



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL NO. 59 OF 2012

(From the original conviction and sentence in criminal case no. 819 of of 2010 the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – PM)

DAKTARI SAID SHILINGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant was charged, tried and convicted in the Lower Court for the offence of Defilement, expressed erroneously in the charge sheet as contrary to Section 8(1) (2) of the Sexual Offences Act. The particulars of the charge state that on the 24th day of September, 2010 at [Particulars withheld] Village, in Kilifi District within Coast Province, he defiled N K M a girl aged 10 years. The appellant was sentenced to life imprisonment. He has appealed to this court against both conviction and sentence.
2. He cited 11 grounds of appeal. Grounds 1, 5, 6, 7, 8 relate to the quality and adequacy of the evidence tendered in the trial. Grounds 2, 3, 4, 9, 10 and 11 raise legal challenges and are framed as follows:

“2. The Hon. Learned trial magistrate erred in law and fact in conducting the trial without recording and showing the language used in the proceedings and this prejudiced the accused person and so far in the Coram, the language used was not indicated.

3. ***The Hon. Learned trial magistrate erred in law and fact by using an incompetent and unsworn Chonyi interpreter Ruth Muye who is a copy typist during the proceedings of 19-5-2011 and particularly when PW2 was giving evidence instead of using the other two Chonyi court interpreters who were present that is Mr. Elvis and Mr. Francis Bandika.***
4. ***The Hon. Learned trial magistrate failed to appreciate that the accused person was suffering from a mental challenge and hurriedly proceeded with the matter to the conviction of the accused person who was in fact insane when he committed the offence.***

9. The Hon. Learned trial magistrate erred in law and fact in that he failed to consider the right age of the accused person when DW2 the father of the accused person was giving evidence where he told the court the age of his son and the date he was born and that the accused was 17 years when he committed the offence but the court did not record that.

10. ***The Hon. learned magistrate erred in law and fact in that the accused age was not subjected to***

age assessment neither was the accused subjected to psychiatrist examination to ascertain the accused's mental status.

11. ***The Hon. Learned magistrate erred in law and fact by conducting a nullity and void proceedings, convicting and sentencing the person who was insane at the time of committing the offence.”***
3. Grounds 2 and 3 raise the issue of interpretation at the trial, while grounds 4, 9, 10 and 11 the question as to the mental status and age of the appellant at the trial. It would seem that after the appeal had been admitted, the appellant filed what is stated to be Supplementary Grounds of Appeal. These grounds are essentially similar to the initial grounds of appeal. The appellant also filed lengthy written submissions which he relied on during the hearing of the appeal. The State opposed the appeal based on the prosecution evidence which they argued, was overwhelming.
 4. As the first Appeal court, this court is obligated to review the evidence afresh and to make its own findings (See ***Okeno vs R 1973 EA 322***). The prosecution evidence was delivered through four witnesses. To the effect that the complainant NKM, a girl aged ten years lived at Msumarini with her grandmother (PW2). On the material date, she was on her way home from school when she was accosted by the appellant, known as “Doki” in the village. He pulled her into a bush and defiled her. She reported to her grandmother and was seen at the local hospital. Upon examination, bruises and tears were noted on her cervix and the hymen was torn. The appellant was subsequently arrested.
 5. The appellant did not testify but called two witnesses including his neighbour DW1 and father (DW2), to the effect that he was away in a place called Junju on the material date attending a funeral.
 6. I have reviewed the proceedings of the Lower Court. In my considered view there is no support therein for the contention that the appellant was prejudiced merely because one Ruth Muye conducted interpretation on 19-5-11, rather than other persons named by the appellant. The appellant did not object to the interpretation by the said Ruth Muye at the trial. The language of the court is clearly recorded as Kiswahili – Chonyi and the appellant participated. There is no merit in that ground.
 7. Similarly, the allegation that the appellant was a minor was, raised during this appeal. The record of DW2 does not state as ground 9 (nine) purports, that the appellant was 17 years of age. For the appellant to state that the court failed to record such a crucial fact creates obvious difficulties at the appeal stage. The appellant struck the court positively as an adult man on first appearance.
 8. This court however, is concerned that the issue of the mental fitness of the appellant was not properly addressed during the trial. The record of plea-taking (4.10.10) shows that the plea court ordered for his examination as to whether he was fit to plead. It is not apparent from the record why the court made this order.
 9. On 11th October, 2010 however, the prosecutor informed the court that the appellant was fit to plead. Apart from the fact that no fresh plea was subsequently taken, the record of the Lower Court does not contain a copy of the relevant report of the government psychiatrist.
 10. The appellant's recorded utterances and conduct on 5th August, 2011 and 15th November, 2011 raise doubts as to his mental state. Indeed the trial court questioned him at some length on 15th November 2011 in an attempt to discern whether the appellant was following the proceedings. Section 12 of the Penal Code states:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make

the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

11. On the basis of what transpired at plea and the trial, the trial court ought to have conducted an inquiry to satisfy itself as to the appellant's soundness of mind as provided under Section 162 of the Criminal Procedure Code. Only a medical examination by a qualified expert could establish such state. Hence in the absence of a medical report on the original court record, the issue remained outstanding.
12. I have seen a medical report on the appellant predating the charges, purportedly prepared at Sun N' Sand Country Health Centre on 10th September, 2010, and a purported letter from the chief Kijipwa location dated 2nd September, 2012 or 2010 warning DW2 to take his son, the appellant, to hospital. These documents were obviously sneaked into the record of appeal. There is no record in the original file of copies of these documents.
13. It is strange that the originals should be in the record of appeal and not in the original file. Be that as it may, it is the court's view that the proceedings before the Lower Court cannot be defended from the challenge of irregularity arising from the question whether indeed the appellant was fit to plea through out his trial.
14. Upon this court's initial perusal of these proceedings, it made an order that the appellant be examined by a psychiatrist. Dr. Mwang'ombe's subsequent report to this court reads inter alia:

“I interviewed the above named accused on the 5th June, 2013 in the presence of Cpl. Hamisi Bundo and Sgt. Zakaria Onyonka who said the accused was of normal behavior while in prison. The accused denied any history of mental illness. On examination, his appearance, behavior, mood, speech and cognition were normal.

OPINION: FIT TO PLEAD.”

15. I have carefully reviewed the evidence on record and especially the P3 form prepared in respect of the complainant. The appellant was charged with a serious offence of which the alleged victim is a child of ten years of age. The appellant was released on bond after three months of being charged, and remained a free man until his sentence on 15th May, 2012. He has been in prison just over one year since then. The offence with which he was charged is one that is very prevalent in this jurisdiction. In my opinion, it is good public policy that persons must be brought to account for their actions. More so where violation of rights of children are alleged. The court is obligated to give meaning to the protections enshrined in Article 53(d) of the Constitution in a purposeful manner even while considering whether the order for retrial will prejudice the appellant. It is a delicate balance.
16. I am satisfied that upon the evidence on record it will be in the interest of justice and the rule of law to allow the appeal by quashing the conviction and setting aside the sentence. However, I will order that a retrial be conducted. The appellant is to be arraigned before the Chief Magistrate's Court Malindi on 31st October, 2013 to take a fresh plea, based upon the psychiatrist report.
17. Meanwhile, for what it is worth, I direct that the appellant be escorted to the District Hospital in Malindi for assessment of his true age. A copy of Dr. Mwangome's report of 7th June, 2013 and the age assessment report are to be placed before the Plea Court on 31st October, 2013. The Deputy Registrar is directed to facilitate the carrying out of these directions.

Delivered and signed at Malindi in open court this **17th** day of **October, 2013** in the presence of the appellant, Miss Mathangani for the State.

Court clerk – Samwel.

C. W. Meoli

JUDGE