



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL 61 OF 2017

Arising from the original conviction and sentence meted out in Criminal Case No. 696 of 2015 on 6th June 2017 by Hon. N. M. Ndagwa (RM)

CM APPELLANT

-Versus-

REPUBLICRESPONDENT

JUDGMENT

Life imprisonment

[1] On 6th June 2017, in Criminal Case No. 696 of 2015, Hon. M. N. Idagwa (RM) convicted and sentenced the Appellant to life imprisonment for defilement contrary to Section 8 (1) 3 of the Sexual Offences Act, No. 3 of 2006. The Appellant had been charged with defilement contrary to Section 8 (1) 3 of the Sexual Offences Act, No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

[2] Being aggrieved by the said conviction and sentence the Appellant filed this appeal. The grounds of appeal in the Amended Memorandum of Appeal filed on 21st September 2017 may be collapsed into two as follows:

- (1) That the learned trial magistrate erred in law and fact by failing to observe that the charge sheet was defective; and
- (2) That the learned trial magistrate erred in law in convicting the Appellant on inconclusive evidence.

Charge sheet defective

[3] When the appeal came up for hearing on 21st September, 2017, the Appellant chose to rely on his written submission entirely and asked the court to consider then in determining the appeal. He argued that there is no dispute a crime was committed on that material date but it is not he who committed it and that the allegations he did it amount to mere frame ups. He further submits that the charge sheet was defective in form as he was charged with the offence of defilement contrary to Section 8(1) 3 of the SOA No. 3 of 2006 is non-existent. Instead it was supposed to be noted that the Appellant is charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the SOA No.3 of 2006. He adds that he was prejudiced when the learned trial magistrate convicted him and yet the charge sheet was defective and thus a re-trial should be ordered or he even be acquitted. He asserts that the evidence tendered by

PW1 who medically examined the victim was inconclusive. This is because there was no penetrative sexual intercourse as the allegations by the medical examination expert that the hymen was broken could not hold water as breaking of one's hymen cannot prove forceful sexual intercourse bearing in mind that breaking of hymen can result from other activities such as sport and games and also that scientifically some children are born without their hymens. Secondly, she did not state whether the perforation in the Complainant's genitalia was fresh or old. Neither could she tell whether the redness was solely due to penetration or as a result of the mother making the place red to frame the Appellant. That there was also need for a DNA test to be conducted upon the Appellant to ascertain whether he was the perpetrator of the alleged ordeal and refers to Section 36(1) of the Sexual Offences Act.

[4] He contended that the Complainant's mother allegedly to have found the Appellant lying on the Complainant and she claimed that the lamp was not lit so how could she recognize that it was the Appellant. That from PW5's evidence it does not show what investigation he carried to confirm that he was the right perpetrator. He urged the court to acquit him.

DETERMINATION

Duty of appellate court

[5] This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **OKENO vs. R [1973] EA KLR**. In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, merely rehashing of the evidence as was recorded is waste of court's precious time. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should make its overall impression of the evidence adduced as placed upon the applicable law in absolute clarity and directness. I shall so proceed.

Claim of defective charge sheet

[6] A matter of preliminary nature has arisen; that the charge the Appellant faced, convicted upon and sentenced thereto was defective. According to him, the defect is in the fact that the charge sheet stated that the offence was contrary to Section 8(1) 3 of the Sexual Offences Act- ad section that is non-existent. Second, the charge sheet did not make reference to the penalty section as required. He concluded that a charge sheet should state the charge to be that of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. His view was that he was prejudiced when the trial court convicted him on a defective charge sheet, thus, a retrial should be ordered.

[7] The type of complaint by the Appellant should be decided on the test provided in Section 382 of the Criminal Procedure Code. A finding, sentence or order passed by a court of competent jurisdiction shall only be reversed or altered on appeal or revision if the error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial occasioned a failure of justice: And 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. Below is full text of section 382 of the CPC:

“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 Complainant, 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.”

The section provides insulation from attack of such finding or sentence except on the basis that injustice resulted from the error or defect. I note that the trial magistrate in her judgment referred to the decision by the Court of Appeal in the case of **SAMUEL KILONZO MUSAU vs. REPUBLIC [2014] eKLR** where the court held that:

“That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge unless it has occasioned a miscarriage of justice”.

[8] The prosecution should clearly state the offence clause as well as the penalty clause. The citing of the section as section 8(1) 3 of the Sexual Offences Act is an embarrassing impleading, but it is a venial error which did not cause any injustice to the Appellant. The offence of defilement is known to law and is established in section 8(1) of the Sexual Offences Act. The appropriate penalty clause is section 8(2) of the Sexual Offences Act. The proper citing of the section should have been section 8(1) and (2). Happily, however, the trial magistrate dealt with the issue accordingly and addressed her mind thereto at page 26 of her judgment as follows;

“under section 382 of the CPC which provides that the defect in a charge sheet is curable so long as it does not cause substantial injustice to the accused appreciating this provision in the case of Samuel Kilonzo Musau v Republic Criminal Appeal No. 153 of 2013 the court of appeal held “that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge unless it has occasioned a miscarriage of justice’. I have looked at the charge sheet and considered the same in light of Section 137 of the CPC and note that failure to correctly quote the section does not cause any injustice to the accused. The particulars are clear and in a plain language they were read to accused who fully understood them and was able to participate trial. I find that the accused was not prejudiced by the omission.....”

Consequently nothing turns on this point. The offence and the attendant sentence was properly grounded in law. As such, the ground fails.

Claim that conviction was on inconclusive evidence

[9] From the grounds of appeal and submissions, the Appellant is saying that the conviction herein was procured on inconclusive evidence. In other words; the prosecution did not prove their case beyond reasonable doubt. The Appellant was charged with defilement contrary to Section 8 (1) & 2 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that; on the 26th June 2015 in Imenti South District within Meru County the Appellant intentionally and unlawfully cased his penis to penetrate the vagina of NM a child aged 6 years. Section 8 (1) of the Sexual Offence Act is the offence clause and provides that:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(2) is the penalty clause and provides as follows:-.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

[10] From these sections, the prosecution must establish three things, namely:

1) That the person defiled was a child and state the age thereof;

2) That there was penetration of the child; and

3) That the person who caused penetration with the child is the Appellant.

Consequently, the three key ingredients are age, penetration and positive identification of the assailant.

Age of child

[11] The age of the victim of defilement is of great statutory significance under the Sexual Offences Act, for it determines that an offence of defilement has been committed and delineates the amount of sentence to be meted out. The victim herein is NM. She testified as PW2. She stated that she was 8 years old but does not know when she was born. At some other time in her testimony, she stated that she was 9 years old. PW3 was PG. She is married to KM who is the son of the Appellant and they all live in the same boma. And she is the mother of the minor victim. She stated that the Complainant was born on 23rd June 2008 and produced an immunization card. Although the child herein stated that she was 8 years and at some other point that she was 9 years, she was categorical that she did not know when she was born. However, the immunization card produced by her mother showed that the child was born on 23rd June 2008. Thus, as at 26th June 2015 the complainant was a child below the age of eleven years. I so find. This fact is relevant to the offence as well as the appropriate sentence to be meted out.

Was there penetration?

[12] According to Section 2 (1) of the Sexual Offences Act penetration:-

“...means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

PW1, one Saberina Kaimatheri, clinical officer at Kanyakine District Hospital produced the P3 form and lab results which showed that the child had redness around the genitalia and her hymen was broken. According to PW1, these were suggestive of penetrative sexual intercourse. There was however no discharge. During cross-examination she declared that she could not tell if the redness was solely due to penetration or as a result of the mother making the place red to frame the Accused.

[13] In his submissions filed on 21st September 2017, the Appellant argued that the evidence tendered by PW1 who medically examined the victim was inconclusive as mere breaking of one's hymen cannot prove forceful sexual intercourse bearing in mind that hymen can break as a result of other vigorous activities such as sports and games. Again, he submitted that, scientifically some children are born without hymen. He took further swipe at the evidence by stating that PW1 did not state whether; (1) the perforation in the Complainant's genitalia was fresh or old; or (2) whether the redness was solely due to penetration or as a result of the mother making the place red to frame the Appellant. He urged further that there was need for a DNA test to have been undertaken upon the Appellant to ascertain whether he was the perpetrator of the alleged ordeal. He referred to Section 36(1) of the Sexual Offences Act.

[14] I have considered the P3 form, lab results and the evidence of PW1 who examined the child victim herein. The medical evidence showed that the child had redness around the genitalia and her hymen was broken. According to PW1, these were suggestive of penetrative sexual intercourse. Despite arguments by the Appellant that hymen may be broken as a result of other vigorous activities like games and that some persons are born without hymen, the medical evidence adduced is conclusive that the breaking of the hymen herein was suggestive of penetrative sexual intercourse. The child also testified that the appellant used the “urinating thing” – this was in relation to a male organ, the penis- on her (she pointed her crotch). Accordingly, there was penetration into the genital organs of the child victim herein. The outstanding question is whether the penetration was by the Appellant.

Was penetration by the Appellant?

[15] This is the relevant evidence. PW2, NM and the victim herein stated that her grandfather, CM sent her to buy biscuits and cigarettes for him. When she came back she went to sleep on her grandmother's bed. The grandfather came and asked if grandmother's bed had been made well. He then removed his clothes and hers and started doing bad manners to her using his urinating thing on her (pointing at her crotch). She lay on the bed facing up while her grandfather lay on her facing her. When he was on top of her, her mother found them. During cross-examination she stated that she was not singing (witness annoyed and cries) and asserted that neither her mother nor Mama Mwenda inserted fingers in her.

[16] PW3, PG and the child's mother stated that she was is married to KM who is the son of the Appellant and they all live in the same *boma*. That on 26th June 2015 at around 7.30 pm she went to call her child from her grandfather's place. As she stood near the grass she had him ask her "*are you feeling sweet*" and when she entered the house she found the Appellant on top of the child. She went and reported the matter to the Nyumba Kumi person one Jacinta Mutugi who came and they both examined the child and saw that she had been injured. The next morning they took the child to hospital and reported the matter to the police.

[17] PW4, Joshua Mutua Rucho was the assistant chief of Igokine. He said that the matter was reported to him on 27th June 2015 by the area manager Dorothy Damiano in the company of the child victim and her mother. He interrogated the child who said that it was true that she had been defiled and referred them to the police.

[18] PW5, PC Boniface Mutiso, No. 54005, from Tharene Police Post was the investigating officer. He stated that he recorded the statements and gave them P3 form which they took to Kanyakine Sub-County District Hospital. From the statements and the P3 form he found sufficient evidence to charge the Accused.

[19] The Appellant gave evidence as DW1. He stated that he was 70 years old and he was aware of the charges facing him. He stated that the case was fabricated for he is a parent and has over 10 grandchildren and he has never defiled them. He queried his arrest which came after the Complainant and her mother in the company of a police officer went back to hospital for the second time. He stated that this is the time they fixed false evidence against him. That the police officer from Tharene lied that he was calling the chief of Kiringato ask him to allow them to release him because there was no evidence. It is the chief who said that he be brought to court and that is suspicious to him.

[20] His witness, DW2, EK who is also 70 years old said that he is the brother and neighbour of the Appellant. He stated that the Complainant was at the home of the Appellant playing with the radio and dancing and that is why she could not hear her mother calling her for she wanted to send her. The Complainant's mother felt bad because she called her and she did not respond. The issue turned into another thing. He said that he even asked the Complainant about this matter and she said it was a lie.

[21] The Appellants submitted that there is no dispute a crime was committed on that material date but it is not he who committed it. He denied the allegations and called them as mere frame ups. He also argued that despite medical evidence, there was no penetration of the genital organs of the child. And that no DNA test that was conducted upon the Appellant to ascertain whether he was the perpetrator of the alleged ordeal. He referred to Section 36(1) of the Sexual Offences Act. He submitted that the Complainant's mother lied when she said that she found the appellant lying on the Complainant yet she claimed that the lamp was not lit. He quipped; how therefore could she recognize that it was the Appellant. He took issue with PW5's evidence which he said did not show what investigation he carried out to confirm that he was the right person who committed the offence.

[22] The question is: who caused the penetration with the child herein? From the evidence recorded, the child victim herein (PW2) stated quite emphatically that she was sleeping in her grandmother's bed when the Appellant, her grandfather came; removed his and her clothes; and then did bad manners with her using his "urinating thing" (she pointed her crotch).The Learned Trial Magistrate who had an opportunity to observe the demeanor of the witnesses who testified before her had this to say with regard to the evidence of PW2;

“the complainant in her evidence stated “he removed my trouser and pant he removed his trouser. He then did bad manners to me, he used his urinating thing here (pointing at her crotch). The complainant was taken to hospital where she was examined and her hymen was found to have been broken and redness around her genitalia seen. PW1 formed an opinion that those were suggestive of sexual intercourse. The complainant was able to give graphic details of what the perpetrator did to her. She has the accused use his urinating thing on her by pointing at her crotch the complainant was referring to her vagina. Taking into consideration her tender age it is most likely the complainant could not clearly understand what those parts are but she was clear enough that it is the accused penis that was used on her crotch.....”

“.....I believe the evidence of the complainant who despite her tender age tried her level best to give a graphic explanation of her ordeal.....” .

From the evidence adduced, the person who caused penetration with her was known to her. This is a person she knew. She was clear it was the appellant. I am aware that the Appellant contended that the Learned Magistrate erred by failing to note that the light used by the PW3 to either recognize or identify the appellant as the perpetrator of this ordeal was not ascertained. From the record, it is not in dispute that the Appellant was PW2’s grandfather and PW3’s father In-law. It was also not in dispute that they all lived in the same compound and ordinarily, must have had regular interactions with each other. In such circumstances and following the vivid picturesque painted by PW2 of the person who committed this heinous crime, identification does not arise as this was a clear case of positive recognition by both PW2 and PW3. In any event the Appellant never raised this issue at the trial. Therefore, keeping in mind that even persons who know one another may be mistaken of the identity of the person they claim to have seen at the particular time, there is clearly no delusion on the part of the complainant that the appellant is the person who caused penetration to her genitalia using his penis. I agree with Mr. Namiti that the complainant gave a proper description of her grandfather, thus, there was no mistaken identity. With that caution, there is nothing which may put to doubt the recognition of the Appellant by the complainant as the person who caused penetration to her genitalia. According to Section 124 of the Evidence Act evidence of the victim alone may found a conviction as long as reasons for taking such course are recorded. See section 124 below:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.[Emphasis added]

Despite her tender age, the child victim gave a detailed and vivid explanation of the incident and nothing shows that she was not telling the truth or was mistaken. The trial magistrate conducted a *voir dire* examination of her and found her to be of sufficient intelligence to give sworn statement. I believe she was telling the truth.

[23] The foregoing notwithstanding, her testimony was corroborated by the evidence of her mother and the clinical officers.PW3, the child’s mother stated that she found the Appellant on top of her daughter and when she examined her she saw that she was injured. The Appellant’s defence was without basis as it was a mere denial. The arguments that hymen may be broken due to vigorous activities or that a person may be born without hymen are valuable as general-knowledge of the subject but have no bearing on this case where hymen was broken as a result of penetrative sexual intercourse with the child. See evidence by PW1 that hymen for PW2 herein was broken due to sexual penetration of the vagina of the child victim. Some claims in the submissions by the Appellant are quite startling, for on the one hand he acknowledges

that a crime of defilement was committed against the child victim herein. See for instances this submission:

Your honour, there is no dispute regarding the crime which was committed on the material date.”

Yet on the other hand, he disputes penetration of the child victim was through sexual intercourse. Again, the defence of frame-up is sinking sand as there is nothing which shows that any of the prosecution witnesses especially PW2, a child of tender years and her mother had any reason to frame him up. DW2 attempted to establish a reason to the effect that the mother was unhappy that she could called PW2 to send her but failed to respond as she was playing at the grandfather’s place. This does not hold sway at all.

[24] Having confirmed that the Complainant is a child of less than eleven years and that penetration of her as per Section 2 (1) of the Sexual Offences Act was caused by the Appellant, I find the Appellant guilty of the offence of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. Accordingly, after considering the mitigation offered, the Appellant is sentenced to life imprisonment in accordance with section 8(2) of the Sexual Offences Act which provides:

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The upshot is that the appeal is dismissed. Right of appeal 14 days.

Dated, signed and delivered in open court at Meru this 13th day of December, 2017

F. GIKONYO

JUDGE

In the presence of:

Appellant in person

Murage advocate for Respondent

F. GIKONYO

JUDGE