



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 114 OF 2015

(From original conviction and sentence in Criminal Case No. 740 of 2013 of the Chief Magistrate's Court at Garissa- M. Wachira - CM)

MOHAMED KINGORI WERU APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court at Garissa with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act 3 of 2006. The particulars of the offence were that on 5th June 2013 at *[particulars withheld]* in Garissa District within Garissa County intentionally caused his penis to penetrate the vagina of KK a child aged 11 years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally and unlawfully touched the vagina of KK a child aged 11 years with his penis. He denied both offences. After a full trial, he was convicted of the main count of defilement. He was sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, the appellant filed his appeal in person on 21st December 2015. Later the appellant appointed an advocate, who filed a supplementary petition of appeal. Mr. Nyaga who appeared for the appellant during the hearing of the appeal, abandoned the original grounds of appeal and relied on the supplementary petition of appeal. The grounds of which are as follows:-

1. That the learned magistrate erred in law and in facts by finding that the complainant was 11 years old despite her testimony that she was 13 years.
2. That the learned magistrate erred in law and in facts in convicting the appellant despite the material contradictions in the prosecution case.
3. The learned magistrate erred in law and in fact in failing to find that the delay in reporting the alleged defilement may have compromised the prosecution case.
4. The learned magistrate erred in law by proceeding with the hearing of the case before the appellant was supplied with all written witness statements, contrary to Article 50 of the Constitution.
5. The learned magistrate erred in law and in fact by failing to find that the prosecution did not prove its case beyond reasonable doubt.

Mr. Nyaga learned counsel for the appellant also relied on case authorities. Counsel submitted that this being a first appeal, the court had a duty to re-evaluate the evidence in order to come up with an independent finding, taking into account that the appellate court did not have a chance to see witnesses testify.

Counsel submitted that the complainant stated in evidence that she was 13 years of age. It was the complainant's guardian PW3 who stated that the complainant came under her custody when she was 5 years old and she lived with her for 6 years making a total of 11 years. Counsel stated that there was a possibility that the age given by the guardian who was not the parent of the complainant was a mistake and such age could not be safely relied upon.

Counsel also faulted the magistrate in allowing the complainant to testify as she was not able to explain herself clearly. Counsel thus stated that what should have been done was to conduct an age assessment as the appellant was charged with defilement of a child of 11 years which carries life imprisonment. It was thus unsafe to conclude that the appellant had committed the offence. Counsel relied on section 169 of the Criminal Procedure Code and said that the finding of the magistrate was a mistake which needed to be corrected and cited a case of **Omar -vs- Republic 2016 EKLK** in which the Judge emphasized that in these kind of sexual offences, age was a very important fact which needed to be proved and failure to do so would be fatal to a conviction.

Counsel also submitted that there were other material contradictions in the evidence. He stated that the complainant PW1 was categorical that K came to the scene and she narrated the incident. On the other hand PW2 said he went to the scene and found the complainant and the appellant in the act and described what he saw. PW1 the complainant did not mention that this witness came to the scene. Counsel submitted that if it was true that PW2 came to the scene PW1 could have said so.

Counsel also submitted that the prosecution failed to call a crucial witness K to clear the doubts. It was thus a mistake for the trial magistrate to say that PW2 corroborated the evidence of PW1 as a minors evidence could not corroborated that of PW1.

Counsel also attacked the delay in reporting the incidence and medical examination of the complainant. Though the complainant stated that the incident occurred on 5th June 2013, PW3 the guardian stated that it was on 7th June 2013 that she discovered that the minor had been defiled. According to counsel, one would expect the medical evidence to corroborate the allegation. The doctor however said the approximate age of injury was 5 days which was a further contradiction PW4 the Investigating Officer said he was assigned the case on 7th June 2013 and by then the child had already been taken to hospital and a P3 form issued. Counsel emphasized the need to carry out medical examination quickly in cases of sexual offences.

Counsel submitted also that the appellant was not given some of the prosecution witness statements in contravention of Section 50 of the Constitution.

Counsel further argued that the prosecution did not bring or tender evidence which proved the case against the appellant beyond reasonable doubt. Counsel emphasized that the Investigating Officer said he visited the scene and found no tangible evidence of the incident. In addition, exhibit 1 the P3 form contained entries that there were no torn clothes or blood stains and probable weapon was said to be penile but without elaborating what informed such a conclusion. Counsel emphasized that the examination of PW1 to find out whether she had sufficient intelligence and knew the importance of saying the truth was scanty and that she contradicted herself by saying she was a Muslim and later said she was a Christian. Counsel said that the evidence of the complainant PW1 was highly prejudicial to the appellant. Counsel referred to a case of **Dominic Kibet -vs- Republic 2013 EKLK**.

Learned prosecuting counsel Mr. Okemwa submitted that cases of defilement attracted a lot of public interest. However there were inconsistencies in the evidence and the charge sheet. It was not clear what the age of the complainant was. Counsel thus conceded to the appeal.

In brief the prosecution evidence is that on the 5th of June 2013, the complainant PWI was herding goats together with two other children one called K and the other one called J. She was in the bush. K and J left her and went fishing in a nearby pond when the appellant Kingori appeared and tied the goats removed the clothes of the complainant, made her lie down and inserted his penis into her vagina. The complainant shouted but no help came. Thereafter the appellant told her in Kiswahili not to tell anybody otherwise he would slaughter her using a machet. Shortly thereafter K came.

Sometimes after the incident the complainant while at home went for a short call and discovered that her urine was not coming out and she disclosed the incident to her guardian E K G PW3 who took her to hospital and a report was made to the police. The complainant was sent for medical treatment and a P3 form was filled. The appellant was then charged with the offence.

When put on his defence, the appellant gave sworn testimony. He said he was a driver but complained that the arresting officer, the Investigating Officer, the doctor and the complainant were not called to testify.

On the evidence on record, the trial magistrate found that prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced.

This is a first appeal. As a first appellate court I am required to re-examine all the evidence on record and come to my own conclusions and inferences. I am required to be mindful of the fact that I did not have the opportunity of seeing witnesses testify to determine their demeanor – see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated all the evidence on record. I have considered the submissions on both sides.

Counsel for the appellant has argued the appeal on several grounds, the main ground being that the prosecution did not prove its case against the appellant beyond reasonable doubt.

With regard to age, the counsel for the appellant has argued that though the charge sheet stated that the complainant was 11 years her evidence was that she was 13 years old.

I observe that the charge sheet was dated 13th June 2013 and the complainant PWI testified in March 2014. There was thus a difference of almost one year from the time the offence occurred to the time the complainant testified in court. The difference would be about one year. I agree as stated by counsel for the appellant that the age of the complainant in cases of defilement is very crucial. Firstly it has to be proved by the prosecution that the complainant is below the age of 18 years. Secondly, the age bracket has to be proved because the severity of the sentence is determined by the age of the complainant.

Assuming that the complainant was 13 years when she testified, in my view that would not affect culpability on the appellant if sexual intercourse was proved. Even if the complainant was 13 years on the date of the incident, instead of 11 years, that in my view would be a curable defect and the conviction would be for defilement of a girl of 13 years, and the sentence would follow appropriately.

As I have said above, the major ground of appeal is with regard to proof of the crime. The incident occurred in broad day light. The complainant and the appellant knew each other before. However the complainant appeared to be a shaky or unreliable witness. She stated clearly when being examined for her intelligence and understanding of saying the truth, that she was a Muslim attending Madarasa classes. She later changed and said she was a Christian attending Jewish Church. In my view that contradiction is not a small one. A witness could start by saying that he or she is a Muslim and later clarify he or she is a Christian. However one cannot say that she is a Muslim attending Madarasa and in the vein time say that she is a Christian attending Jewish Church. That evidence by the complainant showed that she was not a reliable witness.

In addition to the above, PWI the complainant clearly stated that penetration did occur. She was treated shortly after the incident. P3 form report was also filled and produced by the Clinical Officer Macdonald

Kigambi PW5. The entries in the P3 form show that the complainant was slightly injured with a laceration of the upper lip. The approximate age of the injury was 5 days. The P3 form was filled on 10th June 2013 which tallies with the date of the incident which was 5th June 2013.

However this injury was not an injury to the private parts of the complainant. It was an injury on the upper lip. It thus cannot be said that the weapon used to cause the slight laceration on the upper lip was penile.

With regard to Section (c) of the P3 form which covers the particular findings on sexual offences, what was described by the Clinical Officer was “hyperemic labia minora” which he described in evidence as reddishness in her vagina. There was also a whitish discharge. The conclusion made by the clinical Officer in the P3 form is as follows:-

“from the above findings, there is a high possibility that the minor was defiled.”

In my view the above remarks by the Clinical Officer did not agree or tally with the evidence given by the complainant PW1 that there was actually sexual intercourse. The conclusion of the Clinical Officer is also far from establishing that actually sexual intercourse amounting to defilement occurred. High possibility the minor was defiled cannot be said to be proof of defilement.

It is quite possible that the appellant was implicated in this matter without cogent evidence. Other than the complainant no one witnessed the incident. The complainant’s evidence was shaky. In my view therefore the prosecution did not prove the offence against the appellant beyond reasonable doubt. I have to give the benefit of the doubt to the appellant.

For the above reasons, I allow the appeal. I quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 29th day of September 2016.

GEORGE DULU

JUDGE