REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 14 of 2012

MUSEMBI MUEMA…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

[An appeal from the original conviction and sentence in Criminal Case No. 75 of 2010 of Principal Magistrate's Court at Kyuso (B.M Mararo, SRM)]

JUDGEMENT

1. Musembi Muema (the appellant) was tried for the offence of defilement and was convicted and sentenced to life imprisonment by the Mr. B. M Mararo Senior Resident Magistrate Kyuso as he then was. The appellant is dissatisfied and has come to this court on appeal. The charge presented in the lower court reads **Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge are that on 4th September 2010 at (withheld) in Tseikuru District Kitui County committed an act which caused penetration of his penis into the vagina of **M.M** a child of eight years.

2. The prosecution case in the lower court was supported by evidence of five witnesses, **M.M (PW1),** the complainant; **K.M (PW2)** complainant's mother, **L.K.M (PW3),** complainant's grandmother; **Reuben Mureithi (PW4)** the clinical officer and **P.C Meshack Mwangi (PW5)** the investigating officer. The defence case was supported by the evidence of the appellant who opted not to call any witness.

3. The petition of appeal indicates that the appellant is challenging the conviction and sentence but his grounds of appeal seem to be challenging the conviction alone. He raises issues with the trial magistrate for overlooking medical evidence; for failing to observe that the prosecution evidence is not conclusive; for failing to observe that the prosecution evidence was adduced by family members and could be 'tailored' and for failing to consider his defence. The appellant relied on his written submissions in which he seems to support his grounds of appeal on the issues of evidence. He claims there was contradiction in the evidence of PW2 and PW3; that the medical evidence did not prove penetration and that no DNA test was done; that the age of the complainant was not assessed and that his defence was not considered by the court. He also raises the issue of infringement of his constitutional rights under Article 49 (f) (i) and (ii) of the constitution. This was not part of the grounds of appeal but appears in his submissions.

4. The appeal was opposed by the learned state counsel who submitted that it is now settled that an accused persons who claims his rights were infringed for not having been taken to court within 24 hours can be adequately compensated in monetary terms in a civil suit. He further submitted that the evidence

on record is very clear because the appellant was caught in the act and the medical evidence corroborated by other evidence to prove that the appellant committed this offence.

5. This court is alive to the fact that it is required to re-examine and re-evaluate all the evidence with a view to arriving at its own independent findings and conclusion. I am also alive to the fact that I do not have the benefit of having observed the witnesses testify and therefore allowance is given that I am not able to comment on the demeanour of the witnesses. With this in mind I proceed to examine the evidence adduced at the lower court. The record reveals that PW1 was tending to cooking food outside their house on 4th September 2010 when she was grabbed by the appellant, pushed to the ground, her underpants removed and the appellant began having sexual intercourse with her. He threatened to beat her if she said anything. PW2, who is PW1's mother, had gone to watch news at her sister's house. When she returned home she found the appellant on top of PW1 in the act of defiling her while PW1 was lying on her back. PW2 held the appellant and screamed for help. The screams attracted PW3 from her house to PW2's house. PW2 is PW3's daughter. She found PW2 holding the appellant. The appellant was known to both PW2 and PW3. PW3 learned that the appellant had been found in the act of defiling PW1. With help of other family members the appellant was subdued, his hands tied and taken to Tseikuru Police Station where he was later charged with this offence. PW3 checked her grand-daughter and observed semen on her pants. She was taken to hospital after reporting the matter to the police. PW4 confirms examining PW1on 5th September 2010. The medical evidence confirms multiple bruises on PW1's labia minora and labia majora but the hymen had not been perforated.

6. After narrating this evidence and reading the grounds of appeal which are framed in unclear terms and the appellants written submissions it is my understanding that the appellant is raising the following issues:

i. Whether the evidence supports the charge

ii. Whether there are contradictions in the evidence of PW2 and PW3

iii. Whether the age of PW1 was ascertained

iv. Whether the defence evidence was considered

v. Whether his constitutional rights were infringed.

7. My careful reading of the evidence and the judgment of the lower court confirms that the trial magistrate considered all the evidence presented by the prosecution and the defence and made findings on it. I however fault the trial magistrate when he states **"I note that the accused did not even call any witnesses to corroborate his story. All in all I do not find his statement convincing ….."** The appellant had no duty to prove his innocence, to corroborate his evidence or even to convince the court. He could have chosen to remain silent without prejudice to his case. The burden of proving a case in a criminal trial never shifts from the prosecution. Even with poor defence or no defence at all an accused person can go scot-free where the prosecution fails to prove its case.

8. I have carefully read all the evidence and I find it solid. The appellant was found in the act and 'arrested' by PW2. Her testimony reads **'Accused was on top of her. I held the accused and I screamed. He tried to flee. He freed himself and I held him again as he tried to put on his pants. My mother/brother heard and came.'** She went on to say her brother held the appellant. The brother did not testify but her mother testified as PW3. Her evidence is that while at her house at around 8.00pm she heard screams and proceeded to the place. She continued thus **'I found PW2 holding accused. I inquired and PW2 told me that accused had defiled M. (**PW1**). I called the child. I sat her down and I checked her and I saw her pants had sperms**.' The evidence does not show when PW1 wore her pants since she said the appellant had removed it. I however find no contradictions in this evidence at all. It agrees in all material details and I have no reason to doubt that the sequence of events happened as narrated by PW1, PW2 and PW3.

9. Further evidence by the clinical officer confirms injuries on PW1. She was examined 8 hours after the defilement and was found soiled and with multiple injuries. The appellant is challenging the medical evidence especially that it does not confirm that penetration took place. Section 2 of the Sexual Offences Act defines penetration thus **"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.** Applying this definition and having found that medical evidence confirms multiple bruises on PW1's genitalia, I have no doubt in my mind in finding that penetration as defined under section 2 Sexual Offences Act took place. The bruises confirm this and it does not matter that the hymen was not perforated.

10. The record confirms that the trial magistrate considered the defence of the appellant and rejected it. I have agonised over the defence statement in a bid to understand it. It is not clear what relevance to his case some of that statement is. I have noted that he states that he attended a function with his brother on 4th September 2010. That while going home his brother left him. His brother's wife passed him on the road. That later he waited for his brother. That his brother's wife asked him what he was doing and she insisted that he was waiting for his brother's daughter. That an argument ensured. That his brother came and they returned to the wife's place. That her mother came and separated them. That he insisted he would return to the police station as he was injured. That he found police waiting for him claiming that he wanted to attach his brother's daughter. I am not able to make sense of this statement nor am I able to know who he refers to as his brother's wife and daughter. The appellant gave unsworn statement so the prosecutor or the court was not able to cross-examine him to clarify what he meant. I find this evidence not helpful to the appellant at all at least as regards creating doubt in my mind and I hereby dismiss.

11. The age of PW1 was given by her during her testimony as 10 years. During her examination by the trial magistrate as to confirm if she understood the nature of oath PW1 said she was in standard three. Neither her mother PW2 nor her grandmother PW3 testified as to her age or the class she was in. The police indicated on the P3 form that her age was 8 and the same age is indicated by PW4 on page 3 of the P3 form. Assessment of age is crucial in sexual offences. The age of the complainant determines under what section of the law an accused person should be charged and also what penalty to impose. The courts have been strict on this issue and rightly so. I have considered this issue. I take judicial notice that a child in standard three in our school system would be between the ages of 8 and 10 years. In urban settings children normally join standard one at six years of age. In the rural setting the age differs and some children may join from age 6, 7, 8 and even 9 years in extreme cases. This would place the child in standard three between 8 and 11 years of age. This would place the child within the provisions of section 8 (2) of the Sexual Offences Act.

12. In **Fappyton Mutuku Ngui v. Republic [2012] eKLR** Justice Ngugi was of the view that 'conclusive' proof of age in sexual offences cases does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate although such documents may be necessary in border line cases. I do not want to ignore the persuasive value of this authority. As I have analysed above it is my considered view that PW1's age can be placed below 11 years the upper limit under section 8 (2) of the Sexual Offences Act.

13. With the issues raised concluded, I wish to address the issue not raised in grounds of appeal but which this court cannot ignore. The defective charge. From the my experience gained within the one year I have sat as a High Court Judge handling appeals from the lower courts, I have noticed that there are technical deficiencies in drawing the charges. In most cases the appellants become aware of this and challenge the same on appeal. In other cases they may not even be aware of it. In almost all the cases with poorly drawn charges the section of law defining the offence is wrongly quoted. In this particular case the charge is drawn as follows: **Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.** This issue of defective charge has been handled by our courts before. In **Mombasa High Court Criminal Appeal No. 282 of 2008 Mutinda Mwai Mutana v. Republic** the appellant had been charged with defilement under section 8 (3) of the Sexual Offences Act which is the penalty section. The judge handling the appeal stated that **the proper procedure would have been to charge the appellant under section 8 (1) as read with section 8 (3) of the Sexual Offences Act.**

14. The courts have held that the test as to whether a charge is fatally defective is a substantive one. I

agree because an accused person ought to be charged with an offence known to law and that offence ought to be disclosed in a sufficiently accurate manner so as to give an accused person adequate notice of the charges facing him to enable him prepare his defence **(see Fappyton Mutuku Ngui case above).** To resolve this issue I have looked at the evidence and the role played by the appellant in the course of the proceedings. He participated fully in the trial. He had initially pleaded guilty but changed the plea to one of not guilty; he cross examined all the witnesses save for the clinical officer and gave his defence. From this record it is clear to me that he understood the charges facing him. To my mind, there is no prejudice occasioned to the appellant by not framing the charge properly and these deficiencies are curable under section 382 of the Criminal Procedure Code.

15. My conclusion of this matter is that the grounds of appeal raised by the appellant have no merit. My analysis of all the evidence confirms without doubt that this offence was committed by the appellant. The threshold of proof beyond reasonable doubt was met. The appellant's defence was correctly rejected and he was correctly convicted. The sentenced meted out to him is the one prescribed by law. The appeal has no merit, it is hereby dismissed. The appellant will remain in custody serving the term of jail handed to him by the lower court. I order accordingly.

STELLA N.MUTUKU, JUDGE

Dated, signed and delivered this 10th day of December 2012