



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. E017 OF 2021

SHIDA GONA KATANA APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from Original Conviction and Sentence in S.O No. 17 of 2019 of the Principal Magistrate's Court at Lamu

Law Court-Hon. T.A Sitati, PM dated 8th April 2021)

Coram: Hon. Justice R. Nyakundi

Kilonzo Wambua advocate for the appellant

Mwangi for the State

J U D G M E N T

The appellant was charged with defilement contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 23rd February and 24th April 2019 at [Particulars Withheld] village, Mwanamwinga Location Kaloleni Sub-county in Kilifi County within Coast region the accused intentionally and unlawfully caused penis penetrate the vagina of **MKT** a child aged 17 years.

The accused was also charged with an alternative charge of indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on diverse dates between 23rd February and 24th April 2019 at [Particulars Withheld] village, Mwanamwinga Location Kaloleni Sub-county in Kilifi County within Coast region the accused intentionally and unlawfully caused penis to touch the vagina of **MKT** a child aged 17 years.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

- 1) That the learned magistrate of the subordinate court erred in both law and fact in unreasonably, unjudiciously and wrongly finding that the prosecution had proved its case beyond thereby convicting and sentencing the appellant.***
- 2) That the learned trial magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant and in convicting him against the weight of the evidence adduced.***
- 3) That the learned trial magistrate Hon. Wanjiru M.N Resident Magistrate erred in law and fact by convicting and sentencing the appellant on PW2's evidence which was coached, coerced and lured to give incriminating evidence against the appellant***
- 4) That the learned magistrate of the subordinate court Hon. Wanjiru M.N Resident Magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the appellant to the offence of defilement and committing an indecent act with a minor.***

5) That the learned magistrate of the subordinate court, Hon. Wanjiru M.N Resident Magistrate erred in law by failing to consider, appreciate and accord due weight to the Appellant's defence which was way credible and overwhelming.

In light of the above grounds, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

Background

PW1 Mwangolo Chigulu a clinical officer from Mariakani Sub County produced the P3 in respect of the complainant which stated that the complainant had been taken to the hospital on 12/10/2019 on allegation that she had been defiled by someone known to her. On observation, she had no injuries on her body, an unkempt vagina, no hymen, white discharges, fungal infection and was 23 weeks pregnant.

PW 2 MKT told the court that she was 17 years old having been born 14/10/2002. She informed the court that the accused was known to her as her boyfriend and in diverse dates between February 2019 and April 2019 she had sex with him. That she would later discover that she was pregnant and it is the accused who was responsible for the pregnancy. The matter was reported to the school, chief and police.

PW3 JKK, (PW2's) mother informed the court that she knew the accused person as he was their neighbor. That on 28/07/2019 she had noticed changes in **(PW2's)** body and upon inquiry she would learn that the accused was responsible.

PW4 PC VK informed the court that on 11/09/2019 **(PW3)** had reported the matter to the police station. She interrogated **(PW2)** who confirmed that she had been in a relationship with the accused and they had had sex sometime in February 2019 and again in April 2019. She told the court that she had taken **(PW2)** to hospital where she had examined and the pregnancy confirmed. She also confirmed that **(PW2)** was born on 14/10/2002 by way of health card and was therefore 17 years old when the matter was reported. **(PW2)** had then given birth on 17/12/2019.

PW5 Francis Nzeo a government analyst produced a DNA report confirming that the accused was the father of the child born of **(PW2)**

The prosecution closed its case and the trial magistrate ruled that the accused person had a case to answer and placed the accused on his defence. The accused elected to give sworn evidence and called two witnesses.

DW1 Shida Gona Katana, informed the court that he was a boda rider. That on 10/09/2019 he had been summoned by the chief and upon heeding the summons, he was informed that he had been accused of defiling **(PW2)**. That he was taken to the police station and assaulted in order to confess. He denied ever having sex with **(PW2)** and that the pregnancy was not his since he had a wife and children. He stated that the DNA report was false and that **(PW2)** was since married off secretly in June 2020 and all kept under wraps in a plot to victimize him.

DW2 Changwa Katana Mitsanzi a village elder stated that he knew the accused as a man of good behavior and that he had never received a complaint against him and that he suspected that the charges had been brought as a result of a grudge.

DW3 Salama Hamisi the accused's wife stated that she had never seen **(PW2)** in her house and never had an incident of her husband of her husband engaging in extra marital affairs.

The defence closed its case and both parties tendered their submissions. The trial court found in favour of the prosecution and entered a conviction against the accused and sentenced the accused to five years imprisonment.

The submissions on appeal

The appellant submitted the prosecution did not tender adequate evidence to justify the guilt of the appellant. That the prosecution did not establish that the age of the complainant was below the age of 18 years. That the mother of the complainant had testified that the complainant was born on 14th October 2002 yet the child health care card produced had shown that the complainant was born on 14th October 2000. That no birth certificate had been produced as proof of age.

They submitted that the prosecution had not proved its case beyond reasonable doubt and it is for that reason that they pray the appeal be allowed, sentence quashed and the conviction set aside.

The respondent submitted that the age of the complainant was proved by a birth certificated produced as Ex. 3 which proved that the complainant was born on 14th October 2002 making the complainant 17 years at the time of the commission of the offence.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. The task of the 1st appellate Court on first appeal from a conviction or acquittal, was declared by the decision of the Court in **Pandya v R {1957} EA 336 at pg. 337** where the Court held as follows:

“On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the Judgement appealed from but carefully weighing and considering it. When

the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate Court has not seen. On second appeal it becomes a question of Law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles.” (See also Shantilal M. Ruwala v R {1957} E.A 570)

The appellant is accused of committing the offence of defilement. Section 8 (1) defines defilement as

“A person who commits an act which causes penetration with a child of an offence termed defilement.”

Three ingredients must be established for one to be convicted of defilement, which are:

- 1. Age of the Complainant**
- 2. Proof of penetration**
- 3. Proof that the perpetrator of the offence was the Accused person.**

See **Charles Wamukoya Karani v Republic Criminal Appeal No.72 of 2013.**

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. (See **Moses Nato Rapheal v Republic (2015) eKLR.**)

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v Republic (2017) e KLR** cited with approval **Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** which held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello v Republic (2010) eKLR** where the Court stated that:

“In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)..proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”

32. In **Dominic Kibet v Republic Criminal Appeal No. 155 of 2011** it was held that:

“...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

In the instant case the appellant impugned the trial court’s judgement on amongst others that the complainant’s age was not proven as the immunization card provided by (PW3), the complainant’s mother was not sufficient. In the case of **JOA v Republic [2019] eKLR** this court expressed itself s follows regarding the issue of age,

“whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim. This position finds support in several cases: In P M M v Republic [2018] eKLR, Mwongo J stated as follows and I concur:

“Whilst it is true that the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to her age does not constitute such proof, the Court may in certain circumstances rely on evidence other than an age assessment report or birth certificate. In the case of in Musyoki Mwakavi v Republic [2014] eKLR held that: _

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”

The prosecution in this case relied on the immunization card as proof of age of the complainant. I have looked at the ineligible copy provided. I am not convinced that the immunization card provided would be substitute documentation in the absence of a birth certificate or a birth notification to as proof of age. Furthermore, if I were to be persuaded by the same, then the same would show that the date of birth of the complainant was 14/10/2000. I am not convinced beyond doubt that that the complainant was below 18 years to constitute one of the ingredients of defilement especially where the age provided by the prosecution treads on a borderline. In the absence of birth certificate, birth notification or expert age assessment report then I do not agree that the age was proved.

On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as:

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

Section 9 (1) of the Sexual Offences Act provides as follows;

‘A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement’.

The prosecution has a duty to establish that the appellant attempted to defile the victim. In determining attempted penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng v Republic (2013) eKLR** where the court stated that:

“In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence...”

In the present case, the special circumstances are that there was the birth of a child out of the sexual encounter. There was production of DNA analysis report produced as **PEX 6** whose conclusion was that the accused was the father of the baby born of (**PW2**). It is therefore not in contest that there was a sexual encounter between the accused and (**PW2**).

On identification, where identification is based on recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The Court of Appeal in **Francis Muchiri Joseph v Republic (2014) eKLR** held that:

“In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name”.

In this case, the appellant seems well known to the accused and this has not been disputed. To this end the only issue that remains in dispute is whether the alleged defilement did take place.

I have taken into consideration the circumstances of this case and I am not satisfied that the prosecution proved its case to the required threshold of beyond reasonable doubt as regards proof of age which is a key ingredient in proving the offence of defilement.

In the upshot, the appeal succeeds in its entirety and the Appellant shall therefore be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Mulwa advocate for the appellant
2. Mr. Mwangi for DPP