



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 40 OF 2017

Arising from the original conviction and sentence NKUBU SRMCCRC NO 1135 OF 2014 by D.A. OCHARO, SRM on 2.2.2017

(CORAM: F. GIKONYO J.)

JACON NKANDO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT.

Defilement

[1] The Appellant Jacob Nkando was charged with one count of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th August 2014 at [particulars withheld] Village in Imenti South District within Meru County, the Appellant intentionally caused his penis to penetrate the vagina of E M a child aged 14 years. In the Alternative the Appellant faced a charge of committing an Indecent Act with a child contrary to section 11 (1) of the same Act. The Appellant was tried and at the end was convicted of the main charge of defilement and sentenced to 20 years imprisonment.

[2] The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal on 18th April 2017. He subsequently filed Amended Grounds of Appeal setting out the following grounds of appeal

- (a) The Learned Trial Magistrate erred in matters of law and fact by failing to note that the charge sheet was defective.*
- (b) That the Learned Trial Magistrate erred in matters of law and fact by failing to note that it was the complainant who deceived the appellant that she was a grown up.*
- (c) The Learned Magistrate erred in law and fact by failing to note that vital witnesses were not availed to the court during the trial to give their testimonies regarding this matter.*
- (d) That Learned Magistrate erred in law and facts when he acted on incredible testimonies to convict the appellant.*
- (e) The Learned Trial Magistrate erred both in law and fact by failing to note that the*

undergarments worn by the complainant during the alleged ordeal were not produced in court as exhibits

(f) That the Trial Magistrate erred both in law and fact by failing to note that the investigation conducted by PW4 was shoddy.

(g) That the Trial Magistrate erred in both law and fact by failing to observe that the Appellant was neither medically examined nor was a D.N.A test conducted upon him to ascertain whether he was the perpetrator of this ordeal.

(h) That the appellant's defence was rejected without giving cogent reasons and yet it was comprehensively on how he did not commit the alleged ordeal with a guilt mind since he was deceived by the complainant to believe that she was a grown up.

[3] When the Appeal came up for hearing on 21st September 2017, the Appellant chose to rely and urged the court to consider his written submissions in determining the Appeal. Mr. Namiti for the State on the other hand while opposed the appeal and argued that; (1)all the ingredients of the offence were proved; (2) the record showed that even the Appellant admitted in his defence having committed the offence; (3) testimony on commission of the offence was corroborated by PW1 and PW2; and (4) the Appellant was raising a defence that he was deceived under section 8 (5) of the Sexual Offences Act, which defence had a qualification under Section 8 (6) of the Act.

DETERMINATION

[4] 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 **KILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174** where the Court of Appeal stated thus;

i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

ii. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, merely rehashing of the evidence will not pass for a good style. 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.

[5] PW1 the complainant in this case testified that on 13 July 2014, she went to her grandmother's place at [Particulars withheld] village as she had differed with her mother and at around 6 PM, her grandmother sent her to the shop where she met the Appellant on the road and greeted her. It was her evidence that the Appellant was previously known to her though she did not know his name. The Appellant escorted her to the shop and persuaded her to go with him to his home and PW1 agreed. The Appellant introduced her to his mother and later on they slept and had sex several times. It was her further evidence that they stayed as man and wife for one week and that on 19th July 2014, he went to the shamba with several girls and accidentally met her father who persuaded her to go home with him which she agreed and later escaped at

night and fled to the Appellant's house. It was her evidence that they stayed there until 3rd August 2014, and that they had planned to escape to Nairobi. They were later arrested and taken to Kieni Kia Ndege police post and Kanyakine hospital for examination.

[6] PW2 corroborated PW1's evidence by testifying that PW1 was her daughter and that prior to 13th July 2014, she did not know the Appellant and that they were looking for PW1 who had disappeared. It was her evidence that on 19th July 2014, they got information that PW1 had married the Appellant. They reported the matter to the chief and they collected her but she fled again to the Appellant's home at night whereupon they reported the matter at Igoji police station. Subsequently, the Appellant was arrested and PW1 taken to Igoji Hospital for examination.

[7] PW3 JK and father to PW1 corroborated PW2's evidence and testified how their daughter (PW1) had disappeared from home causing them to look for her. She was eventually found at the Appellant's home where they were living as husband and wife.

[8] PW4 No. 43777 Prosecutor Michael Indixa testified that on 3rd August 2014, one Japheth Kiambi reported that his daughter had disappeared from home and was living with a man in [Particulars withheld] village. On 4th August 2014, the said J K came over and reported that he had learnt where his daughter was living and led him and Sergeant Kassim to the Appellant's home. They arrested both of them and took them to Kanyakine Hospital for examination.

[9] PW5 Saberrina Kaimatheri, a clinical officer attached to Chogoria Hospital testified and produced a P3 Form in respect of PW1 who on 4th August 2014, was taken to Kanyakine hospital by her parents who gave history that she had disappeared from home and gone to reside with a man in his home whom she alleged to have married her. She gave history that she participated in sexual intercourse. On examination, hymen was absent and had a foul discharge. In absence of hymen she concluded that the girl had engaged in penetrative sexual intercourse.

[10] The appellant in his defence stated that sometimes in the year 2014 he met a girl by the road side while going home from church and they walked together and when he reached home he branched. It was his testimony that in the evening he went to the market and returned home at 8; 00 PM and while in his house, the same girl knocked at his door asking him to allow her to sleep over until the following day. It was his evidence that subsequent thereafter she started coming frequently and that one day on a Wednesday at 10:00PM she came again and slept over and the following morning they were arrested. In cross examination, the Appellant admitted that PW1 had slept in his house several times and that they had sex several times.

Preliminary issue: Claim of defective charge sheet

[11] 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) 4 of the Sexual Offences Act. He stated that the trial court did not inform the Prosecution to amend the charge during trial but went ahead to amend it in the judgment- something he says was manifestly wrong and vitiated the whole trial. He cited section 134 of the CPC and the case of SIGILAI vs. R (2004) 2KLR 480 in support of this proposition. 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(3) of the Sexual Offences Act. His view was that he was prejudiced when the trial court convicted him on a defective charge sheet, thus, he should be acquitted.

[12] This 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. See the Court of Appeal decision in the case of **SAMUEL KILONZO MUSAU vs. REPUBLIC [2014] eKLR** 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”.

The prosecution should clearly state the offence clause as well as the penalty clause. The citing of the section as section 8(1) 4 of the Sexual Offences Act is just careless and an embarrassing as even mere insertion of word or symbol & so that the citing reads section 8(1) & 4 of the Sexual Offences Act would suffice. Nonetheless, unless prejudice or injustice has occurred, this is a venial error which can be excused. I should state, however, that the trial magistrate ought to have realized that the penalty clause should be section 8(3) and not section 8(4) of the Sexual Offences Act because the age of the child was stated in the charge sheet to be 14 years. Equally, the evidence produced including the Certificate of Birth showed that the complainant was between the age of twelve and fifteen years and as such the appropriate penalty clause should have been section 8(3) of the Sexual Offences Act. But I should think that, since the offence with which he was charged and the relevant section thereto was proper, and the trial magistrate found that the offence has been proved beyond any reasonable doubt, the trial court is obligated in law to impose the appropriate penalty provided for the offence. Any other sentence would have been illegal. Therefore despite the wrong citing of the penalty clause, there was no prejudice or injustice caused upon the Appellant when the trial magistrate relying on the correct penalty clause imposed the appropriate sentence for the offence of defilement of a child of 14 years. Consequently nothing turns on this point. The offence and sentence was grounded on proper provisions of the law. As such, the ground fails. Nevertheless, I feel aggrieved to see the prosecution committing such embarrassing errors time and again. In all the three decisions I delivered on 13th December, 2017, similar error was an issue. And even greater incense would come where the errors escape the eye of the trial court. Such omissions provide enthusiastic appellants with opportunity to take up the point on appeal, thereby, occasioning unnecessary waste of precious judicial ink as well as spending of judicial mind which is needed more elsewhere to deal with more substantial issues of law. How I wish charge sheets in sexual offence are properly drafted and where an error of sort is noted, immediate correction is done in accordance with the law. And this kind of exposition will become unnecessary.

Analysis and findings

[13] I now turn to the real issues in this appeal. The appellant was charged with, convicted and sentenced for the offence of defilement contrary to Section 8 (1) as read with section 8(4) of the Sexual Offence Act. Section 8(1) 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.”

[14] 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.

Whether complainant was a child

[15] The Complainant testified as PW1. She stated that she was 15 years as at 30th June 2015 when she gave her testimony. She produced a Certificate of Birth NO [particulars withheld] which states her date of birth to be 11th February, 2000. Therefore as at 13th July 2014 she was a child of between the age of twelve and fifteen years. This finding will become necessary especially for purposes of sentencing. Accordingly, she was a child under the law.

Was there penetration?

[16] 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 was categorical that she had sex several times with the appellant. This was penetration. Corroboration thereto came from PW5, Saberrina Kaimatheri, a clinical officer attached to Chogoria Hospital who testified and produced a P3 Form in respect of PW1. She stated that on examination of PW1, the hymen was absent and had a foul discharge. According to the P3 Form on the examination of PW1, absence of hymen is indicative of penetrative sexual intercourse. This she said made her conclude that the girl had engaged in penetrative sexual intercourse. This evidence clearly show that there was penetration of PW1. I so find and hold. But by whom?

Was the penetration by the Appellant?

[17] This element, as it were, is where the rubber meets the road. I have carefully considered the evidence that was adduced before the trial court. PW1, PW2 and PW3 all testified and corroborated each other as they narrated how PW1 had escaped from home and went to live with the Appellant as husband and wife. PW1 testified that she was living with the Appellant as husband and wife and that they had sex several times. All this evidence was not contested even in cross examination. Similarly the evidence of PW2 and PW3 remained unshaken in cross examination as the Appellant opted to say nothing in cross examination. The evidence by PW4 and PW5 shows also of a report having been made that PW1 had disappeared from home and was living with the Appellant. This too was not challenged. The pieces of evidence by the prosecution witnesses corroborated each other in all relevant and material respects, and remained cogent, credible, reliable and unshaken throughout the trial. The Appellant indeed confirmed the version given by the prosecution witnesses that PW1 was a frequent visitor at his home and that PW1 run away from her parent's home at night. He confirmed these events led to their arrest. In cross examination the Appellant admitted that PW1 had slept over in his house several times and that he had sex several times with PW1. The evidence by the Appellant was hollow and evasive; he simply talked of PW1 coming and sleeping in his house several times. Again, the Appellant's contention that the Trial Magistrate erred as he was neither medically examined nor was a DNA test conducted to ascertain who the perpetrator was, meets similar fate; the law in Section 36 of the Sexual Offences Act does not provide for a mandatory requirement that DNA must be undertaken in each and every case for sexual assault under the Act. Section 36 leaves the decision on whether to order a DNA testing to the discretion of the court. in this case, there is sufficient evidence on who the perpetrator of this heinous offence. Accordingly, the prosecution proved beyond any reasonable doubt that the Appellant is the person who caused penetration with the child herein.

[18] But before I close, the Appellant seems to have introduced a ground of appeal to the effect that PW1 had deceived her that she was a grown up. It seems the Appellant is taking up the defence in section 8(5) & (6) of the Sexual Offences Act which provides that:-

It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6)The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

This can only be a mere afterthought as the Appellant did not raise it during the trial. In any event and as was rightly stated by Mr. Namiti for the State, the Appellant has not shown that:

(a) The child deceived the appellant into believing that she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) The appellant reasonably believed that the child was over the age of eighteen years after taking such steps to ascertain the age of the complainant.

The Appellant in this case merely stated in his mitigation that he did not know the girl was underage. He did not make any effort to show that he made any attempt to ascertain the age of the complainant. Consequently, nothing turns on this point and is rejected.

[19] Taking into account the totality of all the circumstances in this case, I find that the evidence that was adduced by the prosecution was strong, credible and reliable to sustain a conviction and I cannot fault the Learned Trial Magistrate's finding on the conviction and sentence meted out on the Appellant. The conviction was of the offence of defilement of a child and was founded on proof beyond any reasonable doubt that the Appellant caused penetration with a child of 14 years. Accordingly, Section 8(3) is the penalty clause and provides as follows:-.

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.

Therefore, the appropriate sentence to impose herein is a term of imprisonment of not less than twenty years. The trial magistrate did not therefore err in convicting and sentencing the Appellant as he did. As a consequence the appeal is dismissed. The Appellant shall serve the sentence as meted out by the trial court. It is so ordered.

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

Mr. Murage for respondent

F. GIKONYO

JUDGE