



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 87 OF 2015

B O OAPPELLANT

VERSUS

REPub.....RESPONDENT

(An appeal from the judgment of Hon. Ruguru (RM) in criminal case No. 2358 of 2013 in Mombasa Law Courts delivered on 8th May 2015)

JUDGMENT

1. The Appellant, BENJAMIN OMUNDI OCHIENG was charged with defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006.

The facts were that on diverse dates between 1st February, 2013 and 23rd September, 2013 in Mombasa County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of MA , a girl aged 13 years.

2. The appellant also faced the charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on diverse dates between 12th February, 2013 and 23rd September, 2013 in Mombasa County the appellant unlawfully and intentionally touched the vagina of MA a girl aged 13 years with his penis.

3. The case proceeded for hearing and after a full trial the appellant was convicted for the offence of defilement whereby he was sentenced to serve twenty (20) years imprisonment. There was no finding made in respect of the alternative charge.

4. Upon being convicted, appellant was aggrieved and through his advocate, M/s Were Geoffrey and Co. Advocates, filed an appeal against the conviction and sentence in respect of the main charge.

5. The appellant , through his learned advocate, Ms. Were, faulted the trial magistrate for convicting and sentencing him and addressed the following ground in his memorandum of appeal.

(a) That the learned magistrate erred in law and fact by making a finding that the prosecution has proved their case beyond reasonable doubt.

(b) That the learned magistrate erred in law and fact by placing hearing reliance on the evidence of prosecution witness which was contradictory with in consistencies and therefore not safe to rely

on.

THE APPELLANT'S SUBMISSIONS.

6. The appellant's counsel, Mr Were submitted orally and stated as follows;

(i) That the magistrate in her judgment failed to properly appreciate or analyze the evidence placed before her as the ingredients required to prove a case as the one against the appellant were never sought out.

(ii) That there is evidence in the proceedings which is confirmed by the complainant herself, that she was intimidated, beaten and threatened by her mother into stating the allegations against the appellant which led to his arrest. He submitted that it was therefore unfair for magistrate to rely on evidence of this nature.

(iii) That the evidence was uncorroborated and full of inconsistencies.

(iv) That the magistrate relied majorly on a evidence which was allegedly recorded on the complainant's mother's phone but the same was never produced as evidence in court to confirm if the persons appearing in the video were the appellant and complainant.

(v) That the trial magistrate court ought to have called for clothing or taken samples to compare with other from the appellant since the evidence adduced before the trial court was total fabrication and frame up.

(iv) That even though the appellant chose to give unsworn statement in defence, the trial magistrate ought to have considered it from its credibility as it is the appellant who took the complainant to the police station to make the complaint against the mother. That the magistrate ought to have found that if he was the culprit he would not have taken such initiative.

THE RESPONDENT'S SUBMMISIONS.

7. The respondent through learned state counsel M/s Ogweno submitted orally too and stated as follows:

(i) That from the evidence of Pw2 and Pw4 together with the P3 form (exhibit P1), the prosecution was able to prove oral vaginal penetration.

(ii) She also submitted that a birth immunization card (exhibit P2) provided showed that the complainant was 13 years old which evidence was corroborated by the evidence of Pw1, Pw2 and Pw3, the investigating officer.

(c) She further submitted that the video referred to was not part of the evidence as it only assisted the complainant's mother (pw2) to know what was going on behind the back and this is when she confronted the complainant about it.

(d) She submitted that the complainant was not threatened and forced to give false evidence against the appellant. That she only stated about what happened to her over the period in question.

(e) M/s Ogweno submitted that there was no bad blood between the complainant and appellant.

(f) She then submitted that since it has been shown that the complainant was 13 years old, the sentence of 20 years is reasonable and lawful hence should be upheld by court.

8. This is the first appeal and in Okemo vrs Republic (1972) EA.32, the court of appeal for East Africa

laid down what the duty of the first appeal court is:

“ Its duty is to analyze and re evaluate the evidence which was before the trial court and itself to come to its own conclusion on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the trial court. It may rehearse these conclusion. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”.

9. In summary, the prosecution case was as follows;

(a) Pw1, PA told court that on 23.9.2013 at about 12.00 pm, she was at her home when she took her mobile phone and saw an image of the accused person’s buttocks and a child’s ears which she recognized as being those of M. She then asked M about it in the evening and she refused to tell her anything. She said that she beat her and M told her that the accused had taken her to the bathroom and removed her clothes where he then inserted his penis in her vagina.

(b) Pw1 confronted the accused who was her husband, B O, and he denied. He took M to Nyali police station on a motor bike to report the matter. Pw1 further stated that the complainant was interviewed and taken to Coast General Hospital for treatment, and was issued with a P3 form. According to pw1, the complainant was 13 years old then. She identified a clinic card which showed that the complainant was born on 8.5.2000.

(c) In cross examination Pw 1 said that she did not have the video showing that the accused defiled the complainant.

(d) Pw2 MA, who is the complainant in this case stated that she was in class six (6) at [Particulars Withheld] Primary school and was aged 14 years old.

(e) Pw2 went on to state that on 23.9.2012, she was asleep in the night where she was sharing a bed with her brother C, who is aged 8 years. That the accused woke her up and threatened her while asking her not to scream.

(f) Pw2 said that the accused person took her to the bathroom where he put a bucket over her head and asked her to bend. He then removed her under wear and defiled her, by inserting his something into her anus. She said that she did not see what he inserted in her anus as her head and face had been concealed with a bucket.

(g) Pw2 said that her mother saw the video on her phone and asked her husband what she had seen.

(h) That on being asked about it by the complainant’s mother the accused denied.

(i) Pw2 said that the accused took her to the police station where he reported the they were lying that he had raped her.

(k) She also stated that she was interrogated by the police and she said that she had previously been raped by the accused person on his bed when her mother and brother had travelled.

(l) She finally stated that she was taken to “Makadara” that is, Coast General Hospital by her mother and they were issued with a P3 form which was filled by the doctor. In cross examination , Pw2 said that the accused person defiled her while her mother slept deeply as she had taken some alcohol. She also told court that the accused chased her from home for performing poorly in school and her mother beat her to tell the truth. She denied that she had been coached.

(m) Pw3, Pc Margaret Nyawira told court that she was the investigating officer in this case and was

stationed at Nyali police station when she was assigned this case on 26.1.2013. She requested and was granted time to retain the accused person while in custody. She was given the complainant clinic card from which she ascertained her age was 13 years. She also issued her with a P3 form which was filled by the doctor at Coast General Hospital.

(n) Pw4 was Dr L. Ngone who testified and said that he filled a P3 form on behalf of the Coast General Hospital with respect to the complainant who alleged that he she had been defiled by a person well known to her.

(o) He said that he examined the complainant and established that her hymen was not intact. Further investigations done revealed STD was negative and there were no injuries on the trunk.

(p) He further noted that the complainant had been defiled severally between the year 2012 and 23.9.2012 whereby penetration was found to have been both oral and vaginal. He produced a P3 form and PCR form as exhibits P3 and 4.

10. The accused person, BOO was placed on defence and he opted to give unsworn defence. He called no witness. The accused person stated as follows in unsworn defence;

(a) That on 23.9.2013, he had a birthday party in his house and he later went to sleep. He then woke up at 3.00am to prepare the children for school; and then went to work.

(b) The appellant said that he heard screams from the house and it was M, the compliant being beaten.

(c) According to the accused he had given her notice to leave as she had tested HIV positive. He then put M on the motor cycle and went to report the matter.

(d) The accused said that the complainant and her mother went to the OCS office and it was alleged that he had defiled the complainant.

(e) He said that he wanted to give his wife Ksh 100,000 from the loan he had applied for so she could start a life. He said that M was just like his own child and that this case was fabricated.

11. In her judgment the trial magistrate at page 2 lines 7 to 8, said;

“There is no doubt that the complainant was defiled”.

And on page 4 lines 3 to 5, he stated;

“it therefore follows that, the prosecution has proved he case against the accused person in the main count beyond reasons doubt as required.”

12. I have analyzed and re-evaluated the evidence which was before the trial court bearing in mind that the trial court had the advantage of seeing the witnesses. I find the following issues arose for determination:

(a) Whether the prosecution proved their case against the appellant to the required standard of law.

(b) whether the trial magistrate relied on the prosecution evidence which was contradictory and inconsistent.

13. With regard to whether the prosecution proved their case against the appellant beyond reasonable doubt, I find that he was charged with defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offences Act No 3 of 2006.

14. To establish a case of defilement the prosecution is required to prove;

- (a) the act of penetration.
- (b) the age of the victim and
- (c) the identity of the culprit.

15. For the act of penetration, it was the evidence of Pw1, PA, who is the complainant's mother that on 23.9.2013 at 12.00pm she took her mobile phone and saw the image of the accused person. At page 9, Pw1 stated that;

“ I saw his buttocks. I also saw ears of a child. I recognized the ears to belong to M. In the evening I asked M. At first she refused to tell me anything. I beat her. She told me that the accused took her to the bathroom and removed her clothes. He inserted his penis in her vagina....”

16. Pw2, MA, who is the complainant told court on page 10 lines 6-10.

“As I was sleeping the accused person came. He woke me up and threatened me not scream. He took me to the bathroom. He put a bucket over my head. He told me to bend. He removed my underwear and skirt and defiled me .”

She went on to state at lines 12-14 of the same page.

“He also bent and inserted his something in my anus. I did not see what he used he had concealed my head and face with a bucket.”

On page 11 at lines 3 to 4 of the proceedings she said;

“he had previously raped me when my mother and brother had travelled. He had defiled me on his bed that time.....”

17. According to Pw4, Dr.L Ngone who was based at Coast General Hospital he examined the complainant on 24.9.2013 and found her hymen was not intact. She had a feacial mater around her perinium (genitals) investigations were on all STD were negative . A vaginal swap taken revealed no spermatozoa. She had nophysical injuries in her back. (see lines 12-15 at page 17 of the proceedings)

He concluded at lines 16-17 of the same page.

“ There was enough evidence that M had been defiled before having been brought to Coast General Hospital on 24.9.2013....”

He also said on page 18 lines 1-4 of the proceedings.

“She also said that he had defiled her severally between the year 2012 to 23.9.2013 and penetration was both oral and through the vagina....”

18. From the evidence of Pw1,Pw2 and the P3 form (exhibit P1) and PRC form (exhibit P2) produced by Pw4, it was concluded that the complainant (Pw2) was defiled.

19. Regarding the complainant's age, which has a direct bearing on the sentence confirmed against the appellant of the court, I find that Pw1, her mother told court that she was 13 years then and identified a clinic or immunization card (exhibit P2) which showed that Pw1 had been born on 8.5.2000. At the time of testifying pw2, the complainant said that she was 14 years old. She was ascertained by Pw3 and 4 and it was not contested by the accused person.

20. The other factor that needs to be proved by the prosecution is whether the appellant committed the defilement as alleged.

21. It is worth noting that the appellant was known to both Pw1 and the complainant having been married to Pw1 at the time.

22. It was the evidence of Pw1, mother to the complainant (Pw2) on page 8 lines 15 to 16 of the proceedings that:

“I took my mobile phone. I saw an image of the accused person. I saw his buttocks. I also saw ears of a child. I recognized the ears belong to M...”

23. It is clear that the evidence Pw1 saw on her phone is what informed her of what she alleged happened between the appellant and the complainant, Pw2. And it was a result of this that she confronted the complainant and appellant.

24. I find that this was vital evidence which ought to have been produced in court so as to corroborate Pw1's evidence that indeed the persons appearing in the video were the appellant and complainant, unlike the prosecution's contention in submissions that the video was not part of evidence.

25. While Pw1 did not indicate to court how the recording on her phone happened, it was the evidence of Pw1, the complainant that it was the appellant who used to record what he did to her on her mother's phone. Question then becomes, is this plausible?

26. The complainant in her evidence gave an account of how the appellant defiled her and recorded the incident on her mother's phone. There was need for this phone to have been produced in court as evidence to corroborate the complainant's evidence. One wonders why Pw1 did not hand over the said phone, which was her possession to the police when she went there to report the matter: Pw3, the investigating officer, even told court that she was told the appellant took a video recording the offence on the phone.

27. Also, from the evidence of Pw1, I noted an inconsistency with the evidence of Pw2, the complainant. Pw1 told court that Pw2 told her that the appellant took her to the bathroom, removed her clothes and inserted his penis in her vagina. Pw2 on the other hand stated that the appellant took her to the bathroom, put a bucket on her head and told her to bend, after which he removed her underwear, skirt and defiled her. She went on to state that her head was covered with a bucket that she did not see what he inserted but he inserted his something in her anus.

28. From the evidence of Pw1 and Pw2, it is clear that there is an inconsistency as to whether the complainant (Pw1) was defiled through the vagina or anus. And although Pw4 the doctor testified that he examined the complainant and established evidence of penetration it was not clear whether it was him who established the penetration being anal or vaginal or it is what Pw2 told him. The evidence of faeces around her anal area could not be said to be evidence of penetration through the anus.

29. Another inconsistency was noted when Pw2, the complainant said that the appellant told her to bend and yet Pw3 told court that the complainant (Pw2) told her that she was kneeling during the incident.

30. There was also inconsistency as to when the incident occurred. According to Pw1, on 23.9.2013, she saw the incident on her phone while she was alone at the house. Pw2 the complainant told court that the incident happened on 23.9.2013 while she was at home with her mother who was so drunk and asleep. Pw3 testified that the complainant's mother learnt of the incident on 22.9.2013. The question then becomes when did this incident happen?

31. Lack of corroboration and inconsistencies in the evidence of the prosecution witnesses rendered the same unbelievable to the extent that a lot of doubts have been raised, whose benefit ought to have been granted to the appellant.

32. This was made worse by the evidence of Pw1 when she said that she beat the complainant when she refused to tell her anything and she then told her that the appellant had taken her to the bathroom , removed her clothes and inserted his penis in her vagina. Pw2 confirmed the her mother beat her to tell the truth when she was cross examined by the appellant. This was clear evidence of pw1 having coerced Pw2 to say what she said about the appellant through a beating.

33. With this kind of evidence, one is inclined to believe the appellant when, in his defence he claimed that the offence was fabricated against him.

34. In view of my aforesaid analysis of the evidence of the trial court, I find that the prosecution's evidence against the appellant was not proved beyond reasonable doubt.

35. I also noted in her judgment, the trial magistrate relied on her own imaginations to reach a finding against the appellant. On page 3 of the judgment at lines 23- 27, the trial magistrate stated as follows;

“clearly accused wake up, glanced at his drunk wife to confirm that he had time to satisfy his libido without his wife ever finding out and dashed to the complainant room where she waswith her mother and .”

This Was not evidence of any prosecution witness. One wonders where the trial magistrate got the piece of evidence which forced her of her judgment against the appellant. A judgment should be based on facts, evidence and the law and not extraneous factors on compressions of the trial magistrate.

36. As regards the issue of the sentence of 20 years which was imposed against the appellant, I find that this based on the findings that the complainant was said to have been 13 years old at the time of the alleged offence. The appellant was charged under Section 8 (1) as read with Section 8 (3) of the Sexual Offence Act.

Section 8 (3) of the Sexual Offences Act, finds 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 thirty years.”

37Had the case against the appellant been proved then the said defence would not have been termed to be unlawful or exerciser with regard to the established age of the complainant at the time of the alleged offence, as this is the minimum sentence provided for under section 8(3) of the Sexual Offices Act.”

37. In the result, I allow the appeal against the conviction, which I quash and set aside the sentence against the appellant.

38. The appellant is hence set free forthwith unless otherwise legally held. Judgment accordingly.

Judgment signed, dated and delivered this 16th day of February 2016.

D.CHEPKWONY

JUDGE

In the presence of:

M/s Ochollo for the state

Appellant in person

C/Assistance - Kiarie