



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 73OF 2015
ANTONY JOSEPH KIBITHE..... APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 184of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima(RM) on 10th November 2015)

JUDGMENT

INTRODUCTION

[1] The Appellant herein, James Mwamba Mwandoe, was convicted of the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment. He had also been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

[2] The particulars of the charges were as follows:-

“On the 19th day of March 2015 at around 11.00 am at [particulars withheld] within Taita Taveta County, intentionally and unlawfully caused your penis to penetrate the vagina of S I a child aged 3 years.”

ALTERNATIVE CHARGE

“On the 19th day of March 2015 at around 11.00 am at [particulars withheld] within Taita Taveta County, intentionally and unlawfully caused your penis to penetrate the vagina of S I a child aged 3 years.”

[3] Being dissatisfied with the said judgment, on 25th November 2015, he lodged a Petition of Appeal. The Memorandum of Grounds Appeal were **THAT**:-

- (1) The Hon Magistrate erred in law and fact by considering the evidence of the Prosecution side without a thorough investigation in this case.**
- (2) The single evidence of pw 1 was not sufficient to have given him a sentence of life imprisonment.**
- (3) The learned trial magistrate erred in both law and fact in convicting him on evidence that**

did not meet the threshold of proof beyond any reasonable doubt.

(4) The learned trial magistrate erred in both law and fact in not taking into account the submissions that he made.

(5) The resident magistrate erred by not considering that he was not guilty and that he was the one who reported the matter to the police station without being arrested.

[4] The Appellant's Written Submissions were dated and filed on 11th July 2016, His response to the State's Written Submissions were dated and filed on 28th July 2016. The State's Written Submissions were dated 20th July 2016 and filed on 21st July 2016.

[5] When the matter came up on 28th July 2016, both the Appellant and counsel for the State asked this court to deliver judgment based on their respective Written Submissions which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

[6] As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

[7] It appeared to this court that the issues that had been raised in the Memorandum Grounds of Appeal were more or else related. However, after a careful perusal of the parties' respective Written Submissions, the court concluded that the issue that had been placed before it for determination was really whether or not the Prosecution had proved its case beyond reasonable doubt.

[8] However, as several issues were raised in the parties' respective Written Submissions, this court dealt with the same under the different heads shown hereinbelow.

I. PROOF OF THE PROSECUTION CASE

A. PROOF OF THE CHILD'S AGE

[9] The Appellant submitted that despite the Learned Trial Magistrate having directed that the child be taken for an age assessment on 15th June 2015, this was never done. On its part, the State asked the court to take judicial notice that a Notification of Birth precedes the issuance of a Birth Certificate and consequently the same was proof of the child's age.

[10] While the question of whether or not a Notification of Birth that preceded the issuance of the Birth Certificate was not an issue for determination herein, this court noted the provisions of Section 10 of the Births and Deaths Registration Act Cap 149 (Laws of Kenya) make it mandatory for a birth not only to be notified but also to be registered.

[11] The said Section provides as follows:-

“Every person notifying the birth of a child shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.”

[12] Having said so, it was the considered opinion of this court a court may accept the age of a child as given in a Notification card, postnatal clinic card, baptismal card or any other document that alludes to a child's age or through the oral evidence of a person who has knowledge of when such a child was born provided that such evidence is not rebutted by an accused person.

[13] In her testimony, D H I (hereinafter referred to as "PW 2") who was said to have been the mother of the child stated that the said child was aged three (3) years. She relied on the aforesaid Notification of Birth. Dr Walid Warai (hereinafter referred to as "PW 1") also adduced in evidence a P3 Form that showed that the child's age was three (3) years. The Appellant did not rebut or challenge this evidence.

[14] It was not clear whether that was the reason why the Learned Trial Magistrate accepted the child's age as three (3) years. Be that as it may, the said Learned Trial Magistrate's decision not to revisit the issue of the assessment of the child's age as he had ordered on 15th June 2015, a position that was rightly pointed out by the Appellant, was indicative of a great omission on his part having initially found it necessary to refer the child's age to be assessed.

[15] As the Appellant raised the issue of the age assessment at this appellate stage, the court could not ignore the same. This court observed that the said omission indeed pointed to an irregularity in the manner the Learned Trial Magistrate proceeded on the issue of the child's age as he did not even address his mind to the age assessment at the time of writing his decision.

[16] Proceeding on the assumption that the child's age was not rebutted by the Appellant herein as he did not raise the issue during the trial, it was incumbent on it to adduce evidence that would have at least showed the child's age.

[17] It was not lost to the court that PW 2 testified that her child's name was S M. PW 1 also produced a Post Care Report which he said was for I S.

[18] However, a careful perusal of the Notification of Birth No 518848 showed that the same belonged to one "S I M." This was an issue that the Appellant also raised in his Written Submissions. There was no evidence that was led by the Prosecution to indicate whether or not "S I M" and "S" I referred to one and the same person. This was of utmost importance because throughout her testimony, PW 2 referred to the child as "S."

[19] It cannot be gainsaid that the age of a child in defilement cases is of utmost importance as it has a direct bearing on the length of sentence that an accused person who is convicted of such an offence will be given. Not only should proper proof of the child's age be given in any of the ways that had been stated hereinabove, such proof must relate to the child in question.

[20] Failure by the Prosecution to clarify the discrepancy in the names of the child who was alleged to have been defiled and the said "S I M" led this court to find that it was unsafe to convict the Appellant herein for the simple reason that the name in Notification of Birth did not tally with S M who was alleged to have been defiled by the Appellant herein.

[21] On this ground alone, this court found that there was merit in Ground (3) of the Appellant's Memorandum of Appeal.

B. THE APPELLANT'S AGE

[22] The Appellant also argued that when he took the plea on 20th March 2015, it was directed that his age be assessed. When the matter came before Hon S.M. Wahome who was dealing with the matter at the time, the Prosecutor informed the court that he was nineteen (19) years of age. The State did not submit on this issue.

[23] A perusal of the proceedings did in fact show that the Appellant had been referred for an age assessment. The said Hon S.M Wahome must have had good reason why he felt that the assessment was

important as he had the benefit of observing the Appellant in court. This was not done and if it was, the Prosecution did not present any documentary evidence to prove his age.

[24] This court had due regard to the provisions of Section 8(7) of the Sexual Offences Act Cap 62A (Laws of Kenya) that stipulate as follows:-

“Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act”.

[25] It is therefore evident that whereas a life sentence is mandatory for a person convicted of defiling a child under the age of eleven (11) years, it is not a sentence that can be meted to an offender who is below the age of eighteen (18) years. Indeed Section 191 of the Children Cap 141 (Laws of Kenya) provides that in spite of the provisions of any other law and subject to the said Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in several ways that exclude life imprisonment.

[26] Failure to show proof of the Appellant’s age at the time of the alleged commission of the offence when Hon S.M. Wahome had found it to have been a critical issue therefore dealt a fatal blow to the Prosecution’s case. For the reason that it was not clear to this court how old the Appellant was, it was of the view that it would also be unsafe to uphold his conviction in this matter.

C. EVIDENCE BY THE PROSECUTION WITNESSES

[27] The court would have stopped at the aforesaid conclusions as it was evident that the Appellant’s conviction could not be sustained. However, this court found it necessary to re-evaluate the evidence of the witnesses for completeness of record.

[28] PW 1 testified that the child was examined about an hour after the alleged defilement and after a high swab of the child was taken, no sperms were seen. However, there was presence of white discharge which corroborated PW 2’s evidence that there was liquid like substance coming from the child’s genitalia.

[29] She was emphatic that the Appellant was the only neighbour where they were staying and that when she went to the lodging where he was staying, she opened the door and saw Samira crying. She later said that Samira was inside the Appellant’s room and that he was washing clothes inside his room. On her part, during cross-examination, No 2011345116 APC Peris Shamba (hereinafter referred to as “PW 3”)of the Maungu AP Camp where PW 2, the child went together with the Appellant immediately after the incident, said that there were other people who lived near where PW 2 stayed. This was a contradiction in their evidence and could have led this court to interrogate further if another person other than the Appellant could have committed the alleged offence.

[30] However, that was water under the bridge and no value would be added in analysing the evidence further for the reason that as the child who PW 2 said was crying was called Samira and the court had found hereinabove that it was not certain whether she was one and the same person as “S I M”. Indeed, this court was hesitant to conclusively make a determination as to the child the Appellant was alleged to have defiled in view of the disparity in the names.

[31] In this regard, the court found Grounds Nos (1) and (2) of the Appellant’s Grounds of Appeal to have been meritorious.

II. CONCLUSION

[32] Bearing in mind this court’s observations regarding the identity of the child who was allegedly defiled and the uncertainty of the Appellant’s age, this court came to the firm conclusion that the Prosecution did not prove its case beyond reasonable doubt.

[33] The failure by the Prosecution to produce the requisite documents to identify the child who was alleged to have been defiled was a material omission that went to the root of its case. Failure by the Learned Trial Magistrate to insist on documentary proof of the Appellant's age when the same had been ordered by another magistrate was also another material omission.

[34] As the grave omissions were by both the Prosecution and the Learned Trial Magistrate, this court was not persuaded to find that this was a good case for it to order a Re-trial as such a re-trial would be merely giving the Prosecution a second bite at the cherry, which is not an applicable ground when ordering a re-trial.

[35] Grounds of Appeal Nos (4) and (5) were subsumed in the other grounds and hence were not addressed separately.

DISPOSITION

[36] For the foregoing reasons, this court was persuaded to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same.

[37] The upshot of this court's Judgment was that the Appellant's Petition of Appeal that was lodged on 25th November 2015 was merited and the same is hereby allowed. The court therefore hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

[38] It is so ordered.

DATED and DELIVERED at VOI this 27th day of September 2016

J. KAMAU

JUDGE

In the presence of:-

Anthony Joseph Kibithe..... Appellant

Miss Anyumba.....for State

Ruth Kituva.....Court Clerk