



IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 65 OF 2019

BETWEEN

ABISAI MAKAYA alias ANYORE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence

of Hon N. M. Kyanya-Nyamori, RM dated 26th June 2019 in

Criminal Case No. 78 of 2018 at the Magistrate's Court at Thika)

JUDGMENT

1. The Appellant, **ABISAI MAKAYA alias ANYORE**, was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to **section 8 (1)** as read with **section (3)** of the **Sexual Offences Act** ("the Act"). The particulars of the charges were that on 8th August 2018 at [Particulars withheld] area, Juja Sub-County within Kiambu County he intentionally and unlawfully caused his penis to penetrate the vagina of FWN a child aged 11 years.

2. The Appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal filed on 12th August 2019 and the written submissions filed on 8th September 2020. The thrust of the Appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt. That the evidence against him was inconsistent and contradictory and could not sustain a conviction. He also pointed out that important witnesses were not called to testify. The Appellant also contended that the trial magistrate failed to consider this alibi defence and that the sentence was unlawful.

3. The Respondent also filed written submissions. It supported the conviction on the grounds that the inconsistencies and contradictions were not fatal and that the prosecution proved all the ingredients of the offence of defilement. It contended that the defence was an afterthought and that the sentence was within the law.

4. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see **Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174**). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.

5. The complainant, FWN (PW 1), gave an unsworn testimony after a *voire dire*. She testified that on the 8th August 2018 at around 9:00pm she was leaving the toilet while the appellant was waiting in line to take a bath. She stated that the Appellant coerced her to enter into the toilet with him. She recounted what transpired as follows:

He folded my dress and removed my pant. He folded it up to my chest. He removed his trouser and did tabia mbaya to me. He removed his penis and put it in my vagina. It was painful. He was standing on the wall. I was standing. He is taller than me. He reached my vagina by going down a little. He came to my level and began doing tabia mbaya. His face was facing me. I was just standing. He told me if I report he would kill me so I just kept silent and went to bed.

6. PW 1 testified that this was not the first time that she had sexual intercourse with the Appellant and on this occasion one of the neighbours had seen her with the Appellant in the toilet. In the morning, the neighbour reported the incident to her mother, PW 2. PW 2 asked her what had happened and she explained her what had transpired. PW 1 was later taken to hospital where she was examined.

7. The complainant's mother, PW 2, told the court that on the morning of 9th August 2018, a neighbour informed her that she had seen PW 1 leaving the toilet and a few minutes later she saw the Appellant leaving the same toilet. PW 2 called PW 1 and demanded to know who was in the toilet with her. PW1 informed told her what happened. They proceeded to Juja Police Post to report the incident and the Appellant was arrested thereafter.
8. PW 3 was the doctor who produced the P3 medical form on behalf of the doctor who examined PW 1 on 15th August 2018. According to the P3 medical form, the offence took place on 2nd August 2018. According to the doctor, the external genitalia was normal and the hymen was broken. A high vaginal swab revealed was done but there were no spermatozoa. He concluded that PW 1 had been subjected to an act of penetration.
9. The Investigating officer, PW 4, confirmed that she received a report of the incident on 7th August 2018. She recorded witness statements and visited the scene. She stated that the neighbour who had seen PW 1 and the Appellant refused to come to the station. She also produced PW 1's birth certificate.
10. The Appellant denied the offence in his sworn defence. He told the court that his brother, DW 2, had called him to assist him with some work on 5th August 2018 and he stayed with him until 12th August 2018 at Mwimuto. He stated that he was arrested by an AP Officer on 15th August 2018 and arraigned in court on the next day. He admitted that he was a neighbour to PW 1 and PW 2.
11. The appellant's brother, DW 2, told the court that he had called the Appellant to assist him with work on 5th August 2018. He told the court that the Appellant stayed with him until 12th August 2018.
12. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"
13. The key issue raised by the Appellant is that there were contradictions in the evidence of the witnesses as to when the incident took place. He pointed out that PW 1 and PW 2 testified that the appellant defiled PW 1 on 8th August 2018 at night which was the same date indicated on the charge sheet. PW 3 produced the medical evidence that showed that PW 1 was examined on 9th August 2018 but the offence happened took place on 2nd August 2018 while PW4 testified that the matter was reported on 7th August 2018. Based on these contradictions, Counsel for the Appellant submitted that the conviction was unsafe as it is not clear whether and when the act of defilement took place.
14. Counsel for the Respondent submitted that these contradictions were not fatal as they did not go to the root of the matter. Counsel submitted that from the totality of evidence, the prosecution proved its case.
15. In any case there are bound to be contradictions and inconsistencies in the evidence based on what each witness observed. If they are minor and do not affect the substance of the case, then they can be ignored. In this regard the Court of Appeal in ***Erick Onyango Ondeng' v Republic* NBA CA CRA No. 5 of 2013 [2014] eKLR** observed that:
- With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.
16. Having analysed the evidence in this case, I cannot say the inconsistencies are minor or can be rationalized to give a consistent account of what transpired. The testimony of PW 1 and PW 2 clearly contradicts that of PW 3 and PW 4 who are independent witnesses. The contradictions affect the medical evidence which evidence was scanty, as it did not find any notable evidence apart from the fact that the hymen was broken.
17. The medical evidence can only corroborate the evidence of PW 1 where the date of the offence is clear. If indeed the penetration occurred on 2nd August 2018 as captured in the PRC that would explain the lack of further evidence such as a tender or reddened vagina. Conversely, if penetration occurred on 8th August 2018 merely 24 hours before PW1 was examined, then the medical evidence would fall short corroborating PW 1's testimony.
18. Despite the lack of medical evidence, other evidence implicating the appellant was sufficient to implicate him. The Court of Appeal has upheld the principle that the absence of medical evidence is not decisive of the fact of penetration as it can be proved by oral testimony of the victim or by other circumstantial evidence (see ***Kassim Ali v Republic*, MSA CR APP NO. 84 of 2005 [2006] eKLR** and ***Dennis Osoro Obiri v Republic* NRB CR APP NO. 279 of 2011 [2014]eKLR**).
19. The only other corroborative evidence was that of PW 2. PW 2 did not witness the incident nor did she see the appellant with PW 1 on the night of the offence to warrant the court to examine circumstantial evidence. She was only informed by a neighbour who was not called as a witness.
20. The question though is whether she was an essential witness. The law is that the prosecution need not call all witnesses to prove a fact but where a witness is necessary, the failure to call a witness may lead to the court making an adverse inference (see ***Bukenya v Uganda* [1972] EA 562**). In this case the neighbour was an important witness who would have put the appellant at the scene of crime and would have corroborated the complainant's evidence.
21. These inconsistencies cannot be explained away and are important in such a case because the **section 124** of the **Evidence Act (Chapter**

80 of the Laws of Kenya) allows the court to convict a person for a sexual offence without corroboration if the court believes, for reasons to be recorded, the victim was telling the truth. These contradictions leave the question who was telling the truth or who was lying. The Court of Appeal in **John Mutua Munyoki v Republic NRB CA CRA No. 11 of 2016 [2017] eKLR** observed as follows:

How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully.

22. The trial magistrate did not consider or weigh these inconsistencies carefully or even express any view on the whether PW 1 was telling the truth and the reasons thereof as required by the proviso to **section 124** of the *Evidence Act*. Having considered these contradictions and the fact that the Appellant placed before evidence of an alibi, I have come to the conclusion that the appellant's conviction is not safe.

23. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 4TH DAY OF FEBRUARY 2021.

M. KASANGO

JUDGE

Mr Kasyoka instructed by Ongoya and Wambola Advocate for the Appellant.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the respondent.