REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 123 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 725 of 2014 by the Senior Principal Magistrate's Court at Mumias)

GODFREY MAKUTO WANYONYI..……...…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. TA Odera, Senior Resident Magistrate, of defilement contrary to Section 8(1), as read with section 8(4), of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to twenty (20) years imprisonment. The particulars of the charge that was tried at the trial court was that on the 14th day of August 2014 at 2.00 PM in Matungu Sub-County of Kakamega County, he intentionally caused his penis to penetrate the vagina of SO, a child aged 14 years. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place as stated in the main count, he had intentionally caused his penis to come into contact with the vagina of the subject child.

2. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called seven (7) witnesses.

3. SO, the complainant, testified as PW1. She gave sworn testimony. She stated that she was born on 25th February 2000. She testified that on 14th August 2014, she was sent by her mother to Koyonzo Market to buy some things. After she bought the items, the person who was selling them to her, the appellant herein, told her to follow him to a place where he would give her change money. He led her to a guest house, where he forcibly defiled her. Her screams attracted police officers who came to the scene, rescued her and arrested the appellant. She was bleading badly from her vagina, she was taken to hospital where she lost consciousness. At the hospital they removed a small bottle from her vagina, after which the vagina was stitched. She remained in hospital for a week. PW2, Bridgid Mueni Mbatha, was among the people who took PW1 to hospital. She testified that PW1 was bleeding from her vagina. It is police officers from Koyonzo who allowed her to take the child to the hospital. She stated that PW1 narrated to her that the appellant had pulled her to the guest house, locked her in the room and defiled her.

4. Police Sargent David Walekwa No. 84053124/210307 (PW3) was one of the officers at the Koyonzo AP Camp, and it was to him that a report of a fight at the Koyonzo guest house was made. He and a colleague went there and heard a female voice crying in distress. They were shown records showing that a Franco Godfrey Makuto had booked a room 5. They retrieved PW1 and the appellant from the room. They arrested the appellant. PW1 was in the room, whose bed which was badly stained with blood, and she was bleeding profusely. They took the two to the police camp. At the camp, she called PW2 to come to take PW1 to hospital as time was no female police officer available. On cross-examination, he stated that he found the appellant with PW1, which meant that he was the one responsible for what had befallen her. Police Corporal Alfred Nyukuri No. 80549 (PW4) was attached to the Mumias Police Station. He and his team of officers collected the appellant from the Koyonzo AP Camp and rearrested him. He testified as to the steps that he took after that. . RO testified as PW5. He stated that he was the father of PW1, who was born on 25th February 2000. He said that she was 14 years old in 2014. He stated that he was the one who had sent her to Koyonzo market. He later got a report that she had been defiled and injured. He went to Matungu and found her bleeding profusely. PW2 then took her to hospital, where he said she remained admitted for 20 days. PW6, Police Constable Alfred Kutol No. 93595, was the police officer who developed the films of the pictures taken at the scene into the photographs that were put in evidence. Winton Ogalo, testified as PW7. He was the doctor who produced the P3 form of his colleague, Dr. Opondo, who had treated PW1 and prepared the P3 form put in evidence. He confirmed that she had been defiled. He stated that he could not tell what was used to defile her, but said that the report did not talk of glasses being retrieved from her vagina.

5. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He said he was arrested on 14th August 2014 at the guesthouse. He denied that he was found with PW1. He stated that he was not taken to hospital and new nothing about the case, which he dismissed as fabricated.

6. After reviewing the evidence, the trial court convicted the appellant of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He averred that the court convicted him on evidence that could not sustain a conviction and for relying on certain portions of the state witnesses testimonies as opposed to their entire testimonies. The grounds were later amended to include averments that the charge was totally defective, the trial was unfair, age of the victim was not proved, the medical evidence did not link him to the crime, his defence was not considered and burden of proof was shifted to him.

8. As the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

9. The appeal was canvassed on 5th December, 2019. The appellant relied on written submissions that he placed before me. There are two sets, one drawn by his advocates, and the other by himself. Mr. Mutua, Prosecution Counsel, invited me to look at the record of the trial court. The appellant's written submissions dwelt mainly on the defectiveness of the charge, lack of disclosure of the state evidence ahead of the trial, age of the victim, crucial witnesses not called, medical evidence not linking him to the offence, defence statement disregarded, and inconsistency on what was used to defile the victim. I shall consider all the issues raised in both the petition of appeal and in the submissions, not in any particular order.

10. The first issue relates to disclosure of the prosecution's evidence ahead of the trial. It is a constitutional requirement under Article 50 of the Constitution that an accused person be furnished with the evidence that the prosecution intends to present at the trial. That is intended to enable him prepare for the hearing. It is what is referred to generally as being afforded facilities to prepare his defence, to confront his accusers. I have reread and reread the record before me. It makes no reference whatsoever to disclosure of prosecution evidence. There is no court order commanding the state to avail such evidence, nor any statement by the state that it had availed such evidence, nor a request by the appellant for such evidence or confirming that he had been supplied with such evidence. My inclination would be to hold that the state evidence was not disclosed. However, I note from the record that the appellant indicated prior to the trial commencing on 7th September 2015 that he was ready to proceed. That was repeated in subsequent dates, on 13th April 2016, 16th January 2017, 1st February 2017, 20th April 2017 and 22nd June 2017. If there was a challenge with state evidence, no doubt the appellant would have raised it . The fact that he confirmed readiness to proceed indicates that he was not prejudiced, if at all no evidence was disclosed, and he felt that he understood the chances well enough to proceed even without the evidence. The matter is now being raised as an afterthought. .

11. Regarding the defectiveness of the charge, the appellant submits that the charge sheet cites section 8(4) of the Sexual Offences Act, instead of section 8(3). It is submitted that the age stated in the charge document is 14 years, which ought to bring the charge under section 8(3) as section 8(4) covers the ages of 16 and 17. Section 8(1)(3)(4) of the Sexual Offences Act states as follows:

> *"8. Defilement*
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) …*
>
> *(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*
>
> *(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."*

12. The case that the prosecution presented was that PW1 was 14 years at the time of the alleged assault. She was said to have been born on 25th February 2000. She said so and so did her father. A certificate of birth was produced which bore that birth date. That, therefore, meant that the proper charge should have been brought under section 8(3) and not subsection (4). The charge was defective to that extent.

13. The question then which arises is whether that defect is fatal or curable. The superior courts appear to take divergent positions on this. In *David Mwangi Njoroge vs. Republic* [2015) eKLR and *David Mwangi Munyi vs. Republic* [2017] eKLR, the courts mulled over sections 179, 214 and 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya, and noted that there is legal infrastructure for dealing with such defects, but pointed out, that there are fair trial issues around all these matters for the defects could embarrass the accused person with respect to responding to the charge that he faces. In such cases, the courts tended towards declaring a mistrial and ordering a retrial or acquitting the appellant altogether. On the other side is *CM vs. Republic* [2017] eKLR, where the court was of the view that the wrong citation of the penalty charge should not matter much, so long as the particulars of the charge clearly bring out the case that the accused faces. The defect in citing the wrong penalty section would then be curable under section 382 of the Criminal Procedure Code.

14. Of the two positions, I feel inclined to *CM vs. Republic* (supra). The case that an accused person faces is that disclosed and articulated in

the particulars of the charge. That is the case that the state seeks to prove, and that is the case that the accused person should prepare to meet. The evidence to be adduced should be geared at meeting the case as stated in the particulars. A wrong citation of the charging section should, therefore, not be fatal to the prosecution case.

15. The matter of the age of the complainant has been raised. The appellant is particularly unhappy with the fact that the certificate of birth put on record was obtained after the defilement incident. The charge puts the age of PW1 at 14 at the material time. PW1 and her father, PW5, said she was born on 25th February 2000, the age reflected in the certificate of birth. Apparently, age assessment was not done. A number of documents prepared by medical personnel were placed on record. The post rape care form, dated 15th August 2014, put her date of birth as 1st July 2000. The P3 form did not indicate her age. The discharge summary from the Kakamega Provincial General Hospital, dated 18th August 2014, and a laboratory request and report form, from Kakamega Provincial General Hospital, dated 15th August 2014, indicates the age of PW1 as 14. It could be said that the assessment of age by medical personnel is an estimate, but one would expect that the parent of the child, such as PW5, would know when their child was born. From the available material, there is overwhelming proof that PW1 was 14 years old as at the date of the assault.

16. The other issue is that the court did not consider that the appellant was not medically examined to confirm whether or not he committed the offence. It is now well settled law that a person charged with a sexual offence need not be tested medically or forensically to ascertain any sexual connection between him and the complainant. The court cannot therefore be faulted for not taking that into account. The correct legal position is that the court convicts an accused person on basis of other evidence. It was held by the Court of Appeal in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, that whereas section 36 of the Sexual Offences Act allowed the court to order samples to be taken from an accused person for forensic examination or deoxyribonucleic acid (DNA) testing, but that provision was not mandatory, and the penetration or sexual intercourse could be proved by alternative evidence.it was emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved.

17. The appellant has argued that his defence was not considered. I shall take that together with his submission that the burden of proof was shifted to him. I have perused the judgment. I note that the trial court did pay attention to the defence. In the opinion of the trial court, the same amounted to an alibi defence. The court was of the view that by saying that he lived at Navakholo, the appellant meant that he was not at the scene. That position taken by the trial court was mistaken. The testimony by the appellant, on oath, was that he was arrested on 14th August 2014, the same day PW1 was defiled, at [particulars withheld], that is at the same premises where PW1 was assaulted. The appellant, therefore, concedes that he was at the scene where the crime was allegedly committed. It is here that PW1 was removed by PW3, and she was found together with the appellant. She had been freshly defiled for she was still bleeding. The evidence of PW3 placed the appellant at the scene, in very close proximity to an injured PW1. There was no alibi. The defence that he did not commit the offence cannot wash in view of the testimony by PW1 that it was him, who paid for the room where it happened, pushed her into the room and proceeded to insert something into her vagina. There is nothing to show that the burden of proof was ever shifted to him.

18. Were there inconsistencies in the evidence? One major one was with regard to what was used to defile PW1. She did not say whether it was the penis of the appellant that was inserted into her vagina, but she talked of a bottle being removed from her vagina by the doctors at the hospital at Kakamega. PW7, the doctor, said that the record he presented made no reference to such a bottle or glass, and opined that the thing inserted must have been a penis. Whatever the case, there is overwhelming evidence that the vagina of PW1 was penetrated. The circumstances of the penetration were that the appellant pushed her into a room, threw her onto a bed, removed his shorts, and lie on top of her and PW1 felt something enter her vagina. She did not tell what it was. The room was dark. She was distressed. But the fact that she saw the appellant open and lower his shorts, lay on top of her and the fact that it was just the two of them in that room, leaves no doubt in my mind that it was him who defiled her by inserting his penis into her vagina. The inconsistency in that testimony as to what might have been inserted does not take away from the fact that PW1 was defiled, and that the person responsible for that defilement was the appellant.

19. There was also the issue of crucial witnesses not being called, specifically the women who manned the guesthouse. The answer to this submission is that there is no specific number of witnesses that the prosecution is required to call to prove its case. It suffices that the state calls such number of witnesses as it believes would be sufficient to establish the charge that they have brought against the accused person. The state had no obligation to call every individual who might, in any remote manner, have come into contact with the appellant and PW1.

20. The offence that the appellant faced before the trial court was founded on section 8(1) of the Sexual Offences Act, and its key elements are 'penetration' and 'child.' The Act defines 'penetration' as partial or complete insertion of the genital organs of a person into the genital organs of another person; while 'child' has the meaning assigned thereto in the Children's Act. In *Dominic Kibet Mwareng vs. Republic* [2013] eKLR the court stated that -

> *'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'*

21. In determining this appeal, I shall have to look out for evidence that establishes -

a) whether the age of the complainant was proved,

b) whether penetration was proved, and

c) whether the accused was positivity identified by the minor as her assailant.

22. I am persuaded that the prosecution established the case that they had brought against the appellant. In the first there was sufficient proof that PW1 was 14 years old at the material time, from her own testimony and that of her father, PW5, and the medical records placed on the file by PW7. Penetration was equally proved. PW1 described the scenario in terms that she felt something inside her vagina and she felt pain, and blood oozed out of her vagina. PW2 examined PW1 shortly thereafter, on instructions of PW3, who noted that she was bleeding from her vagina. PW3, the AP officer, being male, did not examine PW1 at the scene, but said that there was a lot of blood in the room, on the bed,

bed sheets and the floor, and PW1 was bleeding profusely. PW1 walked with difficulty. Her father, PW5, also saw her, he said she was bleeding profusely, even though he did not appear to have examined her physically at close range. PW7, the doctor, confirmed that there was penetration. PW1 was medically examined within hours of the assault. Her hymen was perforated and blood was still oozing from it. A high vaginal swab revealed presence of epithelial cells. Beyond doubt, the vagina of PW1 had been penetrated on 14th August 2014. Who did it? PW1 said it was the appellant. The appellant was arrested by PW3 at the room where PW1 said she was defiled at and in her presence. No doubt, the appellant was the culprit. His own defence statement placed him squarely at the scene on the material day, for he stated that he was arrested at the same guesthouse that PW3 had referred to as the place where he went upon receiving the distress call, and where he found both the appellant and PW1, whereupon he arrested him.

23. In view of what I have stated above, I am satisfied that the conviction of the appellant was safe. I shall, therefore, dismiss the appeal before me, and uphold the conviction. I find that the appellant, then aged 40 years, preyed on a defenceless child, and caused her grave injury, necessitating hospitalization for four days. I believe the sentence imposed fits the crime, and I accordingly confirm the sentence. The appellant has a right of appeal to the Court of Appeal within fourteen days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE