



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. E001 OF 2021

(Being an appeal against the conviction and sentence from the Original Mariakani

Criminal Case No. 30 of 2019 in a judgment delivered on 21st day of February, 2021

by Hon. S.K.Ngii – Senior Resident Magistrate)

REPUBLIC.....PROSECUTOR

VERSUS

ABDULRAHMAN HAMISI HABO.....ACCUSED PERSON

CORAM: Hon. Justice S.M.Githinji

Mr Mwangi for the State

Omurwa Advocate for the Accused person

J U D G E M E N T

ABDULRAHMAN HAMISI HABO was charged in the lower court with the offence of defilement, contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 1st day of March, 2019 at around 2100 hours in [Particulars Withheld] village, Mwavumbo location in Kinango Sub-County, the appellants intentionally caused his penis to penetrate the vagina of TR a child aged 16 years.

The appellants as well faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars hereof being that on the 1st day of March, 2019 at around 2100 hours in [Particulars Withheld] Village, Mwavumbo Location, Kinango Sub-County, of Kwale County within Coast region, the appellants intentionally touched the vagina of TR a child aged 16 years with his penis.

The prosecution case is that the complainant in this case who gave evidence as Pw-1, was born on 29th October, 2004. By the time of the alleged offence, on 1st March, 2019 she was aged 14 years old. However, she gave evidence on 20th May, 2019 and alleged that she was 16 years old as was also disclosed in the charge sheet.

On the date of the alleged offence of which the complainant's mother (Pw-2) states was on 15th March, 2019; the complainant who could not remember the exact date stated was on a Friday, 2019, and was at home at about 9.00pm. The mother was in a different room from her. The appellants who was a stranger to her went and asked her to accompany him to his home. The complainant obliged and accompanied him to a place near a school of which is also close to her home. The appellants then forced her into sex. After having sex, the appellants left her at the scene. The mother at about 10.00 p.m. had searched for her in the house and outside in the compound using a torch, but in vain. The following day Mkilo the village elder saw the complainant and took her home. Pw-2 questioned her and she said she had gone to Mkilo to see Abdulrahman Habo. She alleged she slept with the said Abdulrahman in school compound. She was taken to Mariakani Sub-County hospital. Pw-4 a clinical officer in the said hospital examined her. She had no injuries on her genitalia save for the broken hymen. Laboratory tests conducted revealed red blood cells and pus cells.

On 6th March, 2018 the case was reported at Samburu Police Station to Pw-3. Pw-2 reported that the complainant vanished on 3rd March, 2019 at 9.00 pm and went to Mkilo to meet her friend one Abdulrahman Hamisi. At the accused's home the complainant spent the whole night. The following day on 4th March, 2019 the village elder got her and took her home. The complainant alleged she had been chased from home for stealing 20 kshs. On 7th March, 2019 the appellant was arrested by Administration Police Officers from Kalalani and taken to the police station. Pw-3 recorded the witnesses' statements. The P3 was filled on 6th March, 2019. The child Health Card, showing her date of birth was obtained. The appellant was then charged with the offences.

When the appellant was placed on his defence he gave unsworn testimony and called two witnesses. His defence is that he hails from Mkilo and is a casual labourer. On the material day he had attended sports after which he went home. He later heard someone had accused him. Two Administration Police Officers got him while asleep at home and arrested him. He was taken to Kalalani AP's Post and later to Samburu Police Post. He was then charged.

Dw-2 stated that he also hails from Mkilo. On the material day he went to play football with the accused at Changamwe. They went back to Mariakani at 7.00Pm. They escorted the accused to his home and left the following day. They were later told the appellant was arrested. He had an injury and that is the reason they escorted him home.

Dw-3 indicated that he hails from Mkilo. He had gone with the appellant to play football on the material day. The following day he was arrested. On the material night the appellant had not slept at home but in the house of Dw-2.

The trial court evaluated the evidence and in relation to the age of the victim found that at the time of the alleged offence the victim, going by her child Health Card, was 14 years old and not 16 years old as was alleged in the charge sheet. The variation as the Court rightly observed removed the complainant from the age bracket set out in section 8 (4) to the age bracket specified in section 8 (3) of which provides for a minimum sentence of 20 years.

The Court further observed that were it not for the decision of *Muruatetu's case*, such a variation would have been fatal since it would have had the effect of exposing the accused to a severer sentence than what would have flowed from a trial under subsection 4 which is apparently cited in the charge sheet. With *Muruatetu* decision in the place the Court found the variance not fatal as it had a free hand to impose any fitting sentence.

Another important finding by the trial court is that the complainant and the accused person were known to each other. The Court observed that for the complainant to have agreed to leave home at night at the request of the accused person, the two must have been in a relationship for a while.

At the end of it the Court found the accused guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. He was sentenced to server 10 years imprisonment.

Dissatisfied with the said conviction and sentence, he appealed before this Court on the grounds that; -

- 1. He was convicted on evidence of the complainant, a child, whose evidence was highly unreliable and suspicious.**
- 2. Crucial witnesses were not called to corroborate the evidence.**
- 3. An identification parade was not conducted.**
- 4. The evidence relied on was contradictory and inconsistent.**
- 5. The medical evidence relied on was inconclusive.**
- 6. Defence was not properly evaluated.**
- 7. The conviction was not based on the weight of evidence on record.**
- 8. The sentence was manifestly excessive.**

The appeal was canvassed by way of written submissions by both sides. The prosecution in their submissions averred that the age of the victim was established, penetration and the culprit well identified. The conviction and sentence are okay. The appellant submitted otherwise and argued in support of his grounds of appeal.

I have looked at the charge sheet, the evidence adduced by both sides, judgement passed and sentence, as well as the grounds of the appeal and submissions by both sides.

Sentencing for an offence of defilement is guided by the age of the victim. Under section 8 (1) (2) if the victim is 11 years old or less, the convict should be sentenced to imprisonment for life. Section 8 (1) (3) indicates if the victim is between the age of twelve and fifteen years the convict should be sentenced for a term of not less than twenty years. Section 8 (1) (4) states if the victim is between the age of sixteen and eighteen years, the convict should be sentenced to imprisonment for a term of not less than fifteen years.

Given the foregoing, the age of the victim determines the severity of the sentence and therefore also the crime. Prosecution had reliable

document showing the correct age of the victim. However, they indicated the wrong age of 16 years instead of the 14 years in the sheet. The witnesses appeared misguided on the issue as they indicated she was 16 years old, including the victim herself. As such, the appellant was charged with the wrong offence under subsection 8 (1) (4) instead of 8 (1) (3). Though the Court relying on the decision of **Francis Karioko Muruatetu –Vs- Republic** indicated the error was not fatal as it had a free hand in sentencing, the current revisit of the decision by the Supreme Court where some clarities were made to its applicability, discloses that it only applies in murder cases and not any other offence. The trial court had indicated that were it not for the **Muruatetu’s** decision the error would have been fatal. With the current explanation of the decision, the error is fatal as the appellant was convicted of a more serious offence than the one he was charged with. Such error prejudices the appellant and is fatal. The prosecution had a chance to amend the charge but did not. Charge is an important document in any trial and the information in it should be as much as possible correct.

Pw-1 in her evidence stated that the appellant who was a stranger to her visited her and urged her to accompany him to his home. She obliged. However, when the mother questioned her she said she had gone to Mkilo to see Abdulrahman Habo. What she told the mother suggest the appellant did not go for her, but she is the one who visited him. The evidence of the investigating officer also discloses that the mother reported that the complainant vanished from home and went to Mkilo to meet her friend one Abdulrahman Hamisi. This suggests the complainant was known to the appellant and the appellant was not a stranger to her. The trial court observed so, of which means the complainant was not entirely truthful in her evidence. The investigating officer as well stated that when he interrogated the complainant, she stated that she had been chased away from home for stealing 20 kshs. Given the evidence of Pw-2, and her evidence in chief, the complainant lied to the said investigating officer that she had been chased away from home.

Her evidence in relation to the offence that she was defiled by the appellant herein is not corroborated by any other evidence. The appellant denied that he is the one who defiled her and called two

witnesses to state that he had no opportunity to commit the offence as during the day he was playing football and later at night he was asleep. Section 124 of the Evidence Act Cap 80 is to the effect 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 if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

In this case there is evidence that the complainant lied in that the appellant went for her at home. She also lied that he was a stranger to her. Lastly she lied that she had been chased away from home for stealing 20 kshs. These are the lies detectable from other available evidence. We do not know where else she may have lied. She was not entirely honest in her evidence. The lower court having established that she lied in relation to her prior relationship with the accused or her knowledge of him, ought to have been extra careful in relying on her uncorroborated evidence to arrive at a conviction. The Court should as well have recorded with precision reasons in the proceedings which satisfied it that her other evidence is true. Such having not been recorded, there exists possibility where the complainant could have lied about the real culprit. The doubt should have been resolved in his favour. As such I do find that the trial court erred in convicting the appellant of a more severe offence than the one he was charged with, and depended to arrive at a conviction on unreliable and uncorroborated evidence of the complainant.

The appeal therefore succeeds. The conviction and sentence are hereby quashed. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI VIRTUALLY THIS 11TH DAY OF NOVEMBER, 2021

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S. M. GITHINJI

JUDGE

In the presence of

1. The Appellant at Shimo Law Tewa Prison
2. Mr Mwangi for the State