



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 107 OF 2013

AMOS MBUGUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the Criminal case No 529 of 2012 of the Senior Principal Magistrate's court at Mariakani- Hon. L. K. Gatheru – R M)

J U D G M E N T

AMOS MBUGUA (herein after referred to as “the appellant “) was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the Sexual Offences Act, No 3 of 2006 in the main count.

The particulars of the offence are that;

“On the 27th day of December, 2012, at around 09.00hours at [particulars withheld] within Kwale County the appellant unlawfully and internationally caused his penis to penetrate the vagina of RK a child aged 10 years”.

He was also charged with the offence of indecent act contrary to section 11 (1) of the Sexual Offences Act No 3 of 2006 in the alternative charge. The appellant took a plea of NOT GUILTY on both counts. He was subsequently tried and convicted on the main count.

He was then sentenced to serve fifteen (15) years imprisonment. Being aggrieved, the appellant appealed against the conviction and sentence on the following amended grounds of appeal:

- (a) That the learned trial magistrate erred in law and fact in convicting the appellant while relying on a defective charge thus contravening sections 89 (5) , 134, 137 (a) (i) (ii) , 214, 276 (i) and 276 (2) of the Criminal Procedure Code.
- (b) The charge sheet was not duly signed and rubber stamped to meet the required standards in the Criminal Procedure Code, the above being contrary to section 10(18) of the police Act.
- (c) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the AGE of the complainant was not ascertained to the required standards of section 8 (4) of the Sexual Offense Act.
- (d) That the learned trail magistrate erred in law and fact in convicting the appellant without considering that the BURDEN OF PROOF in the present case was not established beyond

reasonable doubt contrary to section 36 of the Sexual Offences Act section 109 of the Evidence Act and Articles 159 (2) (a) and (d) of the Constitution.

(e) That the learned trial magistrate erred in law and fact in convicting the appellant without noticing that CREDIBLE WITNESS who were subsequently mentioned in the present case were never exhibited in court contrary to section 144 as read together with section 150 of the Criminal Procedure Code.

(f) That the learned trial magistrate erred in law and fact in convicting the appellant without giving due weight to the ALIBI DEFENCE advanced by the appellant thus contravening section 212 as read together with section 235 of the CPC.

(g) That there was a grudge between the father of the complainant and the appellant on the issue of a quarry.

PROSECUTION'S CASE

The prosecution's case was that PW1, R K, who is the complainant in this case and a pupil at **[particulars withheld]** primary school in standard 6, told court she was born on 15.8.1995. It is said that she was on her way home from school where she had gone to clear up on 27.12.2012, when she met the appellant who she knew only by appearance. That the appellant held her buttocks and legs and told her that he wanted her since he was not married. He also told her that he was missing her a lot and loved her. He then pulled her into his house where he threw her onto the bed where she fell on her back. The appellant proceeded to remove her pants and his trousers, then despite her resistance, laid on her while threatening kill her with a panga if she screamed. That he had a panga which he used to use for his work.

Pw1 said that the appellant had sex with her and since it was her first time, she felt pain in her stomach and hips that she could not bend or sit. She went home and reported the matter to her parents after the appellant, who had caught her at 9.00 a, released her at 10.00 am. Her father, who was at the shop accompanied her to look for the appellant. They went to his house and Pw1 identified him to her father as the person who she had found in the house. Pw2, the father to the complainant (Pw1) asked the appellant what he had done and he lifted a panga upward. Pw2 managed to hold him. And he dropped the panga and ran away towards the village. Pw2 shouted and people gathered as he entered someone's house where he locked himself. He was removed by the people who had run after him and they beat him up. They went to the Taru police station after being taken to Samburu Health centre by her mother, Pw3. The complainant was issued with a P3 form which was filled after she was examined at Samburu health center by Pw4, Rose Mwakao, a clinical officer, on 27.12.2012. Pw4 confirmed that she examined Pw1 who had gone to her with allegations of having been defiled. That she found she was 16 years old and had tenderness on the neck. She established that the complainant's hymen was broken and she had whitish discharge with blood stains on vaginal examination. She also said that laboratory investigations and vaginal swabs revealed spermatozoa and saw blood cells although syphilis syphilicon UDRL and pregnancy test were negative and so was HIV test. Pw4 produced the P3 form which she had filled and signed as exhibit P1.

Pw IV No 233931 Inspector Paul Njuguna gave evidence of how a group of people frog-matched a suspect to Taru police station where he was working as the Deputy OCS, in charge of crime on 27.12.2012 at around 11.00 am. He arrested the suspect who he sent to hospital for treatment since he had injuries. He recorded the statement of the complainant and issued her with a P3 form. He was then led to the house where the offence was alleged to have been committed near **[particulars withheld]**.

Pw VI, No. 42700 Corpral Michael Kimani of Taru police station was given the clinical health card by the complainant's parents showing that the complainant was born on 15.8.1995. He evidenced that the card as exhibit P2.

Upon analyzing the evidence by the prosecution's witnesses, the trial magistrate held that a prima face case had been established against the appellant. He put him on defence under section 211 of the Criminal

Procedure Code.

The appellant opted to give unsworn statement in defence and called no witness.

DEFENCE CASE

In his unsworn evidence, AMOS MBUGUA, the appellant told court that on 26.12.2012, he was working at Mzee Nyaga's land, when Mwabenge went there complaining that they had paid the 6 feet first and they should pay for 10 feet. That Mzee Nyaga who was collecting hard core on the land asked them why they had not taken the initiative to quarry the stones. That Mwabenge then told the appellant that since he was a foreigner, he should pay for his 10 feet first instead of making another rich. That Nyaga defended the appellant saying it was his hard work and he was getting Ksh 6,000 per lorry. He then asked him to continue with his work which the appellant did. He closed at 1.00pm. And on 27.12.2012, at 7.30 am, he took a buyer to the quarry and measured stones of about 1,200 feet. They calculated and found he was supposed to pay Kshs 30,000 out of which he paid him ksh 3,000. He returned from shopping at the market and was preparing to go for work when Pw2 came in with some people and started beating him up. They took his money and he shouted for help. People came and he was taken to the police station. He denied that he defiled the complainant.

At the hearing of the appeal, the appellant filed written submissions which he said he would rely on entirely. He submitted that;

- (i) The charge sheet upon which the learned trial magistrate based his findings to convict and sentence the appellant in this case was fatal and defective since it was not duly signed and rubber stamped by the OCS or the OCPD of the police station where the report was made.
- (ii) The age of the complainant must be proved beyond reasonable doubt to enable legal sentence to be passed. The evidence of Pw1, Pw2 and Pw5 clearly presents a contradiction as to when the complainant was born.
- (iii) The medical evidence adduced was insufficient as it did not meet the principles of section 36 of the Sexual Offences Act.
- (iv) There were two witnesses namely Sergeant Mutiru and PC Ogolla who were mentioned by Pw4 who ought to have been compelled to attend court and clear the doubt in the prosecution evidence hence a contradiction of section 150 of the Criminal Procedure Code.
- (v) He raised an alibi defence which was adequate enough to vindicate him but was never given consideration by the trial magistrate. He said that the prosecution did not investigate, challenge or rebut his evidence as required by the provisions of section 212 as read with section 235 of the Criminal Procedure Code.

On the other hand the state, represented by the learned counsel, M/s Mbaya in opposing the appeal submitted that;

- (i) Failure to sign a charge sheet by the OCS does not render the same defective because this does not touch on the material conduct of the charge sheet or elements as required by section 134 of the Criminal Procedure Code and neither did it lead to any miscarriage of justice against the appellant.
- (ii) An original card was produced in evidence as exhibit P16 which is conclusive evidence to ascertain complainant's age.
- (iii) That the prosecution needed to prove penetration and not who the spermatozoa that was seen on vaginal swab belonged to.
- (iv) It is upon the prosecution to determine which and what number of witnesses they need to call

as per the provisions of section 143 of the Criminal Procedure Code, to achieve a conviction.

(v) The trial magistrate did consider the appellants defence. The learned state counsel invited court to dismiss the appeal.

DETERMINATION

In determining the appeal before me, I have considered the amended grounds, the written submissions filed by the appellant and oral submission by the learned state counsel arguments before me and cited authorities and the law.

I have however cautioned myself, that my duty is to carefully re examines, re-evaluate and analyze the evidence on record afresh to arrive at own conclusion. I have further cautioned myself that I did not have the benefit of seeing the witnesses and observing their demeanor. This position has been renounced in numerous cases in the Kenyan courts following the case of OKENO VRs Republic. (1957)E.A 32.

In Odhiambo Vrs Republic, Criminal Appeal No 280 of 2004 (2005) KLR, it was cited that;

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re evaluate and assess 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 demeanor”

In the first ground of appeal, the appellant submitted that the charge sheet was fatal and incurably defective. This is because the charge sheet was not duly signed and rubber stamped by the OCS or the OCPD of the police station where the report was made.

I have looked at the charge sheet herein in light of section 134 of the Criminal procedure Code. The sections requires inter alia that

“every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”

The charge and particulars thereof have been reproduced at the beginning of the judgment Clearly, they comply with the provisions of section 134 of the Criminal Procedure Code as they are simple and straight forward. In fact there is no requirement in the provisions for the OCS or OCPD’s signature and rubber stamp of the specific police station. I have also perused the charge sheet in the original court record and find that the same contains a signature of the officer in charge, Taru police station and a rubber stamp of the said police station dated 25.12.2012. I have also looked at section 137 (a) (i) and (ii) of the Criminal Procedure Code which are part of the rules set by this framing charges and information. Section 137 (a) (i) of the Criminal Procedure Code provides that;

“a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence”

Sub section (c) (ii) states;

“the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all essential element of the offence, and if the offence charged is one created by the enactment shall contain a reference to the sections of the enactment creating the offence”

Again, these rules have nothing to do with the requirement of the signature of the OCS or OCPD and rubber stamp of the police station.

In fact as submitted by the learned state counsel, there was no injustice suffered by the appellant. There was also no need to have the charge amended and so sections 124 (1) and 276 (1) of the criminal Procedure code need not have been invoked by the trial magistrate.

In view of the foregoing, the charge sheet is not fatally and incurably defective and dismiss this ground of appeal.

The second ground relates to the issue of whether the AGE of the complainant was not ascertained to the required standards of section 8 (4) of the sexual Offences Act.

The particulars of the charge show the age of the victim as 16 years as at 27th December, 2012 when the offence was alleged to have been committed. The complainant told court that she was born on 15th August, 1995. Her father, when testifying Pw2, on 17.2.2013, said that the complainant was 17 years old having been born in 1995. He said that a copy of immunization card was in court and was showing she was born on 10.8.1995.

Her mother, Pw3 told court that her child was born on 25.5.1995 and said that the clinic card was not in court.

Pw VI, No 42700 corporal Michael Kimani produced the original clinical health card in the name of the complainant showing she was born on 15.8.1995(Exhibit P2)

In sexual offences, age of a victim is a critical issue that must be proved because imprisonment of the culprit is determined by this.

While there are discrepancies in the day and month which the victim was born, the year according to all witnesses is 1995. But of most value is the clinical Health card (exhibit P2) which is a medical document and it clearly shows that the victim was born on 15.8.1995, putting her age at the time of the offence at 17 years 4 months. The learned trial magistrate, in his judgment considered the discrepancies in the date given by the prosecution's witnesses and held quite correctly in my own view, that the appellant was not prejudiced by this since,

“by definition she was thus a child in capable of giving consent “to sexual intercourse”

In the third ground of appeal, it is the appellant's contention that the prosecution did not prove their case against him beyond reasonable doubt contrary to section 36 of the Sexual offences Act, section 109 (2) (c) and (d) of the constitution.

According to the appellant in his submissions, from the evidence of Pw5, the clinical officer which indicated that the complainant was examined and specimen and vaginal swap taken revealed blood and spermatozoa respectively which he believed should have been subjected to DNA testing to confirm who they belonged to, but were not as per the provisions of section 36 of the Sexual Offence Act.

Section 36 of the Sexual Offences Act provides that;

“Notwithstanding the provisions of section 26 of the Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed and offence”.

It will be noted from this provision that the requirement of forensic or other scientific testing by the court is not mandatory. It may be necessitated in circumstances the court may deem fit.

In the instant case, what needed to be proved by medical evidence was penetration and this was done by

the evidence of Pw5, the clinical officer through the P3 form (Exhibit P1)

As for the fourth (4th) ground, the appellant stated that credible witnesses who were mentioned in the case were never called to testify. In his submissions he stated that it came out in evidence of the Pw4 that Sergeant Muturi accompanied him to hospital and PC Ogolla was the investigating officer. He felt that they should have been compelled to come and testified on him, what transpired on the alleged day when the offence was committed and by who.

In analysing the entire evidence by the prosecution, I find that the witnesses who were called adduced evidence which sufficiently proved their case without leaving any gaps or un answered questions. I find that there was no gap or unanswerd questions which required either sergeant Mutimu or PC Ogolla or any other witness to be summoned to file in the same. It was clear why the appellant was arrested and why he was escorted to hospital, hence the requirement under section 150 of Criminal Procedure Code was unnecessary.

As for the fifth (5th) ground where the appellant raised the issue of his alibi defence not being given due weight.

Judgment signed, dated and delivered this 27th day of October 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr Ayodo for the state

Appellant in person

C/clerk- Kiarie