



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 36 OF 2012

JUSTUS KAMUNZI MWANGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Judgment of the Hon. Ireri (Resident Magistrate) in Kibera Chief Magistrate's Court Criminal Case No. 3852 of 2010 delivered on 19th January, 2012)

JUDGMENT

The Appellant, Justus Kamunzu Mwangi was charged with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 16th September, 2010 at Kinoo location in Nairobi within Nairobi area Province, unlawfully and intentionally committed an act by inserting his male genital organ into the female genital organ of R N A which caused penetration into the said child aged 16 years in violation of the said Act.

In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 16th September, 2010 at Kinoo location in Nairobi within Nairobi Area Province, unlawfully and intentionally committed an indecent act by touching the female genital organ of R N A a child aged 16 years in contravention of the said Act.

The Appellant was found guilty and convicted in the main count. He was sentenced to fifteen (15) years imprisonment.

The Appellant has appealed against both the conviction and sentence. He filed Amended Supplementary Grounds of Appeal on 25th November, 2015 alongside written submissions which he relied on during the hearing of the appeal. He is aggrieved that the case was not proved beyond all reasonable doubts, that the medical evidence was not sufficient to found a conviction against him and that his defence was not considered before arriving at a verdict. He was also aggrieved that his Constitutional rights to a fair trial was violated in that some court proceedings were conducted in a language he did not understand in contravention of Section 198 of the Criminal Procedure Code, that the judgment of the learned trial magistrate did not contain points for determination as provided under Section 169 of the Criminal Procedure Code and that his mitigation was not taken into account before sentencing.

In the written submissions, the Appellant urged the court to find that firstly, the prosecution had failed to discharge their burden of proof as required by law. He submitted that the prosecution failed to

demonstrate the nexus between himself and the complainant that would have linked him to the offence. Secondly, as to whether he understood the language of the court, Appellant submitted that the trial court magistrate was obligated to ensure that the proceedings were conducted in a language he understood. Thirdly, he submitted that the fact that the complainant's clothes were washed before she was examined discredited the medical evidence that would have nailed any culprit. Fourthly, he submitted that the prosecution's evidence was laced with inconsistencies and was uncorroborated. As such, whether or not the magistrate considered his evidence, an acquittal ought to have been automatic. Fifthly, he urged that the judgment lacked points for determination as required by **Sections 168 and 169 of the Criminal Procedure Code**. Finally, he submitted that the trial court imposed a harsh and excessive sentence in that it failed to take into account his mitigation. This notwithstanding, he submitted that he was remorseful and sought leniency.

It is now settled law **“that the duty of the first appellate court is to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that” – AJODE –VS- REPUBLIC (2004) 2 KLR, 82.**

PW1, R N was the complainant. She was a child of 16 years. She testified on oath and told the court that she finished class eight in 2009 at *[particulars withheld]* Primary School and was living with her aunt E W in Kinoo. PW1 testified that the Appellant worked as a watchman at the plot where she lived. It was her evidence that on 16th September, 2010 at 9.00 am she was in the house with her cousin when the Appellant went and told her to give him tea. She told him that there was no tea and then went and sat on the sofa. The Appellant walked into the house and came where PW1 was and held her hands. He covered PW1's mouth with both hands, removed her skirt and panty, opened his trousers' zip, and removed her underwear before lying on top of her. He then inserted his penis inside her vagina thereby defiling her. She testified that the Appellant did it for about thirty minutes and did not use any condom. PW1 testified that she felt some wet fluid on her vagina. He also touched her vagina with his hands. He then left the house when he was done. PW1 sent an SMS to her aunt and told her what had happened. Her aunt responded immediately and she went to the house with police who arrested the Appellant. The Appellant and PW1 were taken to the police station before PW1 was taken to Nairobi Women's Hospital where she was treated.

PW2, Dr. Charles Gachara Wolce (name written as Charles Gakeria in the judgment) of Nairobi Women's Hospital produced a medical report for PW1 prepared by Dr. Liku on 17th September, 2010. PW1 had been seen at the hospital on 16th September, 2010 at around 1.30p.m with a complaint of having been sexually assaulted. On examination, PW's external genitalia was normal. There was an old hymen tear with no lacerations. There was some redness on the entrance of her vagina and no lacerations. The Doctor had taken a vagina swab which indicated dead white cells. The test for HIV was negative, hepatitis B and pregnancy tests returned negative. The diagnosis made was of sexual assault. PW2 produced the medical report as exhibit 1.

PW3, Dr. George Mwaura Kungu of Kinoo Medical Clinic testified that he examined PW1 on 17th September, 2010. He noted redness on PW1's genitals but no lacerations or bruises. He formed an opinion that there was defilement. PW3 filled PW1's P3 form and produced it in court as exhibit 2. PW3 was however recalled to testify later on 7th September, 2011. He said that when he examined the Appellant, he did not make any positive findings. He signed and produced the P3 form as an exhibit in court (exhibit 3).

PW4, E W W was the aunt to PW1 and was living with her when the incident took place. She knew the Appellant who was a guard at the plot where she lived. PW4 testified that on 16th September, 2010 she left the house at 9.00 a.m. and proceeded to the office. She received a text message from the complainant telling her that the Appellant had gone to her house and demanded to have sex with her. The Appellant had sex with her against her will. PW4 immediately went to Kinoo Police Post where she reported the incident. Together with the police, they proceeded to the scene and the Appellant who was outside the compound was arrested. They found the complainant PW1 who confirmed that the Appellant had indeed

defiled her. They took the Appellant to the police station where they recorded their statements. PW1 was treated by Dr. Kungu and was later taken to Nairobi Women's Hospital where she was further examined and issued with treatment notes.

PW5, Police Constable Ali Dinda from Kabete Police Station was the investigator in this case. He summed up the evidence of the prosecution witnesses. He, together with another police officer arrested the Appellant. He found the Appellant culpable and charged him accordingly.

The Appellant gave an unsworn statement of defence. He denied committing the offence and said that he was at work on the said date and had not done anything until he saw a man and a woman who came and told him that he had raped a child. He denied the offence but was nonetheless arrested. He stated that he was framed by the complainant's boss, PW4 for no apparent reason.

Before I evaluate the strength of the appeal, I shall first determine whether Section 198 of the Criminal Procedure Code was contravened. This is in line with Appellant's argument that the proceedings of the trial court were conducted in a language he did not understand. The said provision deals with the interpretation of evidence to the accused person or his advocate and it provides as follows:-

1. *Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.*
2. *If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.*
3. *When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.*
4. *The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili."*

I have read the entire proceedings and noted that the charge was read out to the Appellant in either English or Kiswahili languages which he clearly understood and he pleaded to the same. I have also noted that he was represented at the trial by a counsel by the name Njogu, who did not at any time raise any concern regarding the language that was being used in court. The Appellant also had an opportunity of cross examining PW1 in Kiswahili. Besides, at the commencement of every court session, the language of the court was indicated as either English or Kiswahili. He did not complain that he did not understand any of the languages. Effectively, I hold that his complaint is without merit.

The Court of Appeal in **Kyalo Kalani v Republic CA Criminal Appeal No. 586 of 2013 [2013] eKLR** observed that the right to understand the proceedings is a fundamental right under **Article 50(2) (m)** of the Constitution. Therefore, the issue of whether an accused understands the proceedings is not one of form but of substance. A court must ensure that proceedings are entirely conducted in a language that an accused understands failing which an accused person's right to a fair hearing is vitiated. That then would render the entire proceedings a nullity. In the instant case though, the record shows that the Appellant understood the proceedings as he fully participated in them without raising any concern. He participated in the trial and was able to cross-examine PW1 in Kiswahili before he engaged a counsel. His concern is not only an afterthought but a futile attempt to clutch on a loose straw. This ground is therefore dismissed.

On proof of the offence of defilement, the prosecution was enjoined to demonstrate three things; first, that there was penetration, second, that the complainant was a minor and third, that it is the Appellant who committed the offence.

The first issue for determination is whether there was sufficient evidence to prove penetration. The medical evidence of PW2 and 3 corroborated each other in as far as they identified some redness on the entrance of PW1's vagina indicating penetration and the use of some force. Both witnesses who were medical doctors read out conclusions in their respective medical reports that defilement had been meted against the complainant. Penetration is defined under **Section 2** of the **Sexual Offences Act**, to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The P3 form for PW1 was produced in evidence by PW3. It showed that defilement had indeed occurred

and this was further evidenced by the fact that PW1's hymen was broken. The trial Magistrate in his Judgment observed that this evidence was unchallenged and I concur with him.

The second issue for determination is whether it is the Appellant who committed the offence. PW1 was well known to him as he was a watchman in the plot she lived with her aunt. After the Appellant committed the offence, PW1 immediately alerted her aunt on her mobile phone. The latter rushed to the scene in the company of police officers who immediately arrested the Appellant. Pw1 identified the Appellant to the police without any hesitation. Therefore, although there was no eye witness, it is clear that PW1 told the truth and could not have confused the Appellant for somebody else. In any case, the proviso to **Section 124** of the *Evidence Act* states that, ***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*** Hence, it was sufficient to convict the Appellant based on the evidence of the minor if the court entirely believed in it. On the part of this court, there is no reason to doubt that PW1 spoke the truth. She in fact informed her aunt of the ordeal immediately the Appellant finished defiling her and the latter was arrested soon thereafter. Besides, he was well known to PW1 as he was their watchman. I hold that his identification as the assailant was positive.

As regards the age of the complainant, the same is a question of fact to be proved by evidence. The evidence must not necessarily be demonstrated by adduction of a document as enunciated in the case of **Geoffrey Kioji Vs Republic, Crim. App. No. 270 of 2010 (Njeri)** in which the court held as follows:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

In the present case, no documentary evidence was presented to the court to demonstrate that the complainant was 16 years old. But by her own evidence, she told the court that she was born on 7th May, 1994 and that she had completed class 8 in 2009. That placed her age at exactly 16 years as at 25th October, 2010 when she testified. PW3 Dr. George Mwaura Kung'u did testify in evidence in chief that he assessed PW1's age as 16 years. Further, PW1's P3 forms produced as Exhibit 2 indicated her age as 16 years. Based on those testimonies and the medical record, I have no doubt that PW1's age was properly assessed at 16 years.

On whether the judgment of the trial court accorded with **Section 169 of the Criminal Procedure Code**, I duplicate **Section 169(1)** which is of interest herein. The same provides that:

Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it..”

The Appellant submitted that the judgment of the court did not outline points for determination. The contrast is reflected by the record of proceedings at page 35, on the last paragraph, where the learned trial magistrate noted as follows:

“In this case, I am to determine whether the accused person defiled PW1 as alleged by inserting his penis into her vagina unlawfully and intentionally as is pleaded in the main

count. “

He then proceeded to evaluate the evidence and make a determination after which he found the Appellant guilty. That ground of appeal then has no merit and the same fails.

Finally, with regard to whether the learned trial Magistrate considered the Appellant's defence and mitigation, the same is affirmatively reflected by the record. That assertion is also without merit and I dismiss it.

Having evaluated the evidence on record, I hold that the prosecution proved its case beyond all doubts. I find that the Appellant was properly convicted. The appeal lacks merit and the same is dismissed in its entirety.

DATED AND DELIVERED IN NAIROBI THIS 9TH DAY OF DECEMBER, 2015

GRACE NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Miss Atina for the Respondent.