



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 5 OF 2017

JAMES MWANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 113 of 2014 in the Senior Principal Magistrate’s Court at Wundanyi delivered by Hon S. Gilbert (RM) on 27th May 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, James Mwanjala, was tried and convicted by Hon S. Gilbert, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 16th day of March 2014 at [Particulars withheld] Village Wumingu within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of the Complainant, R W (hereinafter referred to as “PW 1”) who was aged thirteen (13) years at the material time. He was sentenced to serve twenty (20) years imprisonment. The particulars of the alternative charge were that on the aforementioned date and place, he intentionally touched PW 1’s vagina with his penis.

2. Being dissatisfied with the said judgment, on 19th January 2017, he filed a Notice of Motion application seeking to have his Appeal heard out of time, which application was allowed and his Appeal deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal. On 13th June 2017, he filed Amended Grounds of Appeal.

LEGAL ANALYSIS

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. On perusing the initial and Amended Grounds of Appeal and the Written Submissions by both the Appellant and the Respondent, it appeared to this court that the issues that had been placed before it

were:-

- a. Whether or not PW 1 used a language the Appellant did not understand as a result of which he did not Cross-examine her which infringed on his right to fair trial;**
- b. Whether or not PW 1's age was proven;**
- c. Whether or not the Prosecution had proven its case against the Appellant herein beyond reasonable doubt.**

5. The Appellant's contention was that whereas it was indicated in which language all the other witnesses gave their evidence before the Trial Court, it was not shown in which language PW 1 adduced her evidence. It was therefore his submission that he did not Cross-examine PW 1 because she testified in a language that he could not understand. On its part, the State averred that the language was indicated during each court attendance.

6. A perusal of the proceedings showed that the Charges were read to him in Kiswahili as he denied the same when he stated "Ni uwongo" which was then translated to "It is not true." The language of interpretation was shown to have been English/Kiswahili. On all subsequent days including the day PW 1 testified, it was clearly indicated in the proceedings that the interpretation was English/Kiswahili and the Appellant indicated that he was ready to proceed with the hearing.

7. Contrary to the Appellant's assertions, he did in fact Cross-examine PW 1 and she responded to his questions. If he did not understand what she told the Trial Court, then it is expected that he would therefore never have known what to Cross-examine her on. He was therefore being dishonest when he argued that she testified in a language that he did not understand as a result of which he did not Cross-examine her because the proceedings showed a completely different position. His Ground of Appeal in this regard was therefore not merited.

8. The Appellant further submitted that PW 1's age was not established because whereas the Birth Certificate showed that she was born on 20th August 2001 and hence twelve (12) years and seven (7) months, the Charge Sheet had indicated that she was thirteen (13) years of age. In response to the Appellant's said assertion, the State pointed out that the penalty for defiling a child between twelve (12) and thirteen (13) years was twenty (20) years and consequently, the Appellant could not be said to have been prejudiced.

9. The Appellant's arguments that PW 1's age was not proven therefore fell by the wayside. Indeed, this court found itself in agreement with the State's arguments that the Appellant suffered no prejudice for the reason that the penalty for defiling a child between twelve (12) years and fifteen (15) years is twenty (20) years' imprisonment as provided in Section 8(3) of the Sexual Offences Act that stipulates that:-

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

10. Going further, the Appellant argued that defilement could not be proved as PW 1 went to hospital two (2) days after the alleged incident which meant that the "best" results could not be obtained. He also contended that the Clinical Officer, Ali Mumba (hereinafter referred to as "PW" 4) could not determine if the wetness on PW 1's pants was caused by him or it was as a result of natural wetness. He argued that if she was defiled on 17th March 2014, then she could not have had wetness in her pants on 18th March 2014 at around 4.30 pm. Further, he averred that although PW 4 mentioned of PW 1 having had a urinary tract infection, he did not attribute it to him.

11. He also pointed out that PW 1 did testify that she had had sexual relations with a different person who may have been the cause of her broken hymen. It was his argument that he ought to have been taken for DNA analysis to establish if he was really the person who defiled her. He submitted that PW 1's aunt, R

M M (hereinafter referred to as “PW 2”) had a grudge against him and that it was improper for the Learned Trial Magistrate not to have considered his defence.

12. On its part, the State pointed out that upon PW 4 examining PW 1, he found that there had been sexual penetration, laceration of the labia minora and perineum. It stated that although PW 1 had stated that she had engaged in sexual relations previously, in this particular instant, she reported the defilement by the Appellant to PW 2 immediately she went home and also informed her teacher, J W M (hereinafter referred to as “PW 3”) the following day whereupon she was taken to hospital.

13. It urged this court to disregard the Appellant’s assertions that there existed a grudge as he had contended because if there was such grudge, he ought to have presented proof to the court. It pointed out that the Learned Trial Magistrate considered his defence and found the same lacked merit.

14. According to evidence that was adduced in court, on 16th March 2014, at about 5.00pm, PW 2 sent PW 1 to purchase juice at [xxx] Shopping Centre. However, PW 1 did not return to her house until 17th March 2014 when she explained that the Appellant had defiled her at his house and locked her in his house till then. PW 3 then took PW 1 to hospital where PW 4 established that PW 1 had been defiled as she had lacerations in her private parts and that she also had a urinary tract infection.

15. The Learned Trial Magistrate took PW 1’s evidence under caution and allowed the Appellant to Cross-examine her. Having carefully analysed PW 1’s evidence, this court noted that it boiled down to being PW 1’s word against that of the Appellant. As was rightly pointed out by the Appellant, it was difficult to envisage how PW 1’s pant would have been wet on 19th March 2014 when the defilement was said to have occurred on 16th March 2014.

16. Indeed, the Charge Sheet and No xxxx PC Stella Wanjiru (hereinafter referred to as “PW 5”) had both indicated that the alleged defilement was said to have occurred on 16th March 2014. In view of the fact that PW 4 had noted a urinary tract infection, the Prosecution failed to establish the nexus between the wetness in PW 1’s pant on 19th March 2014 and her defilement by the Appellant said to have occurred on 16th March 2014.

17. This court placed a lot of importance on the date of the alleged defilement as on 16th March 2014, PW 1 only said that he touched her vagina with his penis the whole night. The question of whether there was partial or complete insertion of her vagina by the Appellant was critical because Section 2(1) of the Sexual Offences Act defines **“penetration as being a partial or complete of the genital organs of a person into the genital organs of another person.”**

18. This court had due regard to the case of Mohamed v Republic [2006] 2 KLR 138, it stated that:-

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

19. The aforesaid holding was derived from the provisions of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that stipulate as follows:-

“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the

court is satisfied that the alleged victim is telling the truth.

20. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

21. The court noted PW 1's testimony that she had had sexual relations with a person who has since been imprisoned and it was reasonable to conclude that her hymen was broken by that person or other person and not the Appellant herein. It was not clear if PW 1 knew the Appellant prior to the alleged incident herein so as to explain how the Appellant herein was arrested. Indeed, none of the Prosecution witnesses made any reference to his arrest.

22. This explanation would have gone a long way in assisting this court unravel the truth of this matter bearing in mind that PW 1 had interacted with the Appellant for the first time and who she said had locked her up in his house and only released her from his house at 9.00pm on 18th March 2014. If she had interacted with the Appellant for the first time and PW 2 only used to see him around town, how did PW 5 come to the conclusion that it was him who had defiled PW 1.

23. This court was also concerned why if PW 1 had been defiled previously and her perpetrator arrested as she had contended, she did not go to the hospital immediately she got home on 17th March 2014 but instead she and PW 2 opted to downplay such a traumatising event and only went to PW 3 on 18th March 2014. A look at the calendar for 2014 indicates that 16th March 2014 was a Sunday. The following day, 17th March 2014 was a Monday.

24. While PW 2's explanation that she accompanied PW 1 to PW 3 to explain why PW 1 never reported to school, this court was at a loss to reconcile the name of the school PW 1 was studying and why they had to go to the school at 10.00pm. Notably, in her evidence, PW 1 stated that she studied at [particulars withheld] Primary School. On her part, PW 3 said that she was a teacher at [Particulars withheld] School and that on 18th March 2014, her head teacher called her and asked her if she knew PW 1 whom PW 2 had brought to explain her absence in school. She denied having known her. Nonetheless, she examined PW 1 and noted that she had been defiled.

25. What was also not clear to this court was why PW 2 took PW 1 to a school where she was unknown to report about her not attending school on 18th March 2014 at 10pm. Further, this court was at a loss whether PW 3 took PW 1 to the hospital that night or if it was the following morning and why she took the responsibility of taking her to hospital personally. How she took over the matter to take a stranger to the police station where a P3 Form was issued also baffled this court. There was no indication in the evidence that was adduced that she had an interest in such matters.

26. Indeed, there was a further contradiction between PW 3's and PW 4's evidence as PW 4 testified that PW 1 was taken to Wundanyi Sub District Hospital on 18th March 2014 at 4.30 pm yet PW 3 had stated that PW 1 and PW 2 went to see her on 18th March 2014 at 10.00pm.

27. It also concerned this court that PW 1 did not make any attempt to scream when the Appellant allegedly dragged her forcefully when they met at the xxx Shopping Centre. It was 5.00pm and human traffic was expected. The fact that she did not seek assistance from passersby made this court to question the veracity or credibility of her evidence.

28. PW 1 may have been defiled. However, who defiled her remained an unanswered question. The fact that there were injuries on her private parts was not conclusive evidence that it was the Appellant who defiled her. This is because the inconsistencies and gaps herein in this case were so serious that they could not be ignored and led this court to question whether the incident happened in the manner PW 1 and PW 2 had explained.

29. The fact that she had been defiled previously and her perpetrator imprisoned led this court to expect that she would have known how to commence the reporting process and not rely on a stranger she did not

know. Her conduct persuaded this court to conclude that PW 1 was not truthful in her evidence.

30. Accordingly, having carefully considered the submissions supported by the case law that was relied upon by both the Appellant and the State, the court came to the firm conclusion that the evidence that was presented in the trial court by the Prosecution was not sufficient to sustain a conviction of the Appellant on the charge of defilement of PW 1 herein. The evidence had several material inconsistencies and gaps.

31. It was incumbent upon the Prosecution to have adduced sufficient and cogent evidence and presented its case diligently to prove that the Appellant herein had actually committed the alleged offence as had been contended by PW 1.

32. In view of the seriousness of the sentences imposed on those convicted of having committed defilement cases and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.

33. Unfortunately, the proof that was adduced in the trial court was not to the standard required which in criminal cases, has to be beyond reasonable doubt. To this court, it did appear that the case against the Appellant herein was determined on a balance of probability.

34. Indeed, great injustice will be occasioned to the Appellant herein if this court were to uphold the conviction and sentence that was meted to the Appellant based on the evidence that was presented before the trial court. The failure by PW 1 to attend hospital immediately the alleged defilement occurred which denied the trial court an opportunity to appreciate any physical evidence of defilement or to rule out the possibility of any other person other than the Appellant having committed the alleged offence herein.

35. The lacuna in evidence and/or silence of how and when the Appellant was arrested created great doubts in the mind of this court as to what actually happened on the date of the alleged offence. Once doubt has been cast in the mind of the appellate court, it would be unsafe to uphold the Appellant's sentence.

36. In conclusion, as an obiter, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 19th January 2017 was merited.

38. Indeed, the inconsistent evidence that was adduced before the Trial Court created doubt in mind of this court. That benefit of doubt led it to quash the conviction and set aside the sentence that was meted upon the Appellant by the Learned Trial Magistrate 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.

39. It is so ordered.

DATED and DELIVERED at VOI this 24th day of October 2017

J. KAMAU

JUDGE

In the presence of:-

James Mwanjala - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk