



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 268 OF 2010

JACKSON NDAMBUKI MUNUVE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An Appeal arising out of the judgment and sentence of Hon. S. Gacheru RM in Sexual Offences
Case No. 20 of 2008 delivered on 21st May 2010 at the Chief Magistrate's Court at Machakos)**

JUDGMENT

The Appellant was charged with and convicted of two counts of defilement the offence of defilement contrary to section 8(1)(3) and section 8(1)(4) of the Sexual Offences Act. The alleged offences took place on 3rd October 2008 at [Particulars withheld] in Machakos District within Eastern Province, and the Appellant was alleged to have intentionally and unlawfully committed an act which caused penetration with M N M aged 15 years, and also with M. T M aged 16 years. The Appellant was also charged with two alternative charges of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act by touching the private parts of the two named complainants.

The Appellant pleaded not guilty to the charges on 5th November 2008. He was tried, convicted of the offence and sentenced to serve 20 years imprisonment for each of the main counts, which sentences were to run concurrently. The Appellant has preferred this appeal against the said conviction and sentence. He availed Amended Grounds of Appeal and written submissions to the Court during the hearing of the appeal on 25th November 2015.

The Appellant's first ground of appeal is that the matter in the trial Court was prosecuted by an unqualified prosecutor who was neither gazetted nor above the rank of Assistant Inspector of Police, contrary to section 85(2) of the Criminal Procedure Code.

Secondly, a number of the Appellant's grounds of appeal touched on the evidence tendered by the prosecution before the trial court. The Appellant in this regard argued that the decision of the trial Court was made in the absence of the evidence of vital and crucial witnesses' evidence. The potential witnesses who the Appellant alleges were not called to testify were the aunt of PW1 the complainants alleged to have visited on the material day, and the lady who found the complainants after the alleged defilement.

Reliance was placed on the decision in **Bukenya vs Uganda (1972) E.A. 549** for the position that the

prosecution should make available all the witnesses necessary to establish the truth. The Appellant also alleged that the evidence tendered was contradictory and was not of the required weight to sustain a conviction. Further, that the trial court shifted the burden of proof to Appellant.

Lastly, the Appellant urged that his alibi evidence was dismissed without being subjected to the test, and the prosecution should have called the hotel worker that the Appellant testified he was with on the material day as a witness.

Ms Rita Rono, the learned prosecution counsel, opposed the appeal in written submissions filed on 4th February 2016. It was urged therein that the prosecution had proved its case to the required standards. It was further submitted that the prosecutor one PC Muyeji was duly gazetted, and a copy of the gazette notice being Legal Notice No 172 of 2010 was provided.

It was also contended that the charges against the Appellant were proved beyond reasonable doubt by the evidence of PW1 and PW2. On the arguments about some witnesses not being called, the prosecution submitted that the testimony of a complainant is enough to convict without corroboration in sexual offences. Lastly, it was submitted that the Appellant's alibi defence was an afterthought, and that he did not call any witness to verify his allegations.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called seven witnesses. PW1 and PW2 were M N M and M T M who were both complainants. Their evidence which was on the events of the day of the alleged defilement, will be subjected to analysis later on in this judgment. D M M (PW3) who was the Assistant Chief of Muumandu Location; Sgt Kilonzi Ndathya (PW4), who was attached to the Muumandu's Chief's camp in Kalama Division; and PC David Kiprono (PW6) who was attached to the Machakos Police Station and the investigating officer in the case, all testified as to the report of the alleged defilement, the arrest of the Appellant and the procedures that followed thereafter including those of taking the complainants for medical examination. The last two witnesses were Dr. Judith Kimuyu (PW5) and Dr. Emily Katunge Mutunga (PW7) who testified as regards the results of the medical examination of the complainants, and age assessment of the complainants respectively.

The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant made an unsworn statement and did not call any witness. He testified that on 29th October 2008 he was working at the hotel where he was employed as a cook at Mutulani market until 9.30 pm, and that he also went back to the hotel the next day and worked from 5am to 8am and left for his home at 10.00am. Further, that he was then told by his employer to go and tell PW2's mother that the complainants had been found, and that he was arrested when he went to Muumandu police post to inquire about the complainants. The Appellant also stated that he was threatened that he would be lynched by the crowd that had gathered by the Assistant Chief, as a result of which he confessed to the offences.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the substantive issues raised in this appeal are firstly, whether the Appellant's conviction for the offence of defilement was based on sufficient evidence, and secondly, whether the defence by the Appellant was given due regard. I note in this respect that the issue raised by the Appellant as to the qualification of the prosecutor was not raised in the trial court, and cannot be raised on appeal, as this entails the introduction of new evidence which cannot be subject to the process of examination at this stage.

On the first issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

PW1 and PW2 gave evidence in this regard that on 29th October 2008 they went to visit PW1's aunt, when the Appellant came and told them that their parents were waiting for them at Katua market. When they reached Katua market the parents were not there, and the Appellant started hitting PW1 and PW2 and led them to his house where he told them to sleep on the bed and locked them in. He later came back and forcefully removed their underpants and inserted his penis into the vagina of PW1 once, and three times for PW2. The Appellant then chased them away from his house in the night, and the complainants met a woman who took them to Muumandu police post where they reported the matter, and were later taken for medical examination.

The Appellant alleged that there were inconsistencies in the evidence of PW1 and PW2. This Court did note a few inconsistencies as regards the events surrounding the alleged defilement. PW1 testified that her aunt who they were visiting was called K while PW2 testified that the said aunt was called N. PW1 testified that the Appellant who was her uncle came to the aunt's house, which is when the aunt told them that PW1's father had said they go home. PW2 on the other hand testified that the aunt was called on the phone, and told them that the Appellant had been sent by their parents to pick them up.

In addition, PW1 testified that after the alleged defilement, the Appellant chased them away from his house in the night, and that they then went to a woman's house who escorted them to Muumandu Police post. PW2 on the other had testified that at about 3.00am the Appellant chased them upto Nzauni area, and that they stayed by the roadside until dawn and as they walked they met a woman and told her what had happened , and the said woman escorted them to Muumandu AP camp where they reported the matter.

The effect of these inconsistencies is that it affects the credibility and reliability of PW1 and PW2's evidence, which thereby requires corroboration. The evidence of PW5 who conducted a medical examination on the complainants was inconclusive in this respect. It was her evidence relying on the medical reports and P3 form she filled after examining the complainants that the genitalia was normal with no visible injuries, there was no bleeding or discharge noted and that their hymen was not intact.

The ages of PW1 and PW2 were indicated by PW7 after assessment as 15 and 16 years respectively. It is noted in this respect that on 8th January 2010 while PW6 was giving his evidence-in-chief, the prosecution applied to amend the charge sheet for the age of the second complainant to read 15 years instead of 16 years. The trial magistrate allowed the amendments, and the trial proceeded with the cross-examination of PW6. The prosecution then applied to recall PW2, which application was allowed, and PW2 was recalled to give further evidence about her age.

Section 214(1) of the Criminal Procedure Code in this regard provides for the rights of an accused person upon the amendment of a charge as follows:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

The Appellant did not plead to the amended charge and no directions were given to this effect by the trial magistrate, and the proceedings that followed after the amendment of the charge in the trial court were to this extent irregular. As the age of a victim of a sexual offence is a material factor in the kind of sentence that will be imposed in the event of a guilty finding, this irregularity is one which prejudiced the Appellant and cannot therefore be cured by section 382 of the Criminal Procedure Code. I therefore find for the above reasons that the conviction of the Appellant on the basis of the evidence before the trial Court and irregularity in the proceedings was not safe, and allow the appeal.

I will briefly comment on the third issue raised by the Appellant which is that his defence of alibi was not given due regard. The defence of alibi is to the effect that an accused person was not at the scene of the crime at the time the crime was alleged to have been committed. The defence by the Appellant in this respect is that on the night of 29th October 2008 when the alleged defilement took place, he was in his house, which is the same place where PW1 and PW2 testified that they were defiled. In addition, an accused person is required to raise this defence at the earliest possible opportunity to give the prosecution time to respond to it. Therefore there was no defence of alibi that was effectively raised by the Appellant, and the finding by the trial Court that his defence was a mere denial was not erroneous.

I accordingly quash the convictions of the Appellant for the two counts of defilement, contrary to section 8(1)(3) and section 8(1)(4) of the Sexual Offences Act respectively. I also set aside the sentences of twenty years imprisonment for each count imposed upon the Appellant for these convictions, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 27TH DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE