



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 84 OF 2013

**Appeal from the original conviction and sentence of the Acting Senior Principal Magistrate in
Mwingi Criminal Case No. 229 of 2011 (H. M. Nyaberi)**

MARTIN MULOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Martin Muloo, the appellant, was convicted and sentenced to 15 years imprisonment for the offence of defilement. The charge is brought under section 8(1)(2) of the Sexual Offences Act. It is alleged that the offence was committed on 25th March 2011 at (particulars withheld) in Migwani District Kitui County. The victim is M.S aged 15 years.

Petition of appeal

The appellant has preferred this appeal which he filed on 8th July 2013 but amended with leave of the court and filed the amended petition of appeal on 9th April 2014. In the earlier petition of appeal, the appellant claimed that the evidence of the prosecution witnesses especially the complainant's father was contradictory; that the trial magistrate shifted the burden of proof to him and that the trial court did not consider his defence. In the amended petition of appeal the appellant claims that:

- i. The prosecution case was not proved beyond reasonable doubt.
- ii. The age of the complainant was not proved.
- iii. He was not identified as the assailant because it was at night.
- iv. There were contradictions in the evidence of the prosecution.
- v. The medical evidence does not confirm defilement due to the delay in examining the complainant.

Appellant's submissions

The appellant filed written submissions in which he has stated that the age of the complainant was not proved beyond reasonable doubt; that the clinic card produced as exhibit of her age cannot be relied on as prove of age because it was not a birth certificate; that if the complainant was born in 1995 as her father testified, then she was aged 16 years and not 15 and that complainant had told appellant that she was 17 years in 2009 making her 21 years at the time of the alleged offence.

The appellant submitted that he was not positively identified as the assailant since the attack happened at night; that from the evidence of the complainant she left the games around 7.00pm and after she was attacked, the assailant quickly knocked her down and defiled her leaving no room for identification.

The appellant further submitted that the medical evidence does not prove penetration and the delay in taking the complainant to hospital is not explained and that the mode of arrest is not established. The appellant submitted that the evidence falls short of establishing beyond reasonable doubt that defilement took place and asked this court to allow the appeal, quash the conviction, set the sentence aside and release the appellant.

Respondent's submissions

The appeal was opposed by the respondent. The learned state counsel made oral submissions in opposition of the petition of appeal. He submitted that the second ground lacks merit as there is evidence proving the age of the complainant; that the charge ought to have been brought under section 8(1) as read with sub-section (3) of the Sexual Offences Act and asked the court to use the provisions of section 382 Criminal Procedure Code to cure that defect.

Learned state counsel submitted that the appellant was known to the complainant as coming from the same village; that the complainant knew where the appellant worked which was confirmed by the appellant who said he knew the complainant for 2½ years; that the appellant was positively identified by the complainant; that the evidence of the complainant on defilement was corroborated by evidence of PW3; that proviso to section 124 of the Evidence Act does not require corroboration in sexual offences where the victim is a child; that the complainant's father explained the reasons medical examination was delayed; that section 2 of the Sexual Offences Act defines penetration as either partial or complete and the case was proved beyond reasonable doubt. Learned state counsel asked the court to dismiss the appeal for lack of merit and uphold the conviction and sentence of the lower court.

Brief facts

M.S, PW1 and complainant in this case attended school games at (particulars withheld) on 25th March 2011. The games ended at about 7.00pm. In company of other pupils they started walking home. She decided to enter into a shop at the town centre to buy sugar and other items her mother had sent her. She told the other pupils to wait for her. When she emerged from the shop she found the other pupils had left her. She started walking home alone. Before she reached home she met the appellant who was known to her. The appellant had removed his shirt and was holding it at the time. Without talking to her he grabbed her neck and tied her mouth with the shirt, knocked her down, sat on her stomach, lifted her uniform and removed her panties. He then defiled her causing her pain and bleeding in her genitalia. This was done beside the road but no one found them. After the defilement the appellant took his shirt and left telling the complainant to leave. The complainant picked her panties, pocketed them and started walking home crying.

In the meantime, the complainant's father **B.S**, PW2, while at home sought to know from complainant's mother where the complainant was. Upon being told she had not returned from school games, PW2 went to look for the complainant following the main route to the town. He met the complainant walking home alone and crying. She narrated to him what had happened and named Martin, the appellant, as the person who had defiled her. PW2 did not have money to take his daughter to hospital and did not report the matter to the police. He left for Nairobi to look for money and returned after three days. He reported the matter to the Assistant Chief who referred him to the police. He reported the matter at Migwani Police Station. The complainant was taken to hospital for examination and the appellant was arrested and charged.

The appellant denied committing this offence. He testified that on the day in question he did not meet the complainant although he had seen her at the school games during the day; he said he had known the complainant for 2½ years before and she had been his 'general' friend. He said he knew her age as 21 since she had told him in 2009 that she was 17 years old. He denied defiling her.

Determination of the appeal

Starting with the age of the complainant, it is my finding, just as the trial court found, that the complainant's age was proved beyond reasonable doubt. I have taken into account that she told the court she was aged 15½ years. Her father, PW2, told the court that the complainant was born on 1st May 1995. He produced copy of complainant's immunization card as proof of age. I have scrutinized the card marked MFI-1 (it seems the card was not marked as an exhibit) and noted that it confirms the date of birth of the complainant as 1st May 1995. On 25th of March 2011 when this offence is alleged to have been committed, the complainant was just two months shy of her 16th birthday. She was above 15½ years old and below 16 years old. Her age places her in the age bracket I have discussed in another case (**Garissa High Court Criminal Appeal No. 76 of 2013 David Muthande Mulyungi v. Republic**, (unreported) in which I have pointed out the gap in ages specified in section 8(2), (3) and (4) of the Sexual Offences Act. Sexual Offences victims who fall between 11 and 12 years and also between 15 and 16 years have not been catered for under this section of the Act and I have recommended in the case above and do the same here that Parliament needs to amend this law to address these gaps.

Despite the gap in the law, I harbour no doubt that that the prosecution proved the age of the complainant beyond reasonable doubt. The evidence of the father and the immunization card lays that issue to rest. For the purpose of this appeal and considering that the complainant had not attained 16 years, she is 15 years of age.

On the issue of identity of the appellant, I have considered that he was known to the complainant before, a fact he admits, and she had seen him earlier that day at the games; he was working at the home of a neighbour namely Nduku Musili which he also admitted and when her father found her crying she told him the appellant had defiled her and she stated his name to her father. It may have been dark and the source of light has not been described but this court has taken into account the above facts. I however caution myself of the dangers of relying on the evidence of a single witness on the issue of identity taking into account the circumstances surrounding the identity of the appellant. I am satisfied that given the fact that the appellant was known to the complainant the danger of the possibility of mistaken identity is mitigated. I am also alive to the provisions of the proviso to section 124 of the Evidence Act and I caution myself again on the evidence of the complainant as the only evidence on the identity of the appellant as the assailant. On this issue I have taken into account the other evidence that the appellant was known to the complainant before. I am convinced there is no mistaken identity because of the reasons I have advanced above.

On medical evidence, I have considered the evidence that the complainant was not taken to hospital immediately. Both her parents seemed ignorant of the importance of reporting a sexual offence as soon as possible to enable gathering and preservation of evidence. The complaint's mother advised her daughter to wash the panties and the father left for Nairobi to look for money to take his daughter to hospital without taking quick action to report the matter to the police who would have taken action immediately.

All the same, the complainant was examined on 30th March 2011 and found to have bruises on the labia minora and majora and pain on the examination of her genitalia. There was also presence of smelly yellowish bloody discharge and pus cells on examination of her urine obviously indicative of infection. The bloody discharge and pain confirms her evidence in reference to the time before being taken to hospital that **“in those days I was feeling some pain and there were some blood coming out”** (*sic*).

The doctor may not have stated that there was penetration but to this court's understanding, bruises on the genitalia are conclusive evidence that the complainant had been penetrated whether partially or completely. The trial court came to the same conclusion.

I have read the judgement of the trial court and I do not agree with the appellant that the trial court failed to consider his defence. The trial magistrate considered the defence and decided to disbelieve it.

I did not find any contradictions in the evidence of the prosecution. I find the evidence cogent and credible. The trial court did not shift the burden of proof to the appellant as claimed and the evidence of

the prosecution proofs this case beyond reasonable doubt.

In conclusion I find the appeal lacks merit. It is hereby dismissed and the conviction and sentence of the trial court upheld. I make orders accordingly.

Dated, signed and delivered this 24th July 2014.

S.N.MUTUKU

JUDGE