REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 38 OF 2018

MATANO CHARO KOI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of the trial court at Kilifi in Criminal Case No. 315 of 2014 presided over by Hon. Ondieki (SPM) dated 7.9.2017)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant Matano Charo Koi was charged, tried and convicted of the offence of defilement contrary to Section 8 (1) as read with Section (4) of the Sexual Offences Act. Upon conviction he was sentenced to fifteen (15) years imprisonment.

Being aggrieved with the conviction and sentence, the appellant appealed to this court on the following grounds:

> ***(i) That the Learned trial Magistrate erred in law and fact by relying on the evidence of a single witness which was insufficient to sustain a safe conviction.***
>
> ***(ii) That the Learned trial Magistrate erred in law and fact by failing to consider that the prosecution failed to prove its case beyond reasonable doubt as required by the law.***
>
> ***(iii) That the Learned trial Magistrate erred in law and fact by failing to consider sharp contradictions from the prosecution witnesses thereby creating doubt on the prosecution case contrary to Section 163 (1) (c) of the Evidence Act.***
>
> ***(iv) That the Learned trial Magistrate erred in law and fact by failing to consider my defence which was un-rebutted there creating doubt on the prosecution side.***

Procedural history at the trial court

The prosecution case was dependent upon the five witnesses who testified to discharge the burden of proof of beyond reasonable doubt against the appellant for the charge of defilement.

The complainant **KCK (PW1)** aged 16 years old and a daughter to PW3 **CC** stated in court that she had several sex acts with the appellants on diverse dates in 2013. That in the course of the sexual relationship she became pregnant and immediately thereafter, the appellant assisted to taken her to Bamba Clinic to abort the pregnancy. The residual aftermath of the abortion was excessive bleeding which caused **PW3** to notice her ill health.

According to **PW3,** on 11.7.2014 she realized that the complainant **(PW1)** was suffering from abdominal pains and also bleeding from her private parts. Further, PW3 testified that she instructed **PW2 – H** to accompany the complainant to Bamba Hospital for medical examination and treatment. It was at Bamba Hospital PW2 confirmed to the court that the complainant was found to have aborted the pregnancy, without the knowledge of her mother PW3.

PW4 – PC Peter Odhiambo Police detective attached to Bamba Police Station, investigated the incident as reported by PW2 and PW3. The investigations revealed that the complainant and appellant enjoyed a sexual relationship in the year 2014 and out of it she became pregnant.

However, on a second thought PW4 told the court the appellant and complainant agreed to terminate the pregnancy. He issued the P3 Form which was later to be filled by **PW5 Dr. Kalu** but produced in court by **Dr. Hassan Bachu** of Kilifi Hospital. In PW5 evidence the examination showed a broken hymen and aborted pregnancy.

From the treatment notes and P3 annexed as exhibit, the complainant had suffered vaginal bleeding. PW5 also formed the opinion that the complainant had been defiled. As a result of the audience the appellant was placed on his defence. He denied the offence and even any knowledge of the complainant.

The appellant submissions on Appeal

The appellant submitted that the indictment was based on a defective charge contrary to the principles in **Yongo v R {1983} KLR.** In view that there was no amendment sought under Section 214 of the Criminal Procedure Code the appellant urged this court to allow the appeal.

The appellant contended that the prosecution evidence on the pregnancy was full of contradictions because there was no link between the vaginal bleeding and the pregnancy established by PW5. Further the appellant argued and submitted that PW5 failed to state whether he knew the signature and handwriting of **Dr. Kalu**, the initial doctor who saw and examined the complainant.

The appellant further submitted that there was no DNA evidence to specify whether he was connected in any way with the alleged pregnancy of the complainant. More significantly, the appellant submitted that the complainant presented herself as an adult and therefore consenting to the sexual intercourse.

He prayed that this court finds that the trial court failed to appreciate the evidence before passing Judgment on conviction and sentence. **Ms. Barbara Sombo**, Learned prosecution counsel, for the respondent one the other hand submitted and opposed the appeal. She submitted and invited the court to rely on Section 124 of the Evidence Act, on testimony of single witness and the independent medical evidence which established penetration.

Learned prosecution counsel argued and submitted that from the complainant testimony, the appellant was positively identified. That in 2013 they had several sexual encounters which later culminated into a pregnancy.

According to the Learned prosecution counsel there were no material contradictions with the evidence that would vitiate the standard of proof of beyond reasonable doubt. The fact that the complainant was assisted by the appellant to carry out an abortion is sufficient circumstantial evidence of his involvement with the defilement. In this regard, Learned counsel contended that the appellant's conduct was not consistent with that of an innocent person or good Samaritan when he took a step to assist in the abortion process.

She further submitted that the appellant defence did not controvert the weight evidence adduced by the prosecution. Learned counsel prayed that the appeal be dismissed.

Analysis and determination

This is a first appeal and the court shall have regard to the principles in **Ruwala v R {1957} EA 370, Kipngetich v R Criminal Appeal No. 141 of 1985:**

> ***"This court is therefore entitled to examine the evidence, to rehear the case, reconsider the material before it and reach its own conclusions therein without disregarding the Judgment of the trial court but carefully weighing it."***

In performing its duty as a trial court, the prosecution was expected to proof the following elements:

> ***(a) Proof of penetration.***
>
> ***(b) Proof of the age of the complainant to be below 18 (eighteen) years old.***
>
> ***(c)That it was the appellant who committed the sex act.***

With regard to the element on penetration, Section 2 (1) of the Sexual Offences Act defines penetration to mean *"**partial or complete insertion of the genital organ of a person into the genital organ of another person."***

On this the trial court heard the evidence from (PW1) that the appellant had been having sexual intercourse with her severally in the year 2013. The venue for the sexual intercourse used to take place within the forest on mutual arrangement with the appellant. She further told the court that as a result of the sexual act she conceived but on request by the appellant they sought medical assistance to abort it. The Learned trial Magistrate also had at his disposal the evidence of PW5 with effect to the medical examination and the P3 Form.

This evidence sufficiently established rupture of the hymen and corroboration that the complainant had the pregnancy which was later aborted. It was therefore clear that the medical evidence demonstrated a nexus between the pregnancy and sexual intercourse.

As to what amounts to corroboration **Lord Reid in Kilborne 1973 AC 729** explained as follows:

> ***"When in the ordinary affairs of life, one is doubtful whether or not to believe a particular statement, one naturally looks to see whether, it fits in with other statements or circumstances relating to the particular matter, the better it fits in the move out is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."***

In addition **Lord Morris in Hister {1973} AC 296 315F** held as follows:

> ***"The essence of corroborative evidence is that one credit worthy witness confirms that another credit worthy witness has said. The purpose of corroboration is not to give validity or credence to evidence which is defilement or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactorily and credible."***

On the facts of this case the prosecution demonstrated that the testimony of the complainant in the charge of defilement was supported by medical evidence proving that a male human being had sexual intercourse with her prior to becoming pregnant. This medical evidence was sufficient to show the act of penetration and release of spermatozoa to fertilize the ovary and as a consequence of it the complainant conceived.

A second element set to be proven by the prosecution is that of age of the complainant. in **Francis Omuroni v Uganda CR Appeal No. 2 of 2000** the court held 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, it may also be possible to prove age by other documentary evidence. The birth certificate, the parents/or guardian with prior knowledge capable of providing cogent evidence necessary as to the age of the complainant."***

The question as to whether the age of the complainant was proved beyond reasonable doubt is to be found in the medical report tendered in court by PW5 as **Exhibit 3** it follows that the trial court cannot be faulted on this ground that the complainant was defiled at the age of 16 years old.

In this appeal, there is one further ground in regard to identification of the appellant. I reiterate, the principles in **Cleophas Otieno Wamunga v R CR Appeal No. 20 of 1989, R v Turnbull {1976} 63 CR Appeal R 132** when re-appraising the evidence of (PW1) the evidence on identification of the appellant was based on recognition under circumstances which were favourable and free from error and mistake.

According to (PW1) evidence the period of observation of the appellant was over long period of time to support recognition of the appellant positively.

From the evidence of the appellant he did not disapprove that he did not engage in sexual intercourse with the complainant. Though the case on identification was solely that of the complainant, I find no danger for the trial court to have convicted the appellant as such on a single identifying witness in the circumstances of this case.

I cannot get away without dealing with the issue on a defective charge raised by the appellant on this point the authorities in **Yosefa v Uganda {1969} E.A. 236, Sigilani v R {2004} 2 KLR** where the court held interalia that:

> ***"A charge sheet is fatally defective if it does not allege an essential ingredient of the offence."***

On perusal of this ground the charge sheet in question contains sufficient information as a whole to inform a reasonable appellant of the essential elements of the offence charged. There are no specifics in this appeal that the appellant substantive fair trial rights were infringed due to the insufficient details in the indictment, in **Rex v Alexander {1936} AD 445** the court held that:

> ***"The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet."***

As matters stand, an essential element of the crime, which is the act constituting or linking the appellant to the circumstances of the defilement was pleaded in the charge sheet and proved beyond reasonable doubt. It is not clear from the appellant complaint so far what part of the charge sheet he did not appreciate to warrant it to be considered defective.

From the material placed before me, this aspect on sentence there is no evidence that the court overlooked some material factor, or took into account some wrong material, or acted on wrong principles.

For the above reasons the appeal on conviction and sentence is dismissed. That is the order of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF FEBRUARY 2020

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R. NYAKUNDI

JUDGE