



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 36 OF 2013

PETER KINYUA MWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Judgment and Conviction by Hon. F.W. Macharia Principal Magistrate in Othaya
CR.C.NO.510 of 2011 dated 19th March, 2013]

JUDGMENT

FACTS

1. The appellant, **Peter Kinyua Mwai**, was charged with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act**. The particulars of the charge were that on the 20th September, 2011 at [particulars withheld] Village, Nyeri South District within Nyeri County he unlawfully defiled a **LG** a minor aged 8 years.
2. In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**; that on the 20th September, 2011 at [particulars withheld] Village he indecently assaulted **LG** a girl aged 8 years by touching her private parts.
3. The facts of the case as recorded by the trial magistrate are that the prosecution called a total of four witnesses; that the complainant gave an unsworn statement as she did not comprehend the meaning of giving evidence under an oath; that on the 20/09/2011 her grandmother (**PW2**) had gone to attend a funeral in Embu and she was left together with her uncle/appellant in **PW2**'s house; that there was no other person in the house; the appellant pulled her into the bedroom, removed her panties and made her lie on the bed, he then proceeded to remove his clothes and then did bad things to her by inserting his '**thing that urinates**' inside her "**thing for urinating**"; she did not tell her grandmother till after 3 days; she was then taken to hospital and thereafter to Chinga Police Station.
4. The evidence of **PW2** was that she was a nurse by profession; that on the 15/10/2011 whilst having breakfast with the complainant she smelt a foul smell emanating from the minor and upon inspecting the child's private parts she found foul smelling vaginal discharge; upon enquiring from her whether anyone had touched her private parts she was told that the appellant had put his urinating '**thing**' in her private parts; she then took the complainant to Othaya District Hospital for examination where she was issued with a P3 Form; thereafter the matter was reported to Chinga Police Station on the following day.
5. The appellant was arrested and subsequently charged in court was tried and convicted on the main charge and was sentenced to life imprisonment.
6. Being aggrieved by both conviction and sentence, the appellant filed a petition of appeal on 2nd April, 2013 raising four grounds of appeal, inter alia;

- i. The trial magistrate erred in convicting the appellant on evidence that did not support the charge;
 - ii. The trial magistrate erred in convicting the appellant without considering that the date of the alleged offence was not ascertainable;
 - iii. The prosecution did not prove its case beyond reasonable doubt;
 - iv. That the trial magistrate failed to consider the defence raised by the appellant.
7. The appeal came up for hearing on the 15/07/2015 before Riechi J who directed that the appeal be disposed of by way of written submissions; thereafter on the 11/02/2016 Counsel for the appellant Mr. Muhoho and Prosecuting Counsel for the State Mr. Njue proceeded to highlight their respective submissions before this court.
 8. Hereunder is a summary of the parties submissions;

APPELLANTS SUBMISSIONS

9. The date the offence did not come out clearly; there were a myriad of contradictions that were fatal to the prosecutions' case; the minors evidence was that it occurred on the 20th September, 2011; that she did not tell her grandmother of the incident until after 3 days; whereas PW2 talks of the 15th October, 2011 a month later; PW2 also stated that she used to bathe the minor; that if that was the position she would have noticed earlier;
10. There was uncertainty on the date of the offence; that the variances in evidence should be resolved in favor of the appellant;
11. There were also contradictions as to where the alleged incident took place; PW1 said it took place in PW2s house; PW2 stated that it was at the great-grandmothers house where the appellant lived.
12. That there was also a lapse of time from the time the matter was reported to the police to the time when the appellant was arrested.
13. The appellant was convicted without the age of the minor being ascertained; the Birth Certificate was not produced; the mother of the minor though alive was not called to verify when the minor was born so as to ascertain age; that this evidence was very paramount to an offence of this nature.
14. Lastly the trial magistrate rejected the appellants defence without good reason; the trial court failed to make a finding that the appellants' sworn testimony was not shaken by the prosecution.
15. The appellant prayed that the appeal be allowed conviction quashed and the sentence set aside.

RESPONDENTS SUBMISSIONS

16. The Charge Sheet was not defective but had a mis-drafting which did not go to the root of the charge nor cause any prejudice to the appellant; the drafting stated that the offence of defilement was contrary to Section 8(1)(2); the charges ought to have read under Section 8(1) as read with 8(2); the defect was curable under Section 382 of the Criminal Procedure Code.
17. That the evidence adduced by the prosecution had material contradictions on the dates of the incident; the evidence of PW1 was that she was defiled on the 20th September, 2011; that she told her grandmother (PW2) about the incident after three (3) days which would then have been on the 23/09/2011; PW2 smelt the foul smell and discovered that the minor had been defiled on the 15th October, 2011; that PW2 testified that she used to bathe the minor and also contradicted herself when she stated she had minimum contact with the minor;
18. There were contradictions as to the place the incident took place; the minor said that it took place at her grandmothers' house; PW2 stated that it took place in the great-grand mothers' house where the appellant resided;
19. The report of the incident was made on the 16th October, 2011; the appellant was arrested on the 16th November, 2011 yet he resided in the same compound with PW1 and PW2.
20. On the ground of appeal of failure to prove the minors age by use of documentary evidence Counsel argued that there should be no confusion between proof of age to establish the offence of defilement and proof of age for the purposes of meeting the appropriate punishment; Counsel made reference to the case of **Aloiz Kirangu Njoroge v Republic [2015] eKLR** where the conviction was upheld but the matter was referred back to the trial court with directions that further evidence be taken to be relied upon when sentencing;

21. The respondent conceded the appeal on the ground that the trial court ought not to have rejected the appellants' defence of alibi; this defence of alibi considered alongside with the prosecution witnesses contradictory evidence on dates together with the time taken to arrest the appellant raised some doubts in the prosecutions' case.
22. On that account the State conceded the appeal.

ISSUES FOR DETERMINATION

23. Upon reading the written submissions and taking into consideration the high-lightings made by the respective counsels this court has framed the following issues for determination;
 - a. whether the charge sheet was defective;
 - b. whether there were material contradictions in the evidence of the prosecution witnesses;
 - c. whether the prosecution proved the age of the complainant;
 - d. whether the prosecution proved its case to the desired threshold;
 - e. whether the trial court considered the appellants defence and had good reasons for rejecting it;

ANALYSIS

1. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the charge sheet was defective

24. I have noted that the Charge sheet reads “**defilement contrary to Section 8(1)(2)**”; the correct wording of the charge ought to have been “**defilement contrary to Section 8(1) as read with 8(2)**”; does the above mis-joinder of the sections by the omission of the words “**as read with**” go to the root of the charge thus making it defective?; Section 134 of the Criminal Procedure Code provides that the charge shall state the specific offence and the particulars give reasonable information on the nature of the offence charged; thus a charge sheet is defective when it fails to disclose an offence; a charge sheet can also be said to be defective if the particulars set out in the charge sheet are at variance with the offence.
25. Upon reading the Charge sheet this court notes that the particulars in the charge sheet made a clear reference to the offence of defilement and the particulars also relate to defilement thus disclosing an offence.
26. The next question that arises is whether this omission caused any prejudice or occasioned any miscarriage of justice; in his submissions on appeal this court noted that the appellant made no reference to any failure of justice or any sort of prejudice occasioned to him by the omission of the wordings; the record shows that the particulars were read out to him and that he took the plea and also participated in the proceedings through-out; and the record also shows that in his statement of defence he stated that;

“I know the charges against me.....”

Which goes to demonstrate that he was fully aware and was not in any way misled as to the nature of the offence with which he had been charged.

27. This court is satisfied that the omission of the words “**as read with**” did not make the charge sheet incurably defective; and in the absence of any evidence of miscarriage of justice or prejudice occasioned to the appellant the defect is therefore curable under the provisions of Section 382 of the Criminal Procedure Code.
28. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution proved the age of the complainant;

29. Section 2 of the Childrens Act defines a “**a child of tender years**” as one under the age of ten years; and also defines “**age where it is not known means apparent age**”.
30. Age of a child of tender years can be proved by oral evidence of the victim, her parents or guardians or observation; in this instance the record shows that the trial court took cognizance of the fact that PW1 was a minor of tender years and proceeded to conducted a voire dire test and made a finding that the minor did not understand the meaning of an oath and proceeded to take her unsworn evidence; her evidence was that she was aged 9 years at the time of testifying; the evidence the grandmother (PW2) who was her guardian was that the minor was aged 8 years and the Clinical Officer (PW4) who carried out the medical examination and made the entries on the P3Form (PExb.1) that clearly indicated the age of the minor to be 8 years.
31. This court is also persuaded by the decision in the case of **Musyoki Mwakavi** where Mutende J held that;

“ ...apart from medical evidence, the age of a complainant may be proved by a birth certificate, the victims’ parents or guardians and observation or common sense”

32. The minor was found to be a child of tender years within the meaning of the Childrens’ Act; that documentary evidence in the form of a Birth Certificate or an age assessment report was not necessarily the only means of proving the minors age; PW2 gave oral evidence on the minors age which was corroborated by the evidence of PW4 the clinical officer and the supporting document ‘PExb.1’ tendered in evidence.
33. This court is satisfied that the prosecution proved the age of the minor to the desired threshold.
34. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether there were contradictions in the evidence of the prosecution witnesses; Whether the prosecution proved its case to the desired threshold;

35. The two issues stated above are all intertwined and shall therefore be analyzed together so as to avoid repetition; the contradictions in evidence tendered by the prosecution witnesses relate to the dates the offence occurred and also to the place; the information on the charge sheet gives the date as 20th day of September, 2011; PW1 also testified to the offence having occurred on the 20th September, 2011; and that she reported the same to PW2 three days thereafter which would then have been on the 23rd September, 2011; the evidence of PW2 was that she made the discovery after 3 weeks and that was on the 15th October, 2011 when she noted a foul smell emanating from the minor; upon carrying out an inspection she found that the minor had been defiled; whereupon she took her to Othaya District Hospital; and the P3 Form (**PExb.1**) indicates that the examination was carried out on the 16/10/2011.
36. From the evidence the dates are indeed at variance the charge sheet reads 20th September, 2011; PW1 states that the offence occurred on that date at 3.00 pm but the witness PW2 gives her dates as 15th October, 2011 as the dates she made the discovery of the defilement; the matter was reported to the police and the medical examination conducted on the 16th October, 2011; the variance of the dates is material when looked at in the light of the medical evidence contained in the P3 Form (PExb.1).
37. If the offence occurred on the 20th September, 2011 as stated by the minor and not 15th October, 2011 then it was incumbent upon the prosecution to tender evidence to explain the delay in taking the minor for medical examination on the 16th October, 2011 three weeks thereafter.
38. The prosecution also had the option of requesting the trial court to allow it to amend the dates on the charge sheet for the sake of uniformity; this could have been at any stage of the trial provided no injustice was occasioned to the appellant; but this court notes that the prosecution failed to take this opportunity to do so.
39. Evidence was also required from the prosecution to explain why upon a report having been made of the act of defilement it took another month for the appellant to be arrested and arraigned in court yet he had not fled from the jurisdiction but continued to live in the same compound as PW1 and PW2.
40. Upon evaluating the prosecutions’ evidence on the dates this courts opines that it was incumbent

upon the prosecution to prove the exact date that the offence occurred and to tender evidence in support of the delays; that in the absence of evidence to explain the delays serious doubts are raised in the prosecutions' case.

41. This court is satisfied that there were contradictions of material particulars in the prosecution case and read together with the absence of evidence to explain the delays raises serious doubts in the prosecutions' case;
42. This court is satisfied that the prosecution failed to prove its case beyond reasonable doubt.
43. The two grounds of appeal are found to be meritorious and are hereby allowed.

Whether the trial court considered the appellants defence and had good reasons for rejecting it:

44. The appellant gave a sworn defence and put forward an alibi that on the material date he was in school and got home at 4.30pm; he was cross-examined and was not shaken and stuck to his testimony; the trial court states in its judgment that;

“it considered the cross-examination of PW2 by the accused. He did not raise the issues raised in his defence statement. I therefore find that this is an after-thought.

The defence statement does not raise any reasonable doubt against the evidence of the prosecution”

45. The trial court states that it considers the appellants' defence to be an afterthought; that during the cross-examination PW2 had a composed demeanour which led the court to believe that she was telling the truth; the trial court did not elaborate further on factors or matters relating to the demeanor and evidence that made it believe the appellant defence was an after-thought or false.
46. It is trite law that the correct approach was for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it as against that of the appellants evidence and then make a finding supported with reasons that the prosecutions' case displaced the defence of alibi.
47. This court is satisfied that the trial court erred in failing to give cogent reasons for rejecting the appellants' defence of alibi.
48. This ground of appeal is found to be meritorious and it is hereby allowed.
49. Upon re-evaluating the evidence on record this court is satisfied that the conviction is unsafe.

FINDINGS

50. For the reasons stated above I make the following findings;

- i. The defect on the charge sheet is found to be curable;
- ii. The minor is found to be a child of tender age and the prosecution proved her age to the desired threshold;
- iii. There are material contradictions in the evidence of the prosecution witnesses which are found to raise doubts in the prosecutions' case; the prosecution thus failed to prove its case to the desired threshold.
- iv. The trial court is found to have erred in rejecting the appellants defence; and
- v. The conviction is found to be unsafe.

DETERMINATION

51. The appeal is found to be meritorious and is hereby allowed.
52. The conviction is hereby quashed and sentence set aside.
53. The appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 26th day of May 2016.

HON.A. MSHILA

JUDGE