



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 70 OF 2018

MUEMA SAMUEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an appeal from the Judgement in Criminal Case No. 303 of 2016

that was delivered on 18th January 2018 in Chief Magistrate's court at Kitui.

JUDGEMENT

1. **Muema Samuel**, the Appellant herein, was charged alongside 2 others with the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offence Act Number 3 of 2006** vide Kitui CM's Court Criminal Case (Sexual Offence Act) No. 303 of 2016. The particulars were that on diverse dates between 13th March 2016 in Kathivo location, Matinyani within Kitui County he intentionally caused his penis to penetrate the vagina of (name withheld) a child aged 14 years.

2. He also faces an alternative charge of committing an indecent act with a child but that is not the subject of this appeal as he was convicted of the principal offence and sentenced to serve 25 years' imprisonment.

3. The Appellant felt aggrieved by both conviction and sentence and filed this appeal. Before I consider the grounds, I will look at a brief summary of the case presented to the trial court.

4. The case against the Appellant was consolidated with 2 other similar cases and the Appellant herein on the consolidated charge was the 3rd accused in Count III of the said consolidated charge.

5. The Complainant was a child aged 15 years at the time of trial and according to her testimony the offence against her, took place between mid-March 2015 and March 2016. She named accused persons generally as the persons who would sneak in at different times to defile her in the house she was staying alone with her siblings. She testified that she used to sleep with her younger sister.

6. The place where the defilement took place however was not very clear because during cross examination, the Complainant told the trial court that the 1st accused was the one who went to defile her where she used to sleep while the 2nd accused followed her on one occasion to a river where he defiled her. In regard the Appellant, she testified that, he followed her on one occasion when she was going to fetch firewood and also defiled her. She was however uncertain when this took place.

7. PM (PW2) a brother to the Complainant testified that he saw appellants co-accused (accused 2) at their house one night. He did not specify when but stated that he was notified by one Boniface that the said accused 2 (William Nzee Katutu) was sleeping with the Complainant.

8. AK (PW3), a teacher at [Particulars Withheld] where the Complainant schooled, testified and informed the trial court that she received a report from her fellow teacher that the Complainant was complaining of pain in her private parts and that she had reported to her that her brother had been sleeping with her for 3 days prior to 7th March 2016. According to her, the Complainant had been defiled by her brother MM who was a pupil at [Particulars Withheld] Primary School. She stated that she was given that information by a fellow teacher she did not name.

9. EM (PW4), another teacher from [Particulars Withheld] Primary School testified and informed the trial court that on 8th March 2021, she received a report that a girl in class seven was being sexually assaulted and that upon receiving the report she called the brothers to the girl who confirmed to her that different men used to defile the girl repeatedly. She informed the trial court that when she inquired from the girl

(complainant) she told her that the men who defiled her were Katutu, Kimanzi and Gitau Katutu.

10. Kennedy Kioko (PW 5) a Clinical Officer at Kitui Sub District Hospital was summoned to produce a P3 filled by a person he referred to as ‘‘colleague’’ at Mutomo Mission Hospital. She produced the P3 (P Ex 1) which indicated that the girl was aged 14 and had been defiled. She however did not state why she was testifying on behalf of a ‘‘colleague’’ working in another hospital.

11. PC Prisca Kendi (PW6) on her part testified that two teachers went to the Police Station at Matinyani and reported that 2 girls had been defiled and named the girls as Kamuta Mutie and the complainant. She stated that the former had been defiled by her brother while the complainant was defiled by two accused persons. She however did not say who the two accused persons were but only suggested that the first accused, Job Kimanzi Mwinzi was mentioned.

12. Joseph Mutiso (PW 7) also testified but his testimony only touched on what her sisters including the complainant told her and that the Appellant’s co-accused –Stephen Mwinzi and William were mentioned by the complainant as the people who had defiled her. He however, did not say when the incident or incidents took place.

13. When placed on their defence, the Appellant and his co-accused denied committing the offence. On his part the Appellant defended himself stating that he was not involved at all and came to learn about the defilement when he was arrested and taken to Matinyani.

14. The trial court however found that the prosecution had proved its case against the Appellant and his co-accused and proceeded to convict them sentencing the Appellant to 25 years in prison.

15. The Appellant felt aggrieved and filed this appeal raising the following two grounds namely: -

(i) That the Learned Magistrate faulted in law and in fact by basing conviction on indirect evidence riddled with contradictions, malice and inconsistencies.

(ii) That the trial magistrate erred by rejecting his defence.

16. In his written submissions filed on 5th May 2021 the Appellant introduced 8 completely new additional grounds without leave of this court. Those grounds having been raised without leave are not going to be considered in this appeal because they are incompetent for want of leave as provided for under **Section 350 (2) (iv) of the Criminal Procedure Code**.

17. The Appellant has submitted that the prosecution did not prove its case beyond doubt as the case was riddled with contradictions. He faults the trial court for rejecting his defence.

18. The State has opposed this appeal through its written submissions dated 31st August 2021. It contends that its case at the trial established beyond doubt that the minor had been defiled pointing out that the 3 necessary ingredients to wit, age, penetration and identification of the appellant were proved. It has urged this court to disregard the new grounds raised by the Appellant without leave of this court as required by law.

19. According to the State, its case proved that the victim was 14 years old and at class 7 and that the evidence of PW5 Prisca Kendi and PW1 proved that fact. It further submits that the age assessment report was produced as P Ex 4.

20. The Respondent has further contended that the medical evidence tendered by Kennedy Kioko (PW5) proved defilement had taken place and that the minor identified the Appellant as the perpetrator who followed her to the bush, where she had gone to fetch for firewood and defiled her there. The Respondent contends that the complainant knew the Appellant well.

21. The State further contends that the Appellant’s defence was well considered and has contested the Appellant’s claim that he had raised alibi as a defence.

22. It submits that the sentence of 25 years meted against the Appellant was justified because unlike the other co-accused, the Appellant did not appear remorseful.

23. This court has considered this appeal and the response made. As I have observed above the Appellant was charged and convicted of the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offence Act**. Going by this provision it shows that for a charge of that nature to be sustained, the following necessary ingredients must be established and proved beyond reasonable doubt.

(i) Prove of penetration.

(ii) Age of the Complainant or the victim.

(iii) Identity of the perpetrator.

24. The mandate of this court as a first Appellate Court is to re-evaluate the evidence tendered at the trial with a view to making its own conclusions having in mind that, unlike the trial court which has had the benefit of observing the witnesses as they testified, this court is limited to the court proceedings as recorded by the trial court.

25. I have already laid out the above evidence tendered by the Prosecution and the Appellant's unsworn statement of defence. I will begin with the first ingredient of the offence upon which the Appellant was charged and that is penetration.

26. I have considered the evidence tendered by the prosecution in regard to this element and it is quite apparent that the prosecution case rested on the evidence of PW1 and PW5.

27. Looking at the evidence tendered by the prosecution in regard to this key element of penetration and I must say that the Appellant's grievance that the prosecution's case was riddled with inconsistencies and contradictions is not far-fetched.

28. I will begin with the medical evidence tendered by Kennedy Kioko (PW5). That witness testified that he was from Kitui Sub- District Hospital and was coming to testify on behalf of a "colleague" who was working at Mutomo Hospital. The witness in the first place failed to lay basis on why he was coming to testify on documents authored by another person in another facility and secondly who the other person was and whether he was a qualified doctor or an expert in the medical field. This court is stating this in light of clear provisions of **Section 48 of the Evidence Act (Cap 80)** which provide as follows: -

“When the court has to form an opinion on point of..... science or art opinions upon that area are admissible if made by persons specially skilled in science or art.....”

The questions posed is who was Kennedy Kioko's unnamed "colleague?" Was he specially skilled in the area of medicine on whose opinion the findings contained in the P3 was relied upon? Those questions going by the proceedings from the lower court remain unanswered.

29. It is a legal requirement that where a maker of a document cannot be found for reasons of death or without an amount of expense that can be considered unreasonable, another expert in that field who is well versed with the handwriting or signature of the maker can be called to testify in his/her place. The provisions of **Section 33 of the Evidence Act** is clear on that. It provides:-

“Statement by deceased person, etc., when Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible

30. The prosecution in this instance failed to lead PW5 to lay basis before proceeding to lead the witness (PW5) to testify on behalf of the medical expert who examined the victim and filled the P3 form and PRC Form.

31. The net effect of that omission by the prosecution was that all the medical evidence tendered at the trial to prove defilement was rendered hearsay and inadmissible. The P3 and PRC form tendered as P Exh 2 & 3 respectively, were inadmissible by operation of **Sections 33 and 48 of the Evidence Act**.

32. On the question of age, this court notes that the age assessment report was also tendered by incompetent witness. Prisca Kendi (PW6) told the trial court that she was a Police Officer. The age assessment report (P Ex 4) was signed by a Medical Superintendent Kitui County Hospital who was the medical expert who should have been availed to testify. PW 6 did not state that she was an expert in that field to qualify to tender the report which could be admitted and relied upon by the trial court to establish the age. Sadly, the age assessment report was also rendered inadmissible in evidence due to lack of diligence by the Investigating Officer and the prosecution. It was erroneous for the trial court to admit the document in evidence and use it to establish the age of the minor as 14 years old. From the foregoing, it is quite clear that there was nothing admissible in Evidence that the trial court could use to establish the age of the minor. There was no birth certificate tendered. The P3 form tendered was inadmissible as I have already found out above. This court finds that the crucial element in defilement which is age was not established and proved by the prosecution's case.

33. Now let me turn to the other piece of evidence that the prosecution could have relied upon to establish the element of penetration. The provision of **Section 124 of Evidence Act** provide that the evidence of a victim can be sufficient to render a conviction if a court for reasons recorded finds that the victim is telling the truth. **Section 124 of Evidence Act** states: -

“124. Corroboration required in criminal cases 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 alleged victim is telling the truth.”

34. In this instance the evidence tendered by the prosecutin from the minor (PW1) was quite unreliable as it was inconsistent with the evidence given by other witnesses who testified. The complainant (PW1) testified that, the accused person whom she did not name used to go to their house at night. The closest he mentioned the Appellant herein is when she stated that he followed her to a river on a unknown date and that her sister could confirm that. That sister was not called as a witness.

35. When you consider her evidence with that of her brother (PW2), the evidence lacks consistency.

The evidence of her teacher AK (PW3) is even more contradictory because according to her, the Complainant informed her that her brother had defiled her for 3 days and caused her pain in her private parts. Ostensibly, it is that complaint, made to the teacher that triggered the action that saw the appellant and his co-accused being arraigned.

36. The evidence of another teacher EM (PW4) threw more contradictions in the case because according to her, the complainant informed her that different men defiled her and named them as Katutu, Kimanzi and Gitau Katutu. Again she did not state when the defilement took place but what is certain is that the Appellant was not mentioned.

37. In the face of the above cited inconsistencies and contradictions as to who was responsible for the defilement of the minor, it is clear that the prosecution's case could not stand. Besides that there were so many doubts created by the Prosecution's case as to when the defilement took place and who the culprit(s) really was or were. One thing is clear, there was simply insufficient evidence to connect the appellant with the offence he was charged with. I am not persuaded by the Respondent's contention that the Appellant was well known to the complainant and hence the reason why he was identified. The prosecution's case against the Appellant was simply too weak and could not stand particularly when his defence is considered. It is evident that the Appellant throughout the trial rarely asked questions in cross-examination because the witnesses simply did not mention him. He even stated in his defence that, he had nothing to do with the offence. This is what he said in part;

“I was not among the people who used to defile. I got to know about the case when I was taken to Matinyani.”

The above statement in my view on the face of evidence tendered against him was a strong defence. It is true that the said he said nothing in mitigation but perhaps he was too mesmerized by the finding of the trial court.

From the foregoing, this court finds merit in this appeal. The evidence tendered did not support the charge against the appellant. It was erroneous for the trial court to convict the appellant based on such evidence. This appeal is therefore allowed. The conviction of the Appellant is hereby set aside and the sentence reversed. He shall be set free forthwith unless he is lawfully held.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 5TH DAY OF NOVEMBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE