



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 253 of 2011

KEPHA ODHIAMBO AKOTH.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera Cr. Case No. 1497 of 2010 delivered by Hon. D. O. Onyango, SPM on 27th September, 2011).

JUDGMENT

Background

Kepha Odhiambo Akoth, herein the Appellant was charged in the main with committing the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act**. The particulars of the offence were that on diverse dates between 8th February, 2010 and 17th March, 2010 at [particulars withheld] 42 within Nairobi Area province, intentionally and unlawfully committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of MA, a child aged 13 years which caused penetration.

In the alternative he was charged of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** by placing his male genital organ (penis) to the female genital organ (vagina) of MA, and touched her private part (vagina).

The Appellant was found guilty of the main offence and was sentenced to 20 years imprisonment. He was dissatisfied with both the conviction and sentence. In Amended Supplementary Grounds of Appeal filed on 26th July, 2017, he appealed in summary on the grounds that the complainant's evidence was not sufficient and did not meet the requirements of Section 124 of the Evidence Act, that the prosecution case was marked with contradictions and inconsistencies, that the charge sheet was defective, that the age of the complainant was not established, that crucial witnesses were not called, that his defence was not considered and largely that the case was not proved beyond a reasonable doubt.

Submissions

The Appellant filed written submissions along the Amended Supplementary Grounds of Appeal. They were brief in nature. In summary, he took issue with the evidence of PW1 the complainant whom he said could not be relied on. This was in view of the fact that PW1 had changed goal posts, initially testifying that she had accepted to be the wife of the Appellant. Thereafter, she complained that the Appellant had

defiled her for a period of thirty days. He also submitted that PW1 lied by stating that he used to beat her. This he said was vindicated by the fact that she never reported to either police or members of the public about the issue none of whom was called as a prosecution witness.

The Appellant took issue with the fact that the medical evidence did not establish the offence of defilement. This was in light of the fact that according to PW3 Dr. Kamau, PW1 only had old hymenal tears which attested to the fact that he had been defiled long before she met him. He added that this evidence was vindicated by the fact that no one could attest that PW1 used to cry or scream as a result of the defilement. As such, PW1 was not a truthful witness whose evidence the court could rely on to convict. Along this argument, the Appellant submitted that the charge sheet was defective because the age of PW1 was not proved to the required standard. He took issue with the fact that apart from PW1's own evidence, no independent evidence was adduced to prove her age. He also took issue with the fact that investigations were not properly conducted as neither the arresting nor the investigating officer was called to testify. Effectively, he was convicted based on hearsay evidence. Finally, the Appellant submitted that his defence was not considered which if it had been considered the court would have acquitted him.

Learned State Counsel, M/s Sigei opposed the appeal. In her oral submission, she stated that all the key elements of the offence of defilement namely; the identification of the perpetrator, the age of the victim and penetration were sufficiently established. On age, she said that the same was proved by the oral evidence of PW1 and the P3 Form adduced by PW3. On penetration, she submitted that PW1 gave a candid account of how the Appellant lied to her that he would secure employment for her in Nairobi but on arrival in Nairobi, he converted her into his wife. He thereafter defiled her for a period of 30 days. This evidence was corroborated by the medical evidence of PW3 and 4 both of whom were medical doctors who produced the necessary medical reports proving that PW1 had been defiled. She submitted that the charge sheet was not defective as the same was supported by the evidence adduced. Further, that the failure to call the investigating officer did not vitiate other strong evidence the prosecution offered. Furthermore, the court ordered for premature closure of prosecution case before the investigating officer could testify. On the whole, M/s Sigei submitted that the prosecution proved its case beyond a reasonable doubt and urged that the appeal be dismissed.

Evidence

PW1, MA, was the complainant. She testified that she was from Migori and used to live with her father's brother. That she had left school a long time ago when in class 6. She testified that she was 13 years old. She recalled that on 7th February, 2010 she met the Appellant who she knew previously. He asked her to accompany him to Nairobi where she could gain employment from his aunt. When they got to Nairobi she met the Appellant's uncle to whom she was introduced as the Appellant's wife. She recalled that in the evening they slept in a hotel and the Appellant started "doing bad manners" to her.

She testified that in the morning he took her to where he lived and that she did not tell anyone what had happened. She recalled that they stayed together for more than a month and she was afraid of informing anyone what was happening. Further that the Appellant would beat her if she refused to do what he asked. She testified that a lady called Alice was informed of her predicament. She disclosed to her what had happened after which she reported the matter to the police and took her to hospital for treatment. When the Appellant learnt about it he beat her but he was arrested and charged accordingly. In cross examination, she denied she told the Appellant her age or that the Appellant asked her about her age.

PW2, AAO, A A O who lived in Kibera heard about the cohabitation of PW1 and the Appellant. She confronted the Appellant who denied living with her. Later, she met PW1 who confided that indeed she was living with the Appellant. When the Appellant learnt about it, he beat up PW1. PW2 then escalated the matter to the police which prompted the arrest of the Appellant. PW1 was also taken to Nairobi Women's hospital where she was treated and a medical report filled.

PW3, Dr. Z. Kamau of police surgery examined PW1 on 23rd March, 2010 and filled her medical examination form (P3) which he produced as an exhibit in court. He did not observe any injury to the valve. He noted PW1 had old hymenal tear and no sexually transmitted diseases.

PW4, Dr. David Thuo of Nairobi Women's Hospital produced a medical report prepared by Dr. Muhombe who was then deceased. The latter had examined and treated PW1. In the report, it was indicated that PW1 had a swelling on the left labia majora and had old tears of the hymen. She also had seminal discharges. She had been infected with syphilis. Urine tests revealed infections. Vaginal swab showed puss cells. Pregnancy test was negative. The report was dated 18th March, 2010 and was produced as exhibit 1.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence in which he denied committing the offence. He stated that he met PW1 in January, 2010 in Migori and both agreed to be friends. In February, 2010 he brought her to Kibera in Nairobi and was planning to marry her and do a wedding. They were living separately though. Later, PW1 told the Appellant that there was a lady who told her that she would be her brother's wife. On 18th March, 2010, both the Appellant and PW1 went to visit PW1's aunt. That is when six men who identified themselves as youths from the chief arrested him. They told him that they were under the instructions of PW2 to do so. They were later escorted to Kibera Police Station and charged accordingly. He stated that PW1 told him that he was born in 1992 and therefore requested that an age assessment be conducted. He also stated that she knew that she was an adult because she had stopped going to school. Further, that medical evidence did not find anything abnormal with him.

Determination

It is trite that one of the key elements of the offence of defilement is proof of the age of the victim. In this case, the court is of the view that the same was not proved to the required standard. Although PW1 testified that she was aged 13 years, before her testimony and in assessing whether a *dire voire* examination would be conducted before she testified, the trial court noted that she was not of tender age. It then proceeded to make an order that she would give a sworn statement of defence. In addition, although the Respondent submitted that PW 3 Dr. Kamau conducted an age assessment on PW1, the record attests to the contrary. His evidence was confined to the examination of PW1 so as to ascertain whether she had suffered sexual assault. He accordingly filled a P3 Form which did not indicate that he conducted an age assessment. He only indicated the estimate age based on the age PW1 gave him. Further, the court may also deduce that his conclusion was informed on the fact that in part I of the P3 Form indicated PW1's age as 13 years. This part is filled by the police and no police officer testified in ascertaining PW1's age.

Therefore, based on the fact that the trial court was of the view that PW1 was not of tender age, and secondly, by the request of the Appellant that an age assessment be conducted so as to ascertain her age, the only evidence that would have erased any doubt as to the age of PW1 was an age assessment. I am more convinced on this finding given that no independent evidence, say, from a close blood relative or documentary evidence was adduced ascertaining the age of PW1.

The record does also show that the Appellant constantly cross-examined the witnesses including PW1 about her age. This would be linked up with his statement in defence that he knew PW1 was born in 1992 which would have placed her age at 18 years as at the time of the offence. In my view then, the failure to call for age assessment of PW1 was a fatal omission that entirely vitiated the prosecution case. I then find and hold that the age of PW1 was not established.

Needless to add is that the prove of the age of a victim in a defilement case is not negotiable based on the fact that under **Section 8 of the Sexual Offences Act**, the penalties imposed are determined by the age of the complainant. It therefore begs on what ground the penalty was imposed when in fact the age of PW1 was not established. This is a case that did not withstand the threshold of the evidence required to discharge the burden of proof.

I do also concur with the Appellant that this is a case that was poorly investigated. Whereas it is not mandatory that an investigating officer testifies, the failure to call him/her or an arresting officer left void in the prosecution case on how and what informed the charging of the Appellant with the offence. Only

any of those two crucial witnesses would have disclosed crucial evidence forming the basis of charging the Appellant. The failure to call such crucial evidence meant that the court is unable to ascertain that indeed the Appellant was charged with an offence he committed.

On these grounds, it is the view of this court that the case was not proved beyond a reasonable doubt. I accordingly allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 31st day of October, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Appellant present in person*
- 2. M/s Sigei for the Respondent.*