



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 25 OF 2015

REPUBLIC.....APPLICANT

VERSUS

JOSEPH KABATHA WAWERU.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 636 of 2013 at the Chief magistrate's Court at Githunguri, delivered by the Senior Principal Magistrate Hon. J. D. Kwena, on 27th January, 2015)

JUDGMENT

Joseph Kabatha Waweru the Appellant herein was charged with defilement contrary to Section 8 (1)(2) of the sexual Offences Act No. 3 of 2006. Particulars of the offence were that on 27th July, 2013 at about 1300 hours at [particulars withheld] Village in Githunguri District within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of L W N a child aged 10 years. In the alternative, he was charged with indecent act with a female child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. Particulars of the offence were that on 27th July, 2013 at about 1300 hours at [particulars withheld] Village in Githunguri District within Kiambu County intentionally and unlawfully committed an indecent act with a female child namely, L W N aged 10 years by causing his penis to come into contact with the vagina of the said child.

The Appellant was found guilty in the main count. He was convicted and sentenced to life imprisonment. He was dissatisfied with the judgment of the learned trial magistrate and he preferred this appeal. By supplementary grounds of appeal dated 27th October, 2015, filed on behalf of the Appellant, by Kilanga and Associates Advocates, together with grounds of appeal filed by the Appellant in person on 10th February, 2015, the Appellant was dissatisfied that the evidence of the complainant who testified as PW1 was not corroborated. He was aggrieved that the offence of defilement was not proved by failure to prove that the penetration was done by the Appellant and that the medical report of the doctor did not link him to the offence. He faulted the testimonies of the prosecution witnesses as contradictory. He was aggrieved that the age of the Complainant was not proved. He was also aggrieved that his right to a fair trial was violated in that on 15th July, 2014, the court compelled him to proceed with the hearing in the absence of his advocate. When his advocate later presented himself in court, he was not allowed to exercise the right to recall the witness who had testified in his absence.

The Appellant's counsel filed written submissions dated 27th October, 2015. He submitted that the age of the complainant was not properly established as required by the law through a Birth Certificate, Baptism Card or age assessment report as was held in both the cases of **Mark Oirruri Mose vs. Republic [2013]**

Eklr and Kaingu Elias Kasomo vs Republic Malindi Cr. No. 504 of 2014. He submitted that the P3 form presented by PW5 only gave an estimate age of the complainant as 10 years. Furthermore, the complainant herself could not remember her date of birth. On penetration, counsel faulted the evidence of PW5. He submitted that he contradicted himself because at one pointed he testified that there was penetration of PW1 but in cross examination stated that there was an attempt to penetrate PW1. He further submitted that even if there was penetration, the prosecution had not linked it to the Appellant. There was therefore need to adduce medical evidence that would have proved the penetration was done by the Appellant. There was also no witness who saw the Appellant defiling PW1. The mother to PW1 and PW6 a police officer sharply contradicted that of PW1 with respect to how PW1's underpants got stained with blood during the defilement. According to PW1, after the defilement, she did not wear back her shorts and underpants and she went home carrying them with her hands. The only thing she put on was her trouser. In contrast, PW3 and 6 testified that PW1's underpants had blood stains. According to the counsel, given this state of evidence, it was doubtful how PW1's clothes would have been bloodstained yet she did not wear them after the defilement. Learned counsel also pointed out that PW1 testified that on 27th July, 2013, after the defilement, she went home but did not find her mother who was attending a funeral of a relative. She went to bed until when S W arrived and told him that she was having a headache. PW2, S W N on the other hand testified that his sister PW1 arrived home on 27th July, 2013 at 8.00 P.M. when he was cooking in the kitchen with her other siblings. According to the learned counsel, such a contradiction pointed to the fact that the witnesses had been couched on what they would tell the court. Learned counsel also poked holes in the evidence of PW3 who first testified that she inspected PW1 and found her to be bleeding. She later back tracked and testified that PW1 refused her to inspect her and that she was inspected at the police Station. As such, he urged the court to find PW3 as an unreliable witness.

On the issue of the blood stain found on PW1 clothes, learned counsel submitted that the same could not be used as proof of defilement because there was failure to examine whether the bloodstains were from a human being. He submitted that there was also failure to establish whether the breakage of the hymen was present or past. Furthermore, the age of the bruises on PW1's vagina was not ascertained. This created doubt on when the defilement may have taken place. Learned counsel also submitted that the learned trial magistrate failed to evaluate the Appellants alibi defence which if she had would have arrived at a different finding.

The learned counsel also submitted that the Appellant's rights to a fair hearing as provided under Article 25(c) of the Constitution was violated because the Appellant, on 15th July, 2015 was forced to proceed with the hearing in the absence of his advocate who had not arrived in court. His argument was that the proceedings of this date were conducted in English language which the Appellant was not conversant with and the court did not ask him whether he was comfortable proceeding in that language. He stated that the Appellant only spoke the Kikuyu language yet the proceedings were not conducted in that language.

Finally, it was the counsel's submission that the prosecution did not prove its case beyond all reasonable doubts as required by the law. He urged the court to uphold the appeal and set the Appellant free.

Learned State Counsel Ms. Ndombi opposed the appeal. She made oral submissions. She submitted that the age of the complainant was proved both by P3 form and the oral evidence of her mother who testified as PW3. She submitted that the Appellant was properly identified by way of recognition as he was previously known to the complainant and her mother. On the material date, the complainant had been left with their siblings when she wandered about and came face to face with the Appellant who led her to a banana farm where he defiled her. When she returned to the house, her minor brother, PW2 noted that she was walking with difficulty and she was bleeding. He informed their mother who confirmed that PW1 pants were blood stained and the matter was reported to the police. PW5, the medical officer who examined PW1 confirmed that she had been defiled and this sealed the prosecution's case. Ms. Ndombi urged the court to dismiss the appeal.

This being the first appellate court, its duty is to re-evaluate the evidence and come up with its independent findings. It should however bear in mind that it has neither seen nor heard the witnesses.

See the case of **PANDYA VS REPUBLIC [1957] E.A, 336**. On evaluating the above submissions together with the grounds of appeal, I conclude that the issues for determination are whether the prosecution proved its case beyond all reasonable doubt and whether the Appellant's constitutional right to a fair trial was violated.

The prosecution's case was that PW1 the complainant was on 27th July, 2013 on a road near their home at [particulars withheld]. The Appellant who was known to him as Kabatha approached her and told her to take him down the road. He requested her to accompany her to a path which passes near the home of one J. He then led her into a banana farm. That is where he told her to lie on the ground. He removed her shorts and underpants which were blue and pink in colour respectively. He also removed her trouser and thereafter did bad manners to her. In her own evidence, PW1 testified that the Appellant inserted his urinating organ between her legs into her urinating organ. She screamed for help and the Appellant fled. He warned her that she would kill her if she reported the matter to anybody. Thereafter she went home while carrying with her the shorts and the underpants she was wearing. In the evening she informed her minor brother, S W that she was having a headache. On the following morning, Samuel sent her to the shop to buy tea leaves. He noted that she was walking with her legs apart and he enquired from her what had happened. She insisted that she had a headache. After she left the shop, she proceeded to her grandmother's home where she met her mother. Her mother also noted that she was walking with her legs astride. That is when she revealed to her that she had been defiled by Kabatha at a banana farm. Her mother took her to Kigumo Health Centre and later reported to the area Local Chief. They were asked to go to the Nairobi Women's Hospital for treatment. The matter was then reported at Gewa Police Post and the Appellant was arrested. A P3 form was also issued to her and it was filled at Kigumo Health Centre.

PW2, S W N aged 16 years corroborated the evidence of PW1. He testified that on 27th July, 2013 at around 8.00 p.m, PW1 then aged 10 years arrived home. She found him cooking food with his other siblings. He noted that when he asked her to get into the house she knelt down with her legs apart. On enquiring from her what had happened she told him that she had a headache. She then left the kitchen went out and started crying. She also refused to eat the food that had been cooked. He then noted that she was bleeding from her private parts. On the following day, PW2 still noted that PW1 was walking with difficulties with her legs astride. That is when he informed his father what he had noticed. By then, PW1 had left for the shop. When she returned, PW2 further prodded her to disclose what had happened to her. She declined to disclose and insisted she had a headache. He later was summoned to record a statement with the police. He also learned that PW1 had been defiled by one Kabatha who he knew as a person who frequently passed near their home.

PW3 L W N testified as the mother to PW1. Her testimony was that on 28th July, 2013, her husband one S W informed her that their son PW2 had told him that PW1 had difficult in walking and she had left their home. At about 10.00 a.m. the same date, PW1 found her at her parent's home. She appeared shy, was crying and sitting with difficulty. She and her relatives started talking to her. She then inspected her private parts and found her bleeding. She took her to Kigumo Health Centre where she disclosed that she had been defiled by a man called Kabatha. She explained to her how Kabatha who is the Appellant herein enticed her from a road into a banana farm where he defiled her. She reported the matter at Kigumo Police Station from where they were referred to Nairobi Woman's Hospital. In addition, they reported the matter to Kwa Miko Polices Station. PW1 was treated at Nairobi women Hospital and given a treatment report. She was also issued with a P3 form. The Appellant was thereafter arrested and charged accordingly.

PW4, W W W an uncle to PW1's father testified that on 28th July, 2013, he was informed by PW1's father one P N that her daughter had been defiled by a man called Kabatha. He testified that he knew the said Kabatha and together with PW1s father reported the matter to Gewa Police Post. He directed the police to where the Appellant was in a bar at [particulars withheld] Trading Centre from where he was arrested.

PW5, Patrick Wambugu Mukuhi a Clinical office at Kigumo sub-district Hospital filled PW1's P3 form. He also examined PW1 on 27th July, 2013. His testimony was that her under pants were bloodstained.

She had bruises on the labia majora and labia minora. The hymen was broken. She had discharge from vagina and her thighs were stained. He estimated her age to be 10 years. Diagnosis was defilement. He referred her for further treatment at Nairobi Women's Hospital and he also produced a report from the said hospital. He emphasized that the victim had no tear in her birth canal and that the injury was confined to the hymen and vagina valves.

PW6, Police Constable Justus Ngugi from Gewa Police Post was the Investigating Officer. He summed up the evidence of the prosecution witnesses. He testified that on 28th July, 2013 he received a call from Kibicho that a young girl had been defiled. Earlier the girl's father had reported at the Police Post of the about the incident. The girl was taken to the Police Post and he noted that she was walking with her legs apart. She had already been seen at Kigumo and referred for further treatment. Investigations commenced and the Appellant was arrested and charged accordingly.

The Appellant denied committing the offence, he gave a sworn statement of defence. He stated that he was a motor vehicle conductor and was married with two children. He told the court that on 27th July, 2013 he was at home with his family since he was off duty. He never left the house the whole day. He confirmed that he knew the complainant whose home was neighbouring his. They both lived at [particulars withheld] village. That the two homes are 1 km apart. He also knew the entire family of PW1. He also did not work on the following day which was on a Sunday. That is the day he went to [particulars withheld] Trading Centre to watch a football match. After the match he went to a bar and that is where three police officers went and arrested him. He was escorted to Gewa Police Post where he was informed that he had been arrested because he had defiled somebody. He went on to state that PW1's mother approached him demanding that he gives her Kshs.200,000/= so that the case could be terminated. He declined the offer because he was innocent.

In support of the Appellant's case, was Margaret Wanjiru Kabatha, his wife who testified as DW2. Her testimony was that on 27th July, 2013, the Appellant was at home the whole day. On the following day, they went to church together. She remained at the church after the service as she was a choir member. She was later informed that her husband had been arrested and taken to police post where she found him. Her further evidence was that she was known to the Complainant. She further stated that PW3 had requested for payment of Kshs. 200,000 from the Appellant so that the family could drop the case against him. However the Appellant declined the offer while stating that he did not have the money.

From the above summary of evidence, it is clear that the Appellant was a person well known to the complainant (PW1). Indeed when PW1 reported about the incident to her mother, she was not shy to state that it was Kabatha who had defiled her. She candidly narrated how the said Kabatha lured her into a banana farm where he defiled her. Of course this tallied with the Appellant's defence that he too was known to PW1. From the evidence of PW1, it is undoubted that the Appellant did in fact defile PW1 in the banana farm.

The fact of defilement was confirmed by PW5 who examined and treated her. His evidence was that the labia majora and labia minora were bruised and that the hymen was broken. These symptoms were proof of penetration into PW1's genitalia. The P3 form together with the Post Rape Care Form from Nairobi Women's Hospital produced by PW5 indicated that the hymen was broken. The p3 form further indicated that there was semen discharge on PW1's private parts and on her both thighs. These further corroborated PW5's oral evidence that indeed defilement had been meted against PW1.

The Appellant faulted the prosecution's case for failure to call other evidence to corroborate that of PW1 to the effect that it is the Appellant who defiled her. Under Section 124 of the Evidence Act, in a Sexual assault case against a minor, no corroboration is required as long as the court believes that the minor was telling the truth. In the instant case, PW1 was forthright in her account that it was the Appellant who had done the heinous act against her. Although she was initially hesitant to disclose to her brother, PW2 what had happened, she finally opened up to her mother and police that the culprit was the Appellant. The hesitation was clearly explained in her evidence in chief as she had been threatened with death if she dared disclose to anyone that the Appellant had defiled her. In this regard, there was no need of other oral evidence to corroborate the fact that it is the Appellant who defiled PW1. This also drives me to conclude

that there was totally no contradiction in the evidence of PW1, 2 and 3 with regard to whom the disclosure of the incidence was made. According to Appellant in his submissions, PW1 did not tell PW2 that she had been defiled. The Appellant also contended that PW3 testified that PW1 at one time did not tell her what had happened until they were at the Police Post. It is important to note that initially, PW1 feared to disclose her ordeal because of the threats issued to her by the Appellant. That is why the timing of the disclosure came late on the following day while she was with her mother at the Police Post.

It also did not matter at what point in time PW3 inspected PW1's clothes and noticed they had blood stains. What is undisputed is that she was seen by PW5 the Clinical Officer on the date of defilement and her underpants were noted to be stained with blood. The presence of blood notwithstanding, what was of paramount importance is that PW5 confirmed that PW1 had been defiled. PW1 on the other hand did link the offence to the Appellant. As such, although PW3 may not have been consistent with respect to the time that she inspected PW1, and whether she is actually the person who inspected her is not an issue that negated the strong evidence against the Appellant. Furthermore, the failure to test whether the blood on PW1's pant was of a human being did not also dislodge the strong evidence placed against the Appellant. In any case, such examination would have been necessary if the evidence collected was too remote to link the Appellant with the offence. The contrast was the case as the Appellant was positively identified through recognition and other medical evidence proved the offence of defilement.

On the age of PW1, the Appellant submitted that the same was not properly established as required by law by way of a Birth Certificate, Baptism Card or age assessment report. I concur with his submission that as was held in the cases of **Mark Oirruri Mose Vs Republic and Kaingu Elias Kasomo Vs Republic (Supra)** age is a key ingredient to the offence of defilement and the same ought to be proved failure to which the prosecution's case is rendered fatal. However, it is now settled that in the absence of medical age assessment report, Birth Certificate, Baptism Card, or a Clinic Card, the age of a victim can also be established or proved by the oral evidence of the victim's parent or guardian, by observation, and common sense. See the case of **Francis Omuroni vs Uganda, Criminal Appeal No. 2 of 2000 (Court of Appeal)**. From the evidence of PW1, she testified that she was 10 years old (it is noted that the learned magistrate when calling PW1 to testify indicated her age as 16 years which did not tally with her evidence). PW3 her mother in cross examination confirmed that she was 10 years old. PW5 in the P3 form estimated her age at 10 years. In my view, that was sufficient prove that PW1 was aged 10 years as at the time of defilement.

The Appellant also argued that his defence was not properly taken into account by the learned trial magistrate. I have had a look at the learned trial magistrate's judgment. At page 3, the magistrate in regard to the Appellant's defence stated as follows:

“Accused denied the charges through a sworn defence and called his wife to support his defence. The court has to determine whether the charges have been proved against the accused person beyond all reasonable doubt.”

There is no other mention of the Appellant's defence in the judgment. The view of this court is that it was important that the learned trial magistrate analyzed the defence of the Appellant and then gave a reasoning of why she did not uphold it. Although that was not done, my analysis of the same is that it did not rebut the overwhelming evidence of the prosecution in support of its case. It is a defence that was lacking in merit particularly giving regard to the strong evidence of identification of the Appellant and the medical report corroborating the fact of defilement. For those reasons, I dismiss the defence as lacking in merit. I also conclude that even if it had been analysed by the learned trial magistrate it would not have altered the findings of the trial court.

Finally, I look into the issue of whether the Appellant's constitutional right to a fair trial was infringed. According to the Appellant's counsel, on the 15th July, 2014, the Appellant was compelled by the court to proceed with the evidence of PW5 without the benefit of the presence of his counsel who was on record. This prejudiced him particularly because he did not understand the language in which the proceedings were conducted. He cited Article 25(c) of the Constitution which reads as follows:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited...”

This provision must be read together with Article 50(2) (g) which provides that:

“Every accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly.”

From the record, the Appellant was represented by an advocate by the name Mburu. On the morning of 15th July, 2014, he informed the court that his advocate had not arrived but was on the way to court. The prosecutor then told the court that he had the Clinical Officer in court. Later on, the court noted as follows:

“Court: It is now 11.46 a.m. Advocate was in court the last adjournment date. He suggested today’s date. He is aware of this hearing. Case will proceed without him.”

The court then proceeded to taken the evidence of PW5 and the accused cross-examined him. After PW5, PW6 also testified and at the close of his evidence in chief, the court noted as follows:

“Court: Mr. Mburu advocates comes in court”

Mr. Mburu then addressed the court in the following words:

“I have been in this matter I got late I was before the Chief Magistrate Kiambu. Accused is facing serious charges. Proper cross-examination be done in all the prosecution witnesses for end of justice to be felt. I wish to have the PW5 recalled for cross examination by the defence. The reasons I have given are convincing enough.”

The prosecutor opposed Mr. Mburu’s report to recall PW5 for further cross-examination. He submitted that the court had waited for him up to 11.30 a.m. and in any case the Appellant had had an opportunity to cross-examine the witness. He also urged the court to note that Mr. Mburu knew about the hearing date but failed to avail himself in time. In rejoinder, Mr. Mburu asked the court to note that his absence was not intentional.

In its ruling, the court directed that Mr. Mburu proceeds to cross-examine the witness who had just completed his evidence in chief being PW6. With regard to PW5, it declined to order his recall because he was an expert witness. The court noted that the defence could challenge the evidence of the witness in their submission. Further, it was the view of the trial magistrate that although the Appellant had a right to legal representation, that right should never be exercised in abuse of the process of court and for delaying justice and the business of the court. The court then proceeded to give Mr. Mburu time to go through the evidence of PW6 after which he cross-examined the witness.

From the chronology of events on record, it is clear that the hearing date was given in the presence of the Appellant’s advocate who knew that the court business began at 9.00 a.m. The court was patient enough to wait for him up to 11.46 a.m when it ordered that PW5 to testify. At that point, the Appellant did not inform the court that he would not be in a position to hear the evidence of PW5. Instead, he proceeded to cross-examine the witness whose answers are on record.

I am therefore unable fathom how he could have cross-examined the witness if he did not understand the language in which the witness was testifying. As clearly shown on record, Mr. Mburu did not come into court until PW6 had given his evidence in chief. That must have been way beyond 12.00 midday. In my view then, as rightly observed by the learned trial magistrate, the right to legal representation cannot be used as an excuse to negate justice. PW5 had waited in court since 9.00 a.m. and owing to the nature of his job would have been unfair to send him without taking his testimony. If the Appellant felt he would be prejudiced if PW5 testified in the absence of his counsel, he would have declined to cross examine the witness. Having done the reverse meant that he had understood the evidence he adduced and therefore

proceeded to challenge it in cross examination. Recalling PW5 would only have delayed the trial. In that case, the failure to further cross-examine PW5 by Mr. Mburu did not in any way prejudice the Appellant.

In the result, I find that the prosecution proved its case beyond all doubt. The appeal has no merit and the same is dismissed. It is so ordered.

DATED and DELIVERED this 12th day of **November, 2015.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

Mr. Businde for the Appellant

M/s Wario for the Respondent.