



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 103 OF 2017

TIMOTHY WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 16 of 2015

at Principal Magistrates Court Kimilili by (Hon. S.W.Githogori – RM on 18th July 2017)

J U D G M E N T

1. **Timothy Wafula**, the Appellant, was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act, No. 3 of 2006. Particulars being that on the 13th March, 2015 in Bungoma North District within Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of **LNN**, a girl child aged 8 years.

2. In the alternative he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. Particulars of the offence being that on the 13th March 2015 in Bungoma North District within Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of **LNN**.

3. Having been taken through full trial he was found guilty, convicted for defilement and sentenced to life imprisonment.

4. Aggrieved, he appeals on grounds that: the trial magistrate failed to comply with Section 36 of the Sexual Offences Act; No spermatozoa were extracted from the Appellant to ascertain through forensic tests whether he was the culprit in the case which was prejudicial to him; The Appellant's rights as provided under **Article 35(1)** of the Constitution were threatened, infringed, denied and violated; and that he was denied access to information due to failure to be furnished with witness statements, therefore making the trial unfair;

5. That failure to call crucial witnesses including the Investigation Officer and the complainant was as a result of fear that their evidence would be against them, which was prejudicial to the Appellant; the case was full of inconsistent and contradictory evidence; the prosecution failed to call evidence to rebut the Appellant's defence under Section 212 of the Criminal Procedure Code (CPC); the court erred in accepting the evidence of Nyumba Kumi chairman which was hearsay, and that the age of the complainant was not proved beyond reasonable doubt through a birth certificate or baptismal card.

6. The prosecution's case was that on the 13th March 2015 at about 4.00 pm, **PW1 VW** was coming from church when she saw the Appellant emerging from an abandoned house; then she also saw the complainant emerge from the same house. On interrogating her, she pointed at her genital organ saying that he had done something to that particular part of her body. She checked the complainant and took her to Makutano Dispensary where medical examination was done. There after she reported the matter to Makutano Police Station and the Appellant was arrested. Investigations carried out culminated into the Appellant being charged.

7. Upon being put on his defence, the Appellant denied knowing the complainant. He stated that on the date he was arrested, he was

watching football at a video shop at Misanga Market. He was taken to Kapchonge Police Station prior to being arraigned in court two (2) days later.

8. The appeal was canvassed by way of written submissions. It was urged by the Appellant that according to the allegation of the clinical officer, the complainant was taken to hospital for examination where it was established that her hymen was broken and there was presence of epithelial cells but the trial court did not direct some samples to be taken from him (Appellant) for purposes of forensic and other scientific testing including DNA test in order to ascertain if he had committed the offence;

9. That crucial witnesses, alleged neighbours, were not called to support the prosecution's case;

10. On contradictions alleged, the contention is that PW4 confirmed to the court that there were no injuries to the labia majora and bruises in the labia muscles. That there was no whitish discharge on the labia majora and on cross-examination it was stated that the hymen was ruptured, her private parts had whitish discharge; contradictions that should have not been relied upon as basis of conviction.

11. That the trial court failed to weigh the Appellant's unsworn statement which should have moved it to acquit him and that he was arrested at the age of 22 years while he still depended on his parents.

12. In a response thereto the State/Respondent opposed the appeal. The Prosecution Counsel submitted that it is not mandatory for the prosecution to adduce forensic evidence in a case where evidence through eye witnesses testimony and medical expert evidence was availed. That **Section 63** of the Evidence Act recognizes direct evidence of that nature as having the probative value in every case. That the complainant was a vulnerable witness and her mother testified in her place after the court determined through *voire dire* that she had no capacity to testify owing to mental retardation.

13. That direct evidence was led by the prosecution which was not contradictory; there is no strict rule or requirement for the age of the victim to be proved by a birth certificate or baptismal card.

14. This being a first appellate court, it is duty bound to analyze and evaluate evidence adduced at trial afresh so as to draw its own conclusions while bearing in mind that it neither saw nor heard witnesses who testified. In the case of ***Kiilu & Another Vs. Republic (2005) 1KLR 174*** the court of Appeal stated that:

“(i) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

(i) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

15. The defilement in issue is stated to have been contrary to Section 8(1) of the Sexual Offences Act (Act) which provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

16. The penal Section being 8(2) of the Act provides thus:

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

17. Therefore, for the Appellant to have been found guilty, the prosecution was required to prove the following ingredients:

- (i) The age of the complainant to establish if indeed she was a child.
- (ii) The fact of penetration having occurred in the complainant's genitalia.
- (iii) The perpetrator of the act of penetration.

18. In the case of ***Kaingu Elias Kasomo Vs. Republic, Criminal Appeal No. 504 of 2010***, the Court of Appeal stated that:

“In defilement cases Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

19. In the case of *Francis Omuroni Vs. Uganda, Criminal Appeal No. 2 of 2000 Vs. Uganda* the court of Appeal stated that:

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

20. The complainant was taken for age assessment. A report authored by a Dental Specialist indicted her age as approximately nine 9 years. Absence of a birth certificate did not change findings on age. Medical evidence adduced was sufficient to prove the age of the complainant.

21. With regard to the act of penetration. It is defined in **Section 2** of the Act as follows:

.....Partial or complete insertion of the genital organs of a person into the genital organs of another person.

22. The child was examined by **PW4 Michael Otubukwa Okwamwiri**, a medical officer based at Naitiri Sub-County Hospital. She was first seen at the hospital at about 16.00 hours on the date of the alleged incident. Her hymen was broken, she had epithelial cells which was an indication of wearing of cells during sexual intercourse hence he concluded that the child had been defiled. This was proof of a genital organ having been inserted into her genitalia which was penetration.

23. The Appellant in furtherance of the argument that he was not the perpetrator, complains that his rights to fair trial and information were violated. As provided by the Constitution, every accused person has a right to a fair trial (See **Article 25** and **50** of the Constitution); that right extends to information held by the State that is expected to be used against them (Also see **Article 35(1) (a)** and **50(1) (c)** and **(1)** of the Constitution.

24. It is trite that whoever asserts the existence of some fact must prove its existence. In his submissions he failed to elaborate how his rights were violated, and at what point it allegedly happened. Although he faulted the prosecution for allegedly having not been supplied with witness statements there was no such complaint on record, hence the presumption that it was done during pre-trial stage.

25. The Appellant faults the court for non-compliance with **Section 36** of the Act that provides as follows:

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

26. In the case of *Abdinasir Guhad Bore Vs. Republic (2020) eKLR* the Court of Appeal stated that:

“Failure by the trial court to order the Appellant to be subjected to medical examination was not fatal. Section 36(1) of the Sexual Offences Act which requires the court to direct the taking of samples for purpose of forensic and other scientific testing, including DNA, in order to ascertain whether or not the suspect committed an offence is undertaken as a matter of judicial discretion. Only where circumstances dictate will the trial court order DNA samples to be drawn from the suspect to ascertain if the offence was committed by him. The trial magistrate in his absolute discretion, weighing the circumstances under which the offence was committed, found no purpose for directing that the appellant’s DNA samples be analyzed.”

27. The way the provision of law is worded indicates that the power bestowed upon the court by Statute is discretionary. The court is not obligated to direct taking of samples from the Accused to determine whether or not he was the culprit or if indeed the offence was committed. The court is enjoined to rely on evidence of the victims, witnesses and medical evidence.

28. **Section 124** of the Evidence Act stipulate thus:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the allege

29. That provision of the law would be applicable when the victim adduces evidence that is credible. The court believing such evidence would convict the accused person. In the instant case, the complainant was not taken through *voire dire* examination. The prosecution availed a report of her mental status. She suffered from mental retardation. In the result the trial court declared her a vulnerable witness. **Section 31(1)** provides thus:

A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—

(a) The alleged victim in the proceedings pending before the court;

(b) A child; or

(c) A person with mental disabilities.

Section 2 of the Act provides that, in that regard the guardian of the victim/child (PW2) was to act as an intermediary.

“Vulnerable person” means a child, a person with mental disabilities or an elderly person and “Vulnerable witness” shall be construed accordingly.”

30. In the instant case, PW1, the guardian of the complainant was identified and acknowledged by the court as an intermediary.

31. The trial court, did not fall into error in declaring the complainant a vulnerable witness and finding PW1 an apt intermediary. However, PW1 was also a witness to the fact. She saw the Appellant coming from an abandoned house. Then she saw the child emerge from the same house and she revealed what had happened to her. She stated “alinifanya hapa” while pointing her private parts. The examination that followed established what had happened to her. She had been violated sexually. Evidence of facts as presented made the court draw a conclusion, and rightly so, that the Appellant was the perpetrator.

32. The appellant contends that crucial witnesses were not called to testify including the complainant and investigating officer. **Section 143 of the Evidence Act** provides thus:

...No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

33. In **Julius Kalewa Mutunga Vs. Republic (2006) eKLR** the Court of Appeal stated that:

“Where the court held that as a general principle, the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence. The trial court found that the prosecution had called witnesses who had given adequate evidence to sustain the charge facing the Appellant and to that extent it cannot be faulted.”

34. With regard to the victim it is clear that an intermediary was identified to testify on her behalf. For the investigating officer, in the case of **Jeremiah Gathuku Kirungi Vs. Republic (Criminal Appeal No. 73 of 2008)** the Court of Appeal stated as follows:

“.....the effect of failure to call Police Officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrates.”

35. In July 2015, the 16th the Investigating officer was availed but the prosecutor did not let him testify citing pressure of work. On 19th November 2015 he was available but the Appellant sought an adjournment on grounds of being unwell. Thereafter the case did not proceed following the trial magistrate, prosecutor and Appellant’s indisposition. Then the Investigating Officer having been assigned other duties. Thereafter it turned out that the Investigating Officer was attending a training. The prosecution counsel decided to close the case without his evidence. However, Evidence adduced by other witnesses having been sufficient to prove the case, failure to call him was not detrimental to the prosecution’s case.

36. The Appellant also complained that the prosecution case was full of contradictions. In the case of **Twehangane Alfred Vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA 6** it was stated 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.”

37. As afore stated there was proof of the victim being a child; there was evidence of oral penetrative intercourse and the Appellant was identified as the perpetrator. The alleged contradictions did not affect the probative value of the case.

38. On Sentence, in his testimony the Appellant stated that he was 22 years old. On being convicted, in his mitigation he alleged that he was 17 years old. This prompted the court to call for an age assessment report. An assessment based on fusion of epiphyseal growth plates established that he was 21 years old. In the circumstances, being an adult who took advantage of a minor who was of tender age and mentally challenged, the court did not fall into error by sentencing him as provided by Statute

39. The upshot of the above is that the appeal lacks merit.

Therefore, it is dismissed in its entirety.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms. Mukangu for ODPP

Appellant

Court Assistant – Brenda