



REPUBLIC OF KENYA
INT HE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 97 OF 2009

GILBERT MIRITI KANAMPIU.....APPLICANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

The Charge

[1] The Appellant was charged with two Counts: 1) Defilement Contrary to Section 9 (1) and (2) of the Sexual Offences Act, and 2) Malicious Damage to Property Contrary to Section 339 (1) of the Penal Code. He was found guilty of both counts and was convicted. He was sentenced;

“On count 1 – to serve 10 years imprisonment,

On count 2- he serves one year imprisonment, sentences to run consecutively”

[2] He was grieved by the convictions and sentence. He then filed this appeal.

The Appeal

[3] The Petition of Appeal carries 4 grounds namely;

1. *THAT I pleaded guilty.*

2. *THAT the learned trial magistrate erred in law and facts by rejecting my defence without considering that a grudge existed between me and the complainant’s mother over a dispute we had with her son*

3. *THAT I do suffer from mental depression which the trial magistrate did not put into consideration even after I had raised the issue.*

4. *THAT the sentence meted upon me by the trial magistrate court is excessive and hard in law considering the fact that I never committed the alleged offence.*

[4] His counsel, Mr Riungu, ably argued the appeal and emphasized two issues that:

(a) The charge omitted the words “intentionally” and “unlawfully” which are mandatory

essential components of a charge of defilement under the sexual Offences Act. According to him, Section 3 of the sexual offences Act gives a peremptory command to the prosecution that those words must be part of a charge for defilement. Failure to use those words makes the charge incurably defective *ab initio*. He relied on the case of **ERRO OBA VS [2009] eKLR** to support that argument.

(b) That there was no age assessment that was done on the victim as required in law. A comprehensive age assessment is necessary and should be done by a qualified medical practitioner. Mere mention of age of the victim in the P3 Form is not sufficient as an assessment of age under Sexual Offences Act. Age assessment entails real age assessment by the doctor. Quite apart from the issues of age assessment of the victim, counsel introduced another nascent argument; that the mental status of the victim should also be assessed in sexual offences. He says although there is no judicial authority making assessment of the assailant's mental status mandatory, this court can lay down the principle as part of jurisprudence making by court. He believes the court should be able to so hold in this case.

c) He argued further that the evidence of PW3 was pure hearsay and should not have been admitted in the first place. Count II was never proved at all. It was only mentioned by the trial magistrate in the judgment.

d) He did not stop there. He astonished the court when he submitted that the trial magistrate made up own evidence to convict and sentence the Appellant. The extraneous evidence imported by the trial magistrate includes; (i) That the Appellant touched the breasts and private parts of the victim; and (ii) That the victim was held by the Appellant when she bent to fetch water.

[5] For the above reasons, counsel for the Appellant was of the view that, the proceedings were conducted unfairly. And, in the circumstances, not even a retrial is feasible. The only legal option is to quash the convictions and set aside the sentence.

Respondent Concedes

[6] M/S Muriithi for the State conceded to the appeal for three reasons:

(a) That the age of the victim child was never assessed. In fact, the prosecution witnesses gave three different ages;

(b) Touching of breast and private parts were foreign matters introduced by the trial magistrate; and

(c) The judgment was not supported by the evidence adduced.

COURT DUTY

[6] The court has a legal duty to re-evaluate evidence tendered and come to own conclusion and findings. See **OKENO V R**. The exercise does not mean or entail mere regurgitation or recount of the judgment of the trial court. Re-evaluation means and entails separate and independent analysis of evidence that underpins the final findings of the court. That duty helps the court to employ an impartial and unbiased lens in looking at the case once again. It also assists the court to dispel any misrepresentations by the parties or their counsel on the evidence tendered before the trial court.

[7] Let me start with the claim that the trial magistrate introduced and relied upon extraneous evidence that was not offered by any of the witnesses. That submission caught the attention of the court, for it aroused the intuitive sense of the court that something must have been awfully wrong if that was true. It was, therefore, for the court to confirm or deny the grave allegations against the

trial magistrate by looking at the record of the trial.

[8] I have perused the record including the judgment of the trial magistrate. The words “*touching her breast and private parts*” were used in the alternative charge for indecent act with a child. The alternative charge is contained on the overleaf page of the charge sheet. The trial magistrate just reproduced the alternative charge as framed and that is how those words “*touching her breast and her private parts*” featured in the judgment. That is the context in which those words were used in the judgment appealed from. It was the duty of the trial magistrate to so restate the charges. It is not, therefore, only indefensible argument that the magistrate imported foreign or extraneous matters into the judgment, but is a careless submission by both counsels in this case. It is a submission that borders professional misconduct on the part of the counsels in making a submission which they knew was disparaging and one that negates their role as officers of the court to assist the court serve justice. It is profitable for Counsels to desist from such misrepresentation of the record. Care should be taken, before imputing such serious charge on a court of law to peruse the record in a meticulous fashion that befits occupants of the chairs of noble legal practitioner. For now, this is the first encounter with those counsels; I will not make any adverse recommendation save to pardon them.

[9] Whereas I do not wish to assign any ominous motive on the part of counsels herein in making the offending submission in the manner they did, I should nonetheless state that the Respondent conceded to the appeal largely on that submission. I should also state that nothing on record which suggests the trial magistrate conducted the proceedings unfairly whatsoever. That matter ends there and disposes of that ground accordingly.

[10] I note that trial magistrate used the words...*when she bent to fetch water*...in the judgment. PW1 did not use those words. Instead she said that...*As I went to fetch water someone held me by the hip*’. But the use of the words ...*when she bent to fetch water*...by the trial magistrate in the judgment, does not distort the proceeding or assume the proportions of conducting a proceeding unfairly as Mr Riungu wants the court to believe. That ground fails.

The magic words: Unlawfully and Intentionally

[11] Mr Riungu made submissions on these words “unlawfully” and “intentionally” in sexual offences. I can do no better than what I stated in **MERU HCCRA NO 78 OF 2008** that:

[3] These words “unlawfully” and “intentionally” are legal terms. Thus, I need to instantly settle the submission by the counsel for the Appellant that the charge herein is defective for it does not use those words as required by the law. Counsel seems to be quite fetish about, and holds unusual fervour for the decision in the case of NKR HCCRA NO. 11 OF 2008 ERRO OBA V REPUBLIC.

[4] The point raised by Mr Riungu is one of jurisprudential importance especially now that we have the Constitution, 2010 and existing laws which must conform to it. But a more fundamental task is to appreciate the provisions in Sexual Offences Act by giving them an interpretation that accords appropriate proportion of significance to the objects of that Act to wit:

An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.

[5] Doubtless, the provisions in the Sexual Offences Act are the linchpin law that governs sexual offences in Kenya. The Act superseded all the earlier law on sexual offences unless it is otherwise provided in law. It is that framework which underpins my explication of the position of the law on the issue herein, the way I know it. Offences are established by law and cannot be presumed or implied. The offence of defilement is

established under Section 8 (1) of the Sexual Offences Act and is found in the act of causing penetration with a child. Penetration is defined in Section to mean;

“.....the partial or complete insertion of the genital organs of a person into the genital organs of another.....”

[6] The act of penetration with a child is what constitutes the offence in question. Prior to the Sexual Offences Act, the provisions in the Penal Code on sexual offences adopted the words “intentionally and unlawfully” as part of the offence, and those words needed to be included in a charge sheet drawn upon those provisions. But, the Sexual Offences Act establishes sexual offences against a child on a totally different awareness on the rights of a child; the status of a child victim in criminal justice on sexual offences; the protection of a child from sexual harm; and the prevention from occurring and punishment of harm by sexual acts on a child through penal sanction. Therefore, it contains a regime of law on protection of child rights and also one that defines the status of a child victim in criminal justice. The offences against a child under the Sexual Offences Act, and especially defilement, does not use the words “intentionally and unlawfully” in the substantive section establishing the offence. That position of law is undergirded by plausible legal and constitutional considerations based on the legal presumption that the act of sexual assault on or sexual intercourse with a child is intentional and unlawful in law. And, indisputably, that intention is expressed in the presumptions in Section 43 of the Sexual Offences Act as to what and in which circumstances an act is deemed to be intentional and unlawful, and of particular significance is Section 43 (4) (f) that a child is presumed to be incapable in law of appreciating the nature of the act of penetration or sexual intercourse or any form of sexual act. In other words, a child is incapable of consenting to any sexual intercourse or activity. These are peremptory commands in international as well as domestic constitutional and statutory laws.

[7] One more thing; Section 3 of the Sexual Offences Act from which Mr Riungu’s argument seems to draw legitimacy, relates to rape and does not extend to other offences especially those committed on a child. Where the law intends to use the words “intentionally and unlawfully”, they have been so used in the text of the substantive provision. It will not, therefore, be defensible to read-in those words in a provision that is so clear and which is free from ambiguity. In sum, as a charge sheet should always be drafted keeping very much to the elements of the offence as established in the relevant law, the charge sheet in question adhered to the law. For those reasons, I find that the charge sheet herein is not defective. The argument by Mr Riungu represents the law before the entry of the Sexual Offences Act.

[12] In step with above exposition of law, I find that charge sheet herein was drawn in accordance with the law and it is not defective.

Assessing the Mental Status of Assailant

[13] Another matter that I wish to dispose of preliminarily and which Mr Riungu placed reasonable prominence is the necessity to assess the status of mind of the assailant in sexual offences. Before I make any further comments on this ground, I need to mention that I have perused the record and no where did the Appellant raise the fact of suffering from mental depression at the time of the commission of the offence herein. That grounds therefore, fails. However, it makes sense to draw a distinction between a situation where the Appellant claims that he suffered from mental condition which affected his ability to understand what he was doing or what he did was wrong; and where the condition of mind makes him incapable of pleading or making his defence in a criminal proceeding. The former is a defence which the Appellant must plead and prove that he is a subject for McNaughton rules or diminished responsibility or automatism. The latter may operate differently depending on the effect of the disease of mind.

Sections 162 -167 of the Panel Code will then apply as is appropriate in determining the fate of the proceedings. See **BGM HCCRC No. 57 of 2009 [2013] eKLR**. When the issue arises, it is the sort of thing that courts are particularly experienced at deciding. The law on the subject in section 162 and 167 of the CPC was clearly stated in the case of **KAPLOTWA C/O TARINO VR [1957] EA 553** that:

“.....it was the duty of the court to consider not only whether he was capable of understanding the charge, but also whether he was capable of making his defence.....”

[14] A further reading of **BGM HCCRC No. 57 of 2009 [2013] eKLR** is important:

*That is why under Article 50 of the Constitution, the accused person should be fit to plead, be informed of the charge with sufficient details, be informed in advance of the evidence the prosecution intends to rely upon, be given sufficient time and facilities to prepare a defence and so on. Therefore where the issue of unsoundness of the accused is raised, section 167 of CPC will not apply, but the law applicable will be section 162 of the CPC. See the case of **SOHAN SINGH s/o LAKHA SINGH v R [1958] E.A. 28**.*

[15] As I said earlier, the defence of mental depression was never pleaded by the Appellant and it is not expected for the trial court to have determined it. It is also not a ground of appeal in the real sense of the law. The ground fails. Now I have determined all the preliminary issues. I shall proceed to re-evaluate the evidence herein and come to my own decision on this appeal.

ANALYSIS BY COURT

Evidence

[16] The victim, PW1 said that she was in standard VI and was 15 years old. She testified how the Appellant held her by her hip and threatened to drink her blood. The Appellant demanded that she engages in a sexual intercourse with him. She refused and a struggle ensued. The Appellant held her inner parts and so she screamed for help. She had not seen the face of the person who had held her hips as the person had approached from behind. Gakii and Kariuki responded to her call of distress and they found the two entangled in a struggle. They stoned the Appellant until he freed her from his arms. The Appellant drew a panga and threatened the people who were pursuing him. He even threatened to kill a goat that was near him. He was later arrested.

[17] PW2 also testified that she responded to the screams by members of the public. She found them beating the Appellant but she stopped them. She reported the matter to the chief who came and arrested him. But PW2 had said earlier that they took the accused to the chief.

[18] PW3 was the father of PW1 and on arrival home he was informed that somebody attempted to rape his daughter. He learned it was the Appellant.

[19] PW4 was the investigating officer and received the report by PW1 of attempted rape. He said that PW1 was at the time 16 years of age.

LAW APPLICABLE

Assessment of Age of Victim

[20] The offence of Attempted Defilement on a child under the Sexual Offences Act lies only where the victim is a minor. Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof Ngugi J in **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC:**

"...that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".

I agree with Mr Riungu that it is mandatory that the age of the victim is ascertained by formal or other acceptable modes from the evidence tendered.

[21] The victim, PW1 told the trial court that she was in standard VI and she was aged 15 years. The other person who talked of the age of the victim (PW1) was PW4 and he said that the victim (PW) was 16 years old at the time. The age of the victim was in doubt which made the necessity for an independent assessment more acute. That omission was fatal in this case which is for attempted defilement. I should mention at this stage that I do not see the basis of Mr Riungu's submission about mention of age in P3 Form as no P3 Form was produced in the case. But that does not affect the finding of the court on that issue.

Failure to Call Crucial witnesses

[22] I think and find that, the evidence by PW1 that she did not see the person who held her hip and the inner parts for he had approached from the back, needed some form of corroboration. The people who first came to her rescue, Gakii and Kariuki were never called to testify. See the case of **BUKENYA AND OTHERS V UGANDA [1972] EA 549** that:

i)....the prosecution] must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

[23] The evidence of those people was crucial and would have shed more light on the identity of the person and the circumstances surrounding the offence. I make this finding fully conscious of the proviso to section 124 of the Evidence Act that evidence of the victim of sexual offences alone could found a conviction as long as the court records reasons for believing the victim was telling the truth. The evidence by PW1 needed corroboration for she said she had not seen the person who held her by the hip.

FINDINGS AND ORDER

[24] The court after re-evaluation of evidence finds that the prosecution did not prove its case beyond any reasonable doubt. The trial court did not make a specific finding on the age of the victim that she was aged 15 years for the offence to be properly grounded. Another shortfall; the prosecution evidence on the commission of the offence by the Appellant was not or was barely adequate. In the circumstances, the prosecution ought to have called crucial witnesses particularly Gakii and Kariuki but it did not. Such failure would entitle the court to draw an adverse inference against the prosecution. For those reasons I quash the conviction and set aside the sentence. The Appellant shall be set to liberty forthwith unless lawfully held in prison.

Dated, signed and delivered in open court at Meru this 22nd day of October, 2013

F. GIKONYO

JUDGE