



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 32 OF 2018

MUNYOKI MWIKYA SYINDUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from Judgement delivered by Hon. M. Murage, CM in Criminal Case No. 82 of 2015 at Kitui Law Court on 18th April, 2018.

J U D G E M E N T

1. **Munyoki Mwikya Syindu**, the Appellant herein, was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offence Act**.

The particulars are that on 13th December 2015 at around 4 PM at Mutanda Location, Kwa Simba within Kitui County, intentionally caused his penis to penetrate the vagina of (name withheld), a child aged 11 years.

2. The Appellant faced an alternative charge of the indecent act but because he was convicted in the main charge, the alternative charge is not a subject of this appeal.

3. The Prosecution's case at the trial was based on the witness accounts of 6 witnesses who testified. The following is a brief summary of their testimony.

4. LK (PW1), the complainant's mother informed the court on 13th December 2015 at around 3PM in the afternoon, she had sent her daughter C to get firewood. According to her the child took long before returning home which prompted her to go looking for her. As she looked for her, she traced the Appellant he looked shocked to see her. She proceeded to ask him about her daughter's whereabouts and he told her that she was down at the valley. That she proceeded to where the Appellant directed her and found her daughter who was crying. She asked her what the problem was but she did answer.

5. She further testified that they proceeded home with her daughter but after two days, she noticed that her daughter was unwell. She complained of stomach pains and when she checked her private parts she noticed that she had injuries. After probing her, the child informed her that, Musyoki the Appellant herein, had hurt her. The witness stated that the Appellant lived with them and that she had a relationship with him.

6. She stated that she called the Chief who advised her to report the matter to the police which she did at Kabati Police Station. She took the child to Kauwi clinic the following day that was, on 17th December 2015.

7. CL (PW2) after a *vore dire* exercise, told the court that she was eleven years old. She explained that she knew the Appellant as he lived with them.

On the material day, she stated that she was fetching firewood when the Appellant called her and asked her to pick firewood for him. As she was doing so, he held her and pushed her down, and proceeded to defile her. As she was doing so, he held her mouth. She was left defiled and bleeding from her private parts.

She stated that shortly thereafter she heard her mother calling her, before they proceeded home. She stated that she did not inform her mother of what has happened to her until 16th December 2015, when she told her mother that the Appellant had defiled her.

The witness further informed the court that the Appellant threatened to kill her if she reported the incident to anyone.

8. PW4 Maria Muthui, the assistant area Chief, Sangala sub-location informed the court that she was called on 16th December 2015 at around 4 PM by the PW2's mother who informed her that the Appellant had defiled her daughter. She stated that the Appellant was later on arrested and taken to Kabati Police Station.

9. Kennedy Kioko Kauwi (PW6) a witness who testified on behalf of Dr. Kitonyi who authored the P3 form gave medical evidence regarding medical examination done on the victim. Regrettably, the witness failed to give the trial court his background regarding his expertise in the medical field and hence his competency to tender the said evidence. That notwithstanding, he testified that the victim was examined and found to have been defiled and infected with a Sexually Transmitted Disease. He testified that the girl was found to have a broken hymen and bruises on her private parts with greenish discharge which emitted a foul smell, a sign that she had been infected with a Sexually Transmitted Disease. He however did not state if further laboratory analysis was done to establish the nature of the venereal disease.

10. When placed on his defence, the Appellant gave a brief unsworn statement of defence denying the offence. He claimed that he was framed and that the case against him was based on malice by the victim's mother. He claimed that he used to work for her and that they later disagreed. He however conceded that she was informed by the victim's mother that the child was unwell before the matter was reported to the Chief.

11. The trial court evaluated the evidence tendered and found that the Appellant was found at the scene of crime where the victim had been defiled while looking for firewood. The trial court found the prosecution's case overwhelming and found the Appellant's defence a mere denial.

12. The Appellant was then found guilty, convicted, and sentenced to life imprisonment as provided by law.

13. The appellant was aggrieved by the conviction and sentence meted out and filed this appeal raising 5 grounds namely: -

(i) That the learned Magistrate erred both in law and facts by convicting me without considering that the doctor indicates that after he examined PW2 and her genitalia but the court did not consider he was not examined so as to prove whether the spermatozoa was his.

(ii) That the Learned Magistrate erred both in law and facts by convicting me relying on the P3 form evidence without considering that, no blood or any lacerations were noted by the doctor in examination to prove a fresh penetration.

(iii) That the Learned Magistrate erred in both law and fact by convicting him relying on identification without considering that she knew him only because she is a neighbour but not because he did anything to her.

(iv) That the learned Magistrate erred both in law and fact without considering that this case is about the enmity of the mother of PW2 to him.

(v) That the Learned magistrate erred in both law and fact by rejecting my defence which was strong enough to beat the contradictory prosecution evidences.

14. In his written submissions the appellant added new additional grounds but because the grounds were raised without leave, as required by law, this court will not consider them.

15. The appellant has raised issues with the charge sheet which he contends is defective and the fact that his Constitutional right to be represented was infringed because an advocate was not appointed for him but the same issues are incompetently raised because as I have said they were raised without leave of this court under **Section 350 (2) of Criminal Procedure Code**. The same shall therefore not form a basis for the decision reached in this appeal.

16. The Appellant disputes the evidence tendered by Kennedy Kioko Kauwi (PW6) contending that the qualification of the said witness was not established to ascertain if he was an expert and that he produced medical documents authored by someone's else. He has relied on the decision of **Joshua Maweu Kangungu versus Republic [2020] eKLR**.

17. The Appellant submits proper investigations were not conducted, he states that he was not tested to verify that the sexually transmitted infection found on the complainant was contracted from him. He submits that there was no witness to verify that he was the aggressor and the evidence relied on by the prosecution was purely circumstantial. He has relied on the case of **Sawe versus Republic [2003] eKLR** and **Kiriti Pal case versus State of West Bengal [2015] 11 SCC 178** and **Republic Versus Elizabeth Anyango Ojwang [2018] eKLR** on his submission or circumstantial evidence.

18. The Appellant also submits that the court failed to call crucial witnesses being Dr. Kitonyi and the Investigating Officer. He submits that the evidence produced by PW6 was hearsay. He has relied on the case of **Paul Kanja Gitari Versus Republic [2016] eKLR** in that regard.

19. The Appellant also takes issue with the prosecution's case submitting that the Complainant's birth certificate was not produced in court to prove age of the victim. He relies on the decision of **Isaack Muhamed Bonga versus Republic (Criminal Appeal Number 124 of 2014 at Eldoret High Court)** to buttress his contention.

20. The Respondent through the Office of the Director of Public Prosecution has opposed this appeal vide its submissions dated 7th June

2021. The Respondent submits that the Appellant's submissions dealt with matters not raised in the petition of appeal and should be disregarded.

21. The Respondent submits that the age of the victim was sufficiently proved to be 11 years and has relied on the decision of **Richard Wahome Chege versus Republic [2014] eKLR**, where the Court of Appeal stated that the age of a victim could be established by any other means and not necessarily a birth certificate.

22. The State insists that ingredients of the offense like penetration was established and proved by the Prosecution's case. It avers that the Appellant lived with the victim and identification was thus positive.

23. The Respondent further contends that the Appellant's defence was duly considered and found weak.

24. It supports the sentence meted out, stating that the same was lawful.

25. This court has considered this appeal and the response made. The duty of this court as a first appellate court is to re-evaluate or re-assess the evidence tendered with a view to drawing its own conclusion.

26. The Appellant as I have observed above was charged and convicted of a charge of defilement contrary to **Section 8(1) (2)** of the **Sexual Offence Act. Section 8 (i)** creates the offence and it provides: -

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

Section 8(2) provides the penalty or sanction as follows:

“A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.”

27. The salient elements in the above provisions are:-

(i) Act causing penetration

(ii) Age of the victim

(iii) Identity of the person who causes penetration.

28. The Appellant's grounds 1 to 3 touches on proof of prosecution's case to the required standard while grounds 4 and 5 touches on his defence which he claims was not considered.

29. I wish beginning with re-evaluation of the prosecution's case in respect of the above 3 elements listed above to find out if the prosecution's case was proved beyond reasonable doubt as required by law.

30. I will begin with the first element of penetration. It is quite evident that the prosecution's case relied on the evidence of the victim (PW2), the victim's mother (PW1) and Kennedy Kioko Kauwi (PW6).

31. The attention of this court has been drawn about the medical evidence tendered at the trial. The witness called to testify on medical evidence to establish whether there was penetration or that the young girl had been defiled, was PW6, who simply identified himself as Kennedy Kioko Kauwi working at the Sub District Hospital. He failed to give his background information to establish his expertise in the medical field he had been called to testify on.

32. Regrettably, the prosecution failed to lead the witness to give that crucial information. It is a matter of law that the opinion of experts in a given field are admissible in evidence only if given by experts in that given field. **Section 48 of the Evidence Act (Cap 80)** provides: -

“When the court has to form an opinion upon a point of science or art..... opinions of that point is admissible if made by persons specially skilled in such science or art.....” Subsection 2 terms such persons - “experts”

33. The Appellant's question on the expertise of PW6 is well taken because, the said witness did not give a background of his expertise. He could as well have been a medical doctor, clinical officer, nurse, health worker but it was not established. What if he was just a watchman? Was he competent to testify as an “expert”? That issue was regrettably not established. A diligent and seasoned prosecutor could have done a better job but that was not the case.

34. It is also evident from the record of proceedings that the said witness (PW6) testified on behalf of Dr. Kitonyi who authored the P3. The record of proceedings shows that the said doctor was away on further studies and **Section 33 of the Evidence Act** allows the evidence of such experts to be tendered by any other persons but those standing in must be experts in a similar field. Besides that, they must show that they had known the expert well enough to know their handwriting and signature. In other words, a basis must be laid first before a witness other than the author of a document is allowed to testify. They must show that they are also experts in the field that they have come to testify on. In

this instance, PW6 did not establish how long he had worked with Dr. Kitonyi and whether he possessed similar competency or qualification with the said Dr. Kitonyi.

Sadly, with the above omissions, the medical evidence in totality was rendered hearsay and inadmissible. The trial court fell into error by admitting evidence that was inadmissible in law at it were.

35. I am alive of the provisions of **Section 124 of the Evidence Act** which provides that the evidence of the victim is sufficient on its own to found a conviction but there is a rider to that. The trial must make a finding based on written reasons that the victim is telling the truth. In this instance even if I was minded to find that perhaps the victim given her age, was telling the truth, that fact was in itself not established. The trial did not make any indication about the demeanor of the victim.

36. From the foregoing, the prosecution's case at the trial failed to establish that crucial element of penetration in their case. The omission by the Director of Public Prosecution to lead PW6 to establish his background was fatal and the failure by the trial court to note the anomaly and move to rectify it on time or at all may have led to failure to meet the ends of justice.

37. On the other element of age, this court finds the prosecution's case quite wanting as well. Though the prosecution has submitted that the element of age can be proved by other evidence and not necessarily a birth certificate which was not produced, they have not indicated what "other evidence" was relied on by the trial court to establish that the minor was aged 11 years going by the charge sheet, and the attendant conviction and sentence meted out.

38. While this court agrees that the age of a victim can be established by other medical evidence such as age assessment or even the P3, in this instance, there was no age assessment tendered. The P3 tendered was not properly tendered and in the absence of age assessment report, P3 or any other solid evidence that established the age, the prosecution's case really hinged on a weak tread.

An offence such as this one where the consequences of the offence is largely determined by the age of the victim, it is crucial that the age of the victim is established and the prosecution should always do everything within its means to ensure that the same is established beyond doubt.

In **Kaingu Elias Kasono versus Republic**, the court held as follows;

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

In Sexual Offences, under **Sexual Offence Act, Section 8**, age of the victim is everything and it cannot be taken lightly. In my view, concrete documentary proof is required because the consequences of conviction can be dire like in this instance, where the Appellant was sent to prison for life given the strict nature of the sentences prescribed by law. Sadly, the prosecution at the trial failed to establish the age of the victim which rendered the conviction and the sentence meted out unsafe and erroneous.

39. This court finds that the issue of the identity of the appellant was proved beyond doubt. The Appellant lived with the victim's mother and was well known and could have as well taken advantage of that closeness to commit the heinous act. He was not stranger as he reportedly cohabited with victim's mother. The Appellant's contention that he was framed is unfounded because he tendered no evidence towards that end.

40. This court finds that the prosecution's case in light of the above anomalies was not proved beyond reasonable doubt and the evidence was insufficient to sustain a conviction. But this court finds that omissions by the Investigating Officer and the Prosecution may have led to a miscarriage of justice because the victim certainly had nothing to do with the said omissions. I have considered the fact that the victim may have undergone a horrendous encounter given her reported age and the fact that she may have been infected with a venereal disease in the process. In order to avoid a miscarriage of justice, a window should be provided for her to access justice. I know the Appellant was presented for trial in 2015 but I have considered all the factors and in my view, the only window for justice is the order for a retrial.

In the premises, while I find that, it is in the interest of justice to invoke the court's power under **Section 354(3) (c) of the Criminal Procedure Code** and make an order for a retrial. This court, therefore, allows this appeal. The conviction is set aside and the sentence is reversed. The Appellant is hereby sent back to the lower court for re-trial so that the ends of justice can be met. Towards that end, I direct the Appellant to be produced at Kitui Chief Magistrate's Court forthwith or as soon as it is logistically practical for purposes of mention and fresh trial before a different court with competent jurisdiction.

The lower court file shall be taken back for that purpose.

Dated, Signed, and Delivered at Kitui this 2nd day of November 2021.

HON. JUSTICE R. K. LIMO

JUDGE