REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 17 OF 2015

JOSHUA MUSYIMI KAVEMBA ……..…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

INTRODUCTION

1. This is an appeal from the decision of the trial court in Sexual Offences Act Case NO. 6 of 2013 at Kithimani Principal Magistrate's Court (Hon. D. G. Karani, PM) in which the appellant was convicted for the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 20 years on 28th January 2015. The appellant had on 1st March 2013 been charged that he had on 8th February 2013 in Yatta District within Machakos County intentionally caused his penis to penetrate the vagina of M M a child aged 15 years, (which was subsequently amended on 17th February 2014 to read 14 years). The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The Prosecution's case

2. The Prosecution's case was that on 8.2.2013 at 6.30pm while returning from fetching firewood near a river the complainant, a class 7 girl aged 14 years had been defiled by the appellant, who was her teacher at [particulars withheld] Primary School. The appellant had approached the complainant while riding a motor cycle and beckoned her to go and greet him. The complainant went to where he was and greeted him but the appellant held on to her hand and dragged into a bush after parking the motorcycle on the road. In the bush, the appellant forcefully removed the complainant's underwear and pushed her to the ground and defiled her. She reported the incident to the mother after the latter, who had seen them coming from the bush, asked what the two were discussing. The complainant was taken to hospital the following day on 9.2.2013 where she was examined and then referred to the police whereupon the appellant was arrested and charged.

The Defence

3. When put on his defence, the appellant while acknowledging that he knew the complainant as a class 7 pupil in the School that he had taught for five years denied the offence as follows:

> *"I did not defile her neither did I commit an indecent act with her. No birth certificate or notification of birth nor was any evidence of proof of age of the complainant given. She never told the court whether she screamed and it is also to be noted that she had bathed before she went to*

hospital. I was never examined. Treatment notes produced did not indicate that she had been defiled. No spermatozoa were noted. P.3 filled almost three weeks since the alleged offence. I was in court when the investigating Officer testified and I remember her tell the court that according to her there was no evidence of defilement. She in cross-examination said she had been pushed by OCS Matuu to charge me. I was framed because I punished the complainant for being lazy in class and was not attempting my assignments. The mother was not happy and she threatened to teach me a lesson. I never met the complainant on the material date. I pray that I be acquitted as I was framed."

On cross-examination, the appellant confirmed that he had not reported the school authorities that the complainant's mother had threatened him.

SUBMISSIONS

4. The Counsel for the Parties - M/S B.M. Mung'ata & Co. Advocates for the Appellant and Ms. Tabitha Saoli for the Director of Public Prosecutions (DPP) - filed written submissions respectively dated 18th December 2015 and 3rd February 2015 and judgment was reserved.

5. The appellant urged three broad grounds of appeal, namely, that the prosecution's case with respect to the age of the complainant was not proved beyond reasonable doubt; that there was insufficiency of evidence of 'the 5 prosecution witnesses' to prove the ingredients of the offence of defilement of age and penetration; and that the learned trial court disregarded the sworn defence of the accused.

6. The Prosecution replied to the appellant's submissions pointing out that the charge sheet had been amended to show the right age of the complainant as 14 years and that the prosecution had produced a birth certificate and age assessment card to prove the age of the complainant. On the insufficiency of evidence to prove the charge, the prosecution contended that the trial court had *'made a finding that the prosecution witnesses were consistent, the evidence corroborated and overwhelming', and relied on the proviso to section 124 of the Evidence Act that 'the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful.'* (citing *Stephen Nguli Mulili v R* (2014) eKLR). As regards the appellant's sworn testimony, it was countered that it was a mere denial and that the appellant *'did not substantiate his whereabouts on the particular date as much as he gave sworn evidence.'*

DETERMINATION

The Burden of proof

7. It is trite law that the burden of proof in a criminal case lies with the prosecution and it is, consequently, never the duty of an accused to prove his innocence. To require, as suggested by the Prosecution's submissions herein, the accused in his defence shows his whereabouts on the particular date or time of the alleged offence is to require him to demonstrate that he was not, or could not have been, the perpetrator of the offence and, thereby, to impose a burden on him to prove his innocence.

8. However, when the an accused has been placed on his defence on a finding of a case to answer, the accused is obliged, if he wishes to challenge an inference of guilt as established from the prosecution evidence, to give an account of his defence that is capable of raising a reasonable doubt to the prosecution's case. A doubt as to the evidence of the prosecution as regards the commission of the offence must be reasonable not whimsical, unusual or fanciful one.

Analysis of Evidence

9. As a first appellate court, this court has the duty to evaluate the evidence presented before the trial court and reach its own conclusions of fact thereon, allowance being had of the fact that the court unlike the trial court did not hear or see the witnesses so as to assess their demeanor. See ***Okeno v. R*** (1972) EA 32. The evidence of PW1, the complainant, was self–contradictory as well as contradicted by the

evidence of other prosecution witnesses. In her examination in chief, PW1 testified that the appellant inserted his penis into her vagina; on cross-examination stated that she had not had sexual intercourse before; that she did not bleed; that she did not change clothes when going to hospital but that she had *showered in the morning*. When examined by the Court, she said that she only *washed her legs* before going to hospital and reiterated that she did not bleed.

10. PW2, the complainant's mother testified that as she returned home from picking her phone from a neighbor having sent the complainant to fetch firewood, she saw a motor-cycle parked near a river; that the appellant had emerged from a bush with the complainant girl emerging a short while later; and that the appellant had mounted the motorcycle and rode away. She had asked the complainant when she came home what she had been doing with the appellant and the complainant had started crying and told her that she had been defiled by the appellant. PW2 said that before taking the complainant to hospital she had called the appellant who had begged her to forgive him and had given her Ksh.500/- to buy medicine. She produced the complainant's birth certificate.

11. On cross-examination, PW2 said:

> *"I never saw the accused defile PW1. She was complaining of pains while urinating. I did not mention the same in the statement. I did not state in my statement that I saw the accused. The statement does not also indicate that the accused admitted to me that he had defiled PW1. I did not record that the accused offered to take PW1 to hospital. I did not examine her private parts. She did not shower before going to hospital. The doctor told me she had been defiled. OCS told me there was no evidence of defilement."*

12. When examined by the Court, PW2 said: 'Cpl. Pamela gave me Ksh.500.00 to go buy medication for the child. I told her I was in financial need and she assisted me.' In the light of this statement it was not clear to this court whether it was the appellant or Cpl. Pamela who gave the complainant's mother Ksh.500/- to buy medicine.

13. PW3, a clinical officer based at Matuu District Hospital who completed the Medical Examination form P3 testified that he attended to the complainant on the 9.2.2013 produced the P3, laboratory results and an Age assessment report made by his colleague one Mr. Maingi, with whose handwriting and signature the witness confirmed to be familiar, as P. Exhibits 2, 3, and 4. On cross-examination, he said he did not produce the treatment notes as they were retained at the hospital but confirmed that -

> *"I saw her one day after the alleged incident. Delay may wipe out some evidence. No blood was detected in the urine. No spermatozoa was noted. I relied on the initial treatment to fill the P3 form. I did not examine the accused person. Laboratory investigations did not reveal anything positive."*

14. The Medical Examination Report P3 form dated 27/2/2013 produced as exhibit in court indicated as follows at Section C thereof on the physical state of and any injuries of the female complainant:

> *"Redness and tenderness on the labia majora/minora. Hymen torn and fresh. Bruises and tear on the anal region. Stains suggestion of semen ejaculation on the thighs."*

15. PW4 Administration Police Sergeant of Ikombe Administration Police testified that he was the arresting officer and was previously known to the appellant whom he arrested on the instructions of the OCS Matuu Police station on the 8/2/2013.

16. PW5 Cpl. Pamela Cheruto of Matuu Police station in her brief testimony said:

> *"I recall about 9.2.2013 at about noon I was at the station when the complainant in the company of her mother came and reported that she had been defiled by a person known to her. I referred her to the OCS who initially advised that there was no evidence to sustain the charge as the lab results were negative. On 27.2.2013 they came demanding for the P.3 and on 28.2.2013 they recorded*

witness statements. Accused was arrested on 28.2.2013 and charged with the present offence."

17. On cross-examination PW5 said she was the investigating officer and that the complaint was received on 9/2/2013 when on the basis of the laboratory results PEx. 3 "we had advised that there was no case to prosecute as per the results" and only "filled the P3 when the complainant and her mother insisted on the same"; that she had not seen any treatment notes; and that the accused was not examined. On re-examination, the witness said she had charged the appellant on the strength of the P3 form and that they had not seen the P3 form when they had advised that there was no sufficient evidence.

Proof beyond reasonable doubt

18. The complainant PW1 and her mother PW2 were categorical that the complainant had not bathed before going to hospital, save for the washing of the legs as stated by the complainant. If that were so, the laboratory tests ought to have indicated presence of blood, if the testimony of the clinical officer as recorded in the Medical Examination P3 form was accurate that there was a fresh tear of the hymen. There cannot have been a fresh tear of the hymen without blood discoverable in the internal genitalia of a victim who had not washed before going to the hospital as alleged by the two witnesses. That the laboratory tests were negative for blood in the complainants vagina raises a doubt as to whether there was penetration which is an integral ingredient of the offence of defilement.

Gaps in the Prosecution case

19. That the investigation officer, PW5, did not present the appellant for medical test despite his availability since the day after the incident (according to the complainant PW1 and her mother PW2 when the appellant was summoned to the Police station and according to PW4 the arresting officer, when he arrested the appellant on instructions of the OCS Matuu Police station) presents a gap in the prosecution case. Such examination on the appellant could have established his involvement, if for example he had on his male organ bruises consistent with the findings of the Medical Examination P3 form for the complainant, or other presence of the complainant's blood cells from her freshly torn hymen on him.

20. Moreover, other gaps and inconsistencies exist in that the complainant's mother as established in cross-examination had omitted to record in her statement to the Police so crucial details of the case that the complainant was complaining of pains while urinating; that she had seen the accused on the day of alleged defilement and that the appellant had admitted to me that he had defiled PW1 or that he had offered to take PW1 to hospital. Section 165 of the Evidence Act in allowing evidence of previous statement to be adduced contemplates a test for consistency of witnesses as follows:

> "**165.** In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

21. In addition, the treatment notes upon which the clinical officer alleged to have used to complete the Medical examination report P3 form on the 27/2/2013, eighteen days after the examination on 9/2/2913, were not produced in evidence to confirm the findings of the "*Redness and tenderness on the labia majora/minora. Hymen torn and fresh. Bruises and tear on the anal region. Stains suggestion of semen ejaculation on the thighs.*"

22. Although, a court has under the proviso to section 124 of the Evidence Act power to convict an accused on the uncorroborated sole evidence of the victim of a sexual offence where it is satisfied that the complainant is telling the truth, the court may not be so satisfied where there are such contradictions, gaps and inconsistencies in the evidence of the prosecution witnesses as demonstrated above.

Evaluation of the Defence

23. I do not find merit in the appellant's complaint that the trial court did not consider his defence. As I understand it, the judgment of the trial court, the learned magistrate considered the appellant's sworn

defence and found it wanting in respect to raising a reasonable doubt. The Court said:

> *"It was further the accused defence that he had been framed for having punished PW1 as she was lazy in class and that her mother had vowed to have him punished for the same. It is noted that this issue never arose when PW1 and PW2 testified and one wonders why. In any event he never told the Court when it is that he had punished PW1 and when PW2 had vowed to fix him. It is further to be noted that he never reported such threats to the school authorities. I reject the same and find that it was an afterthought."*

24. I would agree with that assessment of the appellant's sworn defence, and do not agree that the trial court disregarded credible defence of the appellant as charged by the appellant in his third cluster of grounds of appeal, and I dismiss the same. Had the prosecution proved its case, this defence would not raise any reasonable doubt. But, needless to restate, it is never the duty of an accused to prove his innocence.

25.To be sure, the Prosecution had on the 17th February 2014 amended the Charge to indicate the complainant's age as 14 years and the birth certificate produced as P. Exhibit No. 1 and the Age assessment report produced as P. Ex. No. 4 indicated the complainant's age as 14 years, with birth certificate showing her date of birth as 25th May 1998. I would, therefore, find no merit in the appellant's complaint that the complainant's age was not proved as an integral ingredient of the offence of defilement. However, in view of the Court's finding on proof of penetration nothing turns on this dismissal of the ground of appeal on age of the complainant.

CONCLUSION

26. Upon analyzing the evidence presented by the prosecution and the defence, it is clear to me that the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, though it may have occurred, was not proved beyond reasonable doubt. For the same reasons, the alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act was not proved beyond reasonable doubt.

ORDERS

27. Accordingly, the appellant's appeal herein is allowed, the conviction quashed and the sentence of twenty years imprisonment set aside and the court directs that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of**:** -

Applicant present

Ms. Saoli for the Respondent

Mr. Moruri - Court Assistant.