



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 42 OF 2013

Appeal from the original judgement of the Senior Resident Magistrate at Hola (Mr. M. O. Obiero, SRM) in Criminal Case No 109 of 2012

REPUBLIC.....APPELLANT

VERSUS

MOHAMED ABDI BILLE.....RESPONDENT

JUDGEMENT

Background

Mohamed Abdi Bille, the Respondent in this judgement, was charged before the Senior Resident Magistrate at Hola with defilement contrary to section 8(1) (3) of the Sexual Offences Act. It was alleged that on diverse dates between 2nd May 2012 and 6th June 2012 at (particulars withheld) within Coast Province intentionally caused his penis to penetrate the vagina of N.H. a child aged 15 years.

The prosecution called five witnesses and the Respondent was the only defence witness. The trial court considered the evidence on record and concluded that:

“I have carefully perused section 8 of the Sexual Offences Act and I am unable to find section 8(1)(3). This provision does not exist. What I have captured is that there is section 8(1) which defines the offence of defilement and section 8(3) which stipulates the penalty. As such the charge sheet ought to have been drafted to read as follows: “Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006”. The words “as read with” are very important and their absence or omission totally changes the meaning of the provision of the law. To that extent it is obvious that the charge sheet is fatally defective. I wish to point out that this is not a defect which is curable under section 382 of the Criminal Procedure Code for reasons that once a charge is defective, any trial based on it is a nullity.”

Petition of Appeal

The Appellant has come to this court on appeal contesting the entire judgment and acquittal of the Respondent. The petition of appeal, filed on 27th March 2013, lists four grounds, namely:

- i. **That the learned magistrate erred in law and fact in finding that the exact age of the complainant was not proved.**
- ii. **That the learned magistrate erred in law and fact in making a finding that the charge sheet**

- was fatally defective.
- iii. **That the learned magistrate erred in law and fact by failing to invoke the provisions of section 382 of the Criminal Procedure Code.**
 - iv. **That the learned magistrate erred by failing to consider the overwhelming evidence as put across by the Prosecution witnesses.**

Learned state counsel submitted that though section 348A of the Criminal Procedure Code allows the State to appeal on points of law only, following **Joshua Ntonja Mailanyi v Republic Criminal Appeal No. 481 of 2010** an appeal is allowable where the lower court reaches a conclusion on the evidence which no court properly directing itself could have reached and this error has been recognized to be an error of law; that it was sufficient to rely on the age assessment in the P3 form as was held in **Robert Kabwere Kiti v. Republic Criminal Appeal No 486 of 2010 (2012 eKLR)**.

The appellant further submitted that the trial court found the charge fatally defective for not stating “section 8(1) as read with section 8(3) of the Sexual Offences Act” and acquitted the Respondent. It was submitted that the trial was not a nullity and the defects were curable under section 382 of the Criminal Procedure Code. Counsel cited **Fappyton Mutuku Ngui v. Republic HC Criminal Appeal No 296 of 2010 (2012 eKLR)** to support this argument. Counsel submitted that the evidence is overwhelming and at least the Respondent ought to have been found guilty on a lesser charge. He asked the court to vary the lower court’s findings and find the Respondent guilty.

Submissions by the Respondent

Mr. Omwancha for the Respondent opposed the appeal terming it as lacking in merit. He submitted that the prosecution failed to prove age of the complainant despite there being various ways of proving this issue; that the prosecution failed to amend the charges despite the law allowing a wide latitude to amend; that section 382 CPC is irrelevant at this stage and by reversing the order, this court will be assisting the prosecution to fill in the gaps since their investigations were poorly done.

He further submitted that the charge sheet is defective and that the evidence was not in tandem with the charge. He asked the court to dismiss the appeal and uphold the acquittal.

Determination

Section 354 (3) Criminal Procedure Code provides that the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may;

“(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit” (emphasis added).

I wish first to dispose of the issue that arises in view of section 348A of the Criminal Procedure Code. Can this court entertain an appeal on points of fact? Section 348A of the Criminal Procedure Code provides as follows:

“When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order on a matter of law.”

As pointed out by learned counsel for the Appellant, the Court of Appeal in **Joshua Ntonja Mailanyi, above** discussed this issue in its judgement as follows:

“We recognize that what constitutes a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of the determination by the subordinate court and will vary infinitely from case to case. In some cases, the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are ex facie, erroneous in law or embark on an erroneous statutory interpretation. Those cases where the error of law is patent or in apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court has treated the evidence adduced at the trial. The cases of Republic v. Kidaga [1973] EA 368; Republic v. Wachira [1975] EA 262 from the High Court and Patel v. Republic [1968] EA 97 from the predecessor of this Court are good illustrations of this category of cases. In all the three cases, the respective subordinate courts acquitted the accused without putting him on his defence on the ground that there was no case to answer. In all the three cases, the Attorney-General appealed to the High Court under section 348A CPC against the acquittal. The appeals were invariably allowed on the ground that the respective magistrates reached a conclusion on the evidence which no court properly directing itself could have reached. That ground was recognized to be an error of law. So a question of law warranting an appeal to the High Court by the Attorney-General arises if the subordinate court reaches a decision which, on evidence, no reasonable court properly directing itself on the evidence and the law could arrive at.....”(emphasis mine).

The matters being raised by the Director of Public Prosecution in this appeal fall in this category.

Having stated this let me examine the evidence in the lower court in this matter before I proceed.

N.H, PW1, is the victim. She testified after a *voire dire* examination had been conducted and the court found she could testify under oath. She told the court that the Respondent approached her on 18th April 2012 during a wedding dance. They became friends and engaged in sexual intercourse on several occasions thereafter after the Respondent gave her money. She singled out 2nd May 2012 and 6th June 2012 as the dates they had engaged in sex and mentioned other dates she could not recall. However, their secret was out after PW1’s brothers R.M.N and A.N found out what she had been doing on 6th June 2012. Fearing that her brother, S.M.A, PW4 may bit her she did not sleep at their home but at a neighbour’s. On the morning of 7th June 2012 she went to school but PW4 followed her to school. He took PW1 to Bura Police Station where the matter was reported and PW1 referred to hospital.

R.M.N, PW2 confirmed that in company of A.M they followed PW1 and after failing to know which house she had entered, they walked towards the Respondent’s house talking, they saw PW1 and the Respondent emerge from that house and start running away on spotting PW2 and A.M. PW2 and A.M chased and apprehended her. He told them that the Respondent was her boyfriend and that they had engaged in sex.

PW4 confirmed this evidence. PW4 further testified that on 7th June 2012 she found PW1 at school and she confirmed to him that she had engaged in sex with the Respondent and that he took her to the Police Station at Bura on 8th June 2012 to report the matter.

Police Constable Joab Ouma, PW3, confirmed receiving the report from an elderly man who brought a young girl to the police station on allegations of defilement on 8th June 2012. PW3 interrogated the girl who told him how she had met the Respondent at the wedding ceremony and how he used to give her money for sex. After investigations PW3 charged the Respondent.

The last witness for the prosecution is Doctor John Mwangi, PW5, who examined PW1. He testified that he found an old scar on the hymen. He also recommended further tests due to PW1’s complaint that she was experiencing pelvic pains. The results confirmed a sexually transmitted disease.

In his defence the Respondent told the court that he was aged 17 years and that he did not commit the

offence. He testified that he had not attended the alleged wedding or entertain PW1 at home. He stated that PW1's home is 2 kilometres from his and that there was a grudge between him and PW2 A.M brother to PW1.

This is the evidence the trial magistrate subjected to scrutiny after which he found that the prosecution had failed to establish the age of the complainant.

The trial magistrate found the evidence of PW1 and PW2 well corroborated and the doctor's evidence confirming defilement did take place. However, after finding defilement was proved, the trial magistrate found there existed doubts as to whether it was the Respondent who had defiled PW1 because the prosecution failed to establish whether the Respondent had a sexually transmitted disease and therefore must have been the one who infected PW1.

The trial magistrate went further and found the charge fatally defective and the defects incurable under section 382 CPC.

I intent to determine the following:

- i. Whether the charge was defective.
- ii. The age of the complainant.
- iii. Whether the evidence supports the charge.

PW1 said she was 14 years old. Her brother PW4 placed her age as 13 years. PW5 the doctor who examined her, placed her age at approximately 14 years. In the absence of a birth certificate or clinic card this court has no other way of confirming the age. In **Robert Kabwere case above**, the Court of Appeal was of the view that the P3 form showing age assessment by the doctor who had examined the complainant was adequate evidence establishing her age. I have no reason to doubt PW1, PW4 and PW5 on the age of PW1. It is the finding of this court that the age of PW1 has been proved beyond reasonable doubt to be 14 years.

As regards the evidence in support of the prosecution case, I find the evidence of PW1 corroborated by that of PW2. Although PW2 did not witness the sexual act taking place, the behaviour of PW1 and the Respondent of running away on seeing PW2 and A.M indicates they were culpable. PW5 examined PW1 two weeks after the act and he found an old scar on the hymen. This again confirms sexual intercourse took place.

In addition to this evidence, by dint of the proviso to section 124 of the Evidence Act it is no longer necessary for courts to require corroboration of evidence of a child victim of a sexual offence. As stated in the **Robert Kabwere case, above**, the trial magistrate in this case conducted a *voire dire* examination on PW1 and found her understanding the meaning of oath and intelligent enough to give a sworn evidence. The trial magistrate believed her evidence on defilement. The Court of Appeal in the **Robert Kabwere case, above**, quoted with approval the case of **Mohamed v. Republic [2005] 2 KLR** in which the following observations were made:

“By legal notice No. 5 of 2005 which introduced the proviso to Section 124 of the Evidence Act, Parliament drastically qualified Section 124 of the Evidence Act to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

There is evidence from PW1 to show that she was defiled by the Respondent. Her evidence on this issue is corroborated by that of the doctor that her hymen had an old scar confirming she was sexually active. The trial magistrate was in error in disregarding this evidence.

On defective charge sheet I fault the trial magistrate for failing to invoke the provisions of section 382 CPC to cure the defects in the charge. Section 134 CPC has this to say about charges:

“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.” (emphasis mine).

The charge as drawn contains a statement of a specific offence, namely defilement, and such particulars as they may be necessary for giving reasonable information as to the nature of the offence charged. The only error is the manner the section of the law creating the offence and the penalty is quoted. The drafter of the charge did not separate the section 8(1) and 8 (3) of the Sexual Offences Act (See also section 137 CPC).

I have gone further to examine the evidence. I note that the Respondent was represented by an advocate and he participated in the trial in a manner suggesting that he understood the charge he was facing. There is no miscarriage of justice or prejudice on his part due to the manner the charge is drafted. I am therefore satisfied that the Respondent was accorded his rights to a fair trial. Besides, the Respondent did not, through his advocate, raise any objections before the trial court in regard to the manner the charge was drafted.

Section 382 CPC states that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding.”

Had the trial magistrate invoked the provisions of this section, he would have noted that the defects in the manner the charge was drawn were curable under it. I think I have said enough to demonstrate that the defects in the charge are curable under the above section.

Lastly, I wish to comment on the issue touching on the age of the Respondent. This matter was addressed by the trial court following an application by the counsel for the defence. It has resurfaced during appeal. On the date the Respondent testified, his defence counsel was in court. The Respondent testified on oath. He said he was aged 17 years and on cross examination he said he was born on 5th February 1996. He told the court on cross examination that he had no document to confirm his age.

Given that the Respondent through his counsel raised the issue of his age and addressed the same as a result of which the trial court made a ruling, it is strange that he or his counsel did not see it fit to produce evidence of his age including an age assessment report during his defence.

The Investigating Officer, PW3, in an effort to prove the age of the Respondent came across minutes of the vetting board established for purposes of vetting applicants for issuance of national identity cards. He said the Respondent was listed in the minutes as Applicant No. 40 as a result of which he established the Respondent was born in 1994. The minutes are dated 18th May 2012. I have seen the copy of the minutes marked as exhibit 2. The defence did not object to the production of the minutes nor did they seek to have the maker of the minutes summoned to testify. In my considered view the defence did not rebut evidence that the Respondent is an adult.

In conclusion, I fault the trial magistrate for confusing himself even after finding there was evidence in support of defilement. I find the prosecution evidence sufficient to support this charge. The defence can only be pure lies and I hereby reject the same. I find the charge of defilement proved beyond reasonable doubt. Having so found, I have no alternative but to reverse the order of the trial magistrate acquitting the Respondent. In its place and after finding the evidence sufficient to support this charge, I find Mohamed Abdi Bille guilty of the offence of defilement as charged. Section 8(3) is coached in the following terms:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

This section gives the minimum sentence but not the upper limit. This court therefore convicts the Respondent for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. I proceed to sentence him to twenty (20) years imprisonment. It is so ordered.

Dated, signed and delivered on 27th March 2014.

S.N MUTUKU

JUDGE