



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 43 OF 2012

FELIX KYULE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 310 of 2011 by

Hon. S.K. Mutai, SRM on 16/3/2012)

J U D G M E N T

1. **Felix Kyule**, the appellant was charged with defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the 25th day of November 2011 at about 5.00am in **Mutomo** within **Kitui County** defiled **F H K** a girl aged **17 years**.
2. In the alternative charge, he was charged with **Indecent Act** of a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the 25th day of **November 2011** at about 5.00am in **Mutomo** within **Kitui County** committed an act of indecency with **F H K** a girl aged **17 years** by touching her private parts namely vagina and breasts.
3. He was tried, convicted on both counts and sentenced to serve **fifteen (15) years** imprisonment.
4. Being aggrieved by the conviction and sentence thereof, the appellant in the amended petition of appeal dated 5th September 2013 appeals on grounds that the learned trial magistrate erred in law and fact when he; convicted the appellant on uncorroborated and contradictory evidence; held that the appellant was properly identified by the complainant having relied on hearsay evidence; failed to evaluate evidence of the complainant who told the police she was 24 years old while in court she alleged she was 17 years old and there was no birth certificate to rely on; relied on evidence of a clinical officer who examined the complainant three (3) days later; and when he imposed upon the appellant a sentence of 15 years when there was no sufficient proof tendered in court.
5. The case as presented by the prosecution was that on the 24th/25th November 2011 PW1, **FHK** in the company of PW3, **MMK** boarded a motorbike operated by the appellant. The appellant grabbed her, chased away her sister and took her to the bush. He strangled her and defiled her. An hour later she escaped and was rescued by a certain lady. She reported the matter to the police. She was examined by a medical practitioner and the P3 form was filled. The appellant was arrested and charged.
6. When put on his defence, the appellant stated that he worked as a boda boda operator. On the 24th

November 2011, he carried a man with two (2) girls to **Mang’etheni**. It had rained heavily. They had an accident (fell down). The man started quarrelling and the complainant (PW1) started screaming. People answered her call of distress. The person ran away and people held him. The complainant alleged that he had defiled her. He argued that no sperms were found in the complainant. He was framed up.

7. At the hearing of the appeal Counsel for the appellant relied upon written submissions.

8. The learned State Counsel, **Mr. Mwangi** opposed the appeal. He narrated evidence as adduced in the Lower Court. He stated that there was proof of penetration of the complainant following medical examination; the appellant was positively identified; and the issue of age was not raised. He urged the court to confirm the conviction. In response thereto Counsel for the appellant, **Mr. Musembi** stated that the issue of age was a ground of appeal.

9. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (*See Okeno versus Republic [1972] E.A. 32*).

10. With regard to ground 1 of the appeal, it is argued that evidence adduced was not corroborated and was contradictory. In the case of *Mohamed versus Republic (2008) 1 KLR (G & F) 1176*, the Court of Appeal held thus:

“It is now settled that courts shall no-longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is telling the truth”.

The court went on to define what corroboration is. It stated that:

“The Court of Appeal has reiterated that an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only that the evidence that the crime has been committed but also that the accused committed it.”

11. In another case of *Mukungu versus Republic [2003] AHRLR 175 (Ke CA 2003)*, It was stated that:

“...the requirement for corroboration in Sexual Offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.”

12. From the foregoing, it is apparent that if the court which had an opportunity to hear the complainant and observe her demeanour believed that she was telling the truth, it was needless to call for some other evidence to corroborate hers. The magistrate did appreciate the law as provided by **Section 124** of the **Evidence Act**. The trial court found that the evidence adduced by the complainant was corroborated by that of PW4, PW5 and PW6, therefore, did not have to give reasons in the proceedings regarding the fact that he satisfied himself that the complainant was telling the truth.

13. It has been stated that the charge was defective. It was, therefore, dangerous for the trial magistrate to proceed with the trial and eventually convict the appellant on the same.

Section 134 of the **Criminal Procedure Code** provides:

“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 the nature of the offence charged.”

The charge as drawn stipulates the statement of the offence. The particulars of the offence stipulate:

“...defiled FHK a girl aged 17 years.”

The particulars of the offence ought to have given sufficient information to help the appellant understand what he was being accused of. It ought to have enabled him prepare appropriately for his defence. The ingredients of the offence ought to have been stated in a clear and unambiguous manner. (*See Sigilai versus Republic (2004) 2 KLR 480*).

14. The essential ingredient of the offence of defilement consists of the age of the complainant and the act of penetration. This should have been stated in the particulars of the offence. The age of the complainant was stated but the act of penetration was not stated. This was defect in the charge. The issue to be considered is if it occasioned an injustice. This court is also enjoined to consider whether the defect alluded to should have been raised at an earlier stage of proceedings (*see Section 382 of the Criminal Procedure Code.*)

15. I do note that the appellant herein was unrepresented. Having had no services of person conversant with the law, he could not raise an objection to the charge as being defective. He participated in proceedings but it cannot be stated with certainty that he understood what he was being accused of to know what kind of defence to come up with. In the premises the charge was rendered defective.

16. The prosecution was faulted for failure to call vital witnesses in particular a woman who allegedly rescued the complainant per the evidence that she adduced. In her testimony PW1 stated that she was rescued by a woman after the ordeal. On cross-examination she repeated what she had stated in examination-in-chief that a woman rescued her. This particular woman did not testify. The person who testified as having found the complainant and arrested the appellant stated that he went to open his kiosk at 6.00am when he found a girl crying. She told him about the appellant and PW1. He then saw PW1 crying. Her clothes were soiled. The appellant's clothes were also soiled. He arrested him. In his defence the appellant alleged that they fell down from the motorcycle hence his clothes being soiled. PW1 on the other hand was silent on having been saved by PW2. She claimed she escaped and later the appellant was arrested.

17. In her evidence the complainant stated that they left home at 2.00pm on the 24th/25th November, 2011. PW3 alluded to 4.00am. There was a post rape care form produced in evidence by **PW6, Daniel Mulwa** a Clinical Officer, irregularly. He did not state who filled the same. A perusal of the document indicates the assault was at 4.00am while the examination was done at 3.09pm. The information on the document is what formed what was filled in the P3 form. There are persons designated to fill the Post Care Rape Forms namely; Doctors, Clinical Officers and Nurses.

18. It was important for such information to be given to establish the authenticity of the document and its content.

19. The age of the complainant is challenged on the ground that witnesses spoke of rape and not defilement. Secondly, that no birth certificate was produced to prove her age. A preliminary inquiry was conducted by the court prior to PW1 being sworn. She told the court that she was aged 17 years old. In her testimony she did not state her age or when she was born.

20. **PW7, No. 85760 P.C. Dickson Kikonye** the Investigating Officer was silent on that particular fact. PW6 who filled the P3 form on cross-examination stated that :-

“The patient was examined at Mutomo Hospital. The patient was examined on the same day... I cannot tell the age of the injuries. I saw the patient when I filled the P3 form”.

It is indicted the P3 form was filled on the 28th November, 2011. This particular witness who used information in the Post Care Report Form to fill the P3 form as it is, similarly recorded that he age of the complainant was estimated as 17 years. Whether that was the age of the complainant as stated is a matter that was not proved beyond any reasonable doubt.

21. There was an alternative charge of committing an indecent act with a child. It is stated that the appellant touched the complainant's vagina and breasts. The complainant stated that the appellant raped

her for one (1) hour. She stated that the appellant took her to the bush and defiled her after removing his clothes. He was not specific as to what the appellant did that amounted to defilement. An indecent act is defined as :-

“Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration”.

22. Evidence adduced by the complainant was silent on whether the complainant’s breasts and vagina were touched and by what. The particulars of the offence are also silent on what part of the body allegedly touched the complainant. Similarly that charge was not proved.

23. Finally, it was erroneous on the part of the trial court to convict on both counts. It was required to convict on one count and make no findings on the other.

24. From the foregoing, the appeal succeeds. I quash the conviction and set aside the sentence meted out. The appellant shall be set free unless otherwise lawfully held.

25. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 28th day of JANUARY, 2015.

L.N. MUTENDE

JUDGE