* and there was evidence of penetration.

52. The child/complainant said she was 14 years. P3 indicated that she was 13 years. Immunization card indicated that she was born on 22/06/2000 thus on the material date of the incident 09/10/2013 she was 13 years. The charge sheet indicated the complainant was 15 years.

53. The provisions of Section 8(3) of Sexual Offences Act give bracket of between 12 to 15 years. All the ages stated above lie within the same brackets provided by the law.

54. The appellant defence was that he was framed by the girl because the person who committed the offence was the girl's father who he found at the police station but was thereafter released.

55. The trial court observed the complainant demeanor and found her evidence to be credible as she was candid and believable.

56. The appellant defence did not shake the prosecution evidence adduced. The court therefore finds that the case was proved beyond reasonable doubt.

57. On the second issue, i.e. the alleged violation of Article 50(2) (j) is that the appellant was not informed of his rights to representation. The court notes that the appellant did not raise the issue in the trial court at any time.

58. However, the provisions are mandatory on the issue of information of that right and appointment of a legal representation if appellant is not able to afford one and if substantial injustice would otherwise result.

59. The Supreme court in **R –VS- KARISA CHENGO PET NO 5 OF 2015** In the above context, held that;

"It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings.

Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- the seriousness of the offence;

- the severity of the sentence;

- the ability of the accused person to pay for his own legal representation;

- whether the accused is a minor;

- the literacy of the accused;

- the complexity of the charge against the accused;

In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act no. 6 of 2016"

60. However, there is no general or specific parameters set other than instance cited above to measure the instance where the substantial injustice may result to meet the threshold contemplated by the constitution nor does the constitution prescribe that failure to comply with the stated provision would result with mistrial or the proceedings being nullified.

61. However, the court of appeal in **JULIUS KAMAU MBUGUA –VS- REPUBLIC, CRIMINAL APPEAL NO. 50 OF 2008** which was decided on 8th October, 2010 after reviewing several local and foreign decisions on this constitutional issue, came to the conclusion that violation of an accused's constitutional right does not render the trial a nullity. The accused's remedy in such circumstances lies in a claim for compensation by way of damages.

62. In view of the decision in **JULIUS KAMAU MBUGUA –VS- REPUBLIC (SUPRA)** I find and hold that the violation of the appellant's constitutional rights did not render his trial a nullity.

63. The court thus reject the ground and states that the appellant is at liberty to pursue his claim in a different forum.

64. The court having found that the case was proved beyond reasonable doubt, it makes the following orders:-

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

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 21ST DAY OF AUGUST, 2017.

C. KARIUKI

JUDGE

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