



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 143 OF 2017

MWAJEFA MNYENZE MWANYAA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the Judgment of P.K. Mutai, Resident Magistrate, delivered on 7th July, 2017 in Kwale Chief Magistrate's Court Criminal Case No. 106 of 2016).

JUDGMENT

1. The appellant, Mwjefafa Munyenze Mwanayaa, was convicted and sentenced to serve 30 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya. The particulars of the charge were that on diverse dates between 10th January, 2016 and 23rd January, 2016 at an unknown time in Mwaluphamba in Kwale County within Coast region unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of MZ [name withheld] a girl aged 9 years.

2. The appellant filed a petition and grounds of appeal on 17th August, 2017. On 23rd July, 2019 he filed amended grounds of appeal, with leave of the court. His grounds of appeal are-

(i) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 30 years imprisonment without a proper finding that he was 18 years of age when the offence was committed;

(ii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 30 years imprisonment without a proper finding that the charge of defilement was not proved beyond reasonable doubt;

(iii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 30 years imprisonment without a proper finding that the evidence of the Clinical Officer, PW3, and the P3 form he produced was inconclusive as to whether the complainant was defiled and/or penetrated;

(iv) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 30 years imprisonment without a proper finding that the reasons of his arrest had not been disclosed by the people who arrested him; and

(v) That the Learned Trial Magistrate erred in law and fact by merely dismissing his defence out of hand which amounted to a serious error on the part of the Trial Court.

3. The appellant filed his written submissions on 23rd July, 2019. He submitted that his age assessment report indicated that he *was about* 19 years old. In making reference to Black's Law Dictionary, he stated that the words "*he is about*" mean "*something less than required*". He contended that he was below the age of 19 years at the time of the alleged commission of the offence and he should have been placed in a borstal institution. He argued that since he was below 19 years of age as at the time of assessment, the sentence of 30 years was unlawful. He relied on the case of **Mwanyele Daniel vs Republic**, Malindi High Court Criminal Revision No. 24 of 2014, where the court discharged the applicant who had been charged for the offence of defilement as he and the complainant were minors.

4. The appellant challenged the complainant's (PW1's) evidence as she claimed to have been defiled thrice but on the 1st and 2nd occasions she did not inform any one. He also said that PW1 who was 9 years old neither screamed nor bled and no one seemed to have noticed anything wrong with her. The appellant submitted that PW1 testified that she reported the defilement after the 3rd incident. In his view, failure to report the 1st and 2nd incidents was unconvincing.

5. It was submitted that PW3, the Clinical Officer's evidence was inconclusive as to whether PW1 was defiled and/or penetrated. That was for the reason that PW3 in his evidence said there were no bruises and no injuries were noted on PW1's private parts or any discharge therefrom. The appellant argued that apart from the P3 form, the medical notes of PW1 were not availed yet she had visited another health clinic. He relied on the case of **Kazungu Mramba Mweni vs Republic**, Mombasa High Court Criminal Appeal No. 220 of 2007, where the court found no evidence to support the allegation of sexual assault.
6. The appellant made reference to the P3 form which indicates that PW3 found no injuries on PW1's private parts. The hymen was said to be broken and that the breakage was an old one.
7. He also relied on the case of **John Cardon Wagura vs Republic and 2 Others** [2011] eKLR to show that the credibility of PW1 was in question as to whether she was really defiled and she failed to meet the threshold set by Section 124 of the Evidence Act.
8. The appellant submitted that PW6 Corporal Lydia Odipo testified that the appellant was arrested by members of the community policing and taken to the police station but the said persons were not called to testify to clear the doubt about his arrest. He relied on the case of **Bukenya and Others vs Uganda** [1972] EA 549 to state that if the prosecution had called the said witnesses, they would have given evidence that was adverse to its case.
9. Ms Mbaeh, Prosecution Counsel, filed written submissions on behalf of the DPP on 31st July, 2019. She submitted that PW1's evidence was corroborated by that of PW2 and the medical evidence which was presented in court. It was stated that PW1 gave a vivid account of how she was defiled by the appellant whom she knew as Mwajefa, their neighbour, on 3 occasions. The Prosecution Counsel indicated that PW1 was steadfast in her evidence and remained firm in cross-examination.
10. In regard to the medical evidence adduced by PW3, it was submitted for the prosecution that PW1 was examined 5 days after the incident when her P3 and PRC forms were filled. It was submitted that PW3 filled the P3 form for PW1 on 27th January, 2016. There were no bruises or injuries on her genitalia or discharge noted she had bruises on her thighs. It was stated that in cross-examination, PW3 said that he noted an infection in PW1's urine and her hymen was broken.
11. It was argued by the prosecution that PW1's genitalia appeared to have no bruises because she was taken to hospital 5 days after the incident. It was also stated that her mother had taken her to Mwaluphamba Hospital for medical examination, thus an earlier medical intervention that initiated the healing process. Ms Mbaeh also submitted that the bruises on PW1's thigh were clear evidence of a struggle during the act of defilement.
12. On the issue raised by the appellant about his age, Ms Mbaeh relied on the age assessment report which indicated that he *was about* 19 years old. She relied on Section 2 of the Children's Act which defines age as the "apparent age". She submitted that since the apparent age of the appellant was 19 years, the provisions of Section 191 of the Children's Act did not apply in respect to his case. She pointed out that if there was an error about the appellant's age, he would either be 18 or 20 years old which would still not fall under Section 191 of the Children's Act.
13. On the issue of the failure by the prosecution to call the persons who arrested the appellant, the prosecutor relied on Section 143 of the Evidence Act which stipulates that it was not necessary to bring a particular number of witnesses to court to prove any fact. She relied on the case of **Benson Mbugua vs Republic**, Criminal Appeal No. 257 of 2009 to augment her submissions. She prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

14. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the Trial Court and reach its own independent conclusion. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal stated thus:-

"1. An appellant on first appeal 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.

2. 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; only then can it decide whether the Magistrate's findings should 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."

15. The complainant who testified as PW1 was a minor. She was taken through voir dire examination. The Trial Magistrate found that she did not appreciate the importance of giving evidence on oath. She gave unsworn evidence.
16. PW1 was MT [name withheld]. She indicated that she knew the appellant as Mwajefa who was their neighbour. It was her evidence that on a date she could not recall, her grandmother sent her to the shopping centre. She came across the accused in the bush along the road. She testified that he removed her panty and used his "mdudu" to insert into hers. She stated that he threatened to kill her if she revealed what had happened. Her grandmother asked her about it.
17. She recounted that the appellant repeated the act again when she went to collect firewood, by forcefully taking her to his brother's house. He had sex with her. She testified that there was another time she came across the appellant on the way. She ran away but the appellant chased her and caught up with her. He took her to Mrina's house and defiled her.
18. PW1 testified that she alerted her grandmother who reported the matter to the appellant's home. PW1 was later taken by her grandmother

to the police station. She was then taken to hospital for examination. P3 and post rape care forms were filled.

19. PW2 was CM [name withheld]. She was PW1's grandmother. She indicated that as at 21st September, 2016, PW1 was 10 years old. It was her evidence that on the said date she sent PW1 to the shop. She later noted that PW1 was walking with difficulties. On asking her what the problem was, she told her that she had been defiled by Mwajefa. She took PW1 to Mwaluphamba Hospital for medical examination. She also reported the matter to Kwale Police Station. She said that the appellant was her neighbour. PW2 further testified that PW1 told her that she had been defiled on 3 occasions by the appellant.

20. Mohamed Gamallo, a Clinical Officer at Kwale Hospital testified as PW3. He produced the P3 and PRC forms for PW1. He stated that the P3 form was filled on 27th January, 2016. He noted bruises on PW1's right thigh. He said there were no bruises noted on the genitalia or any discharge. A laboratory report revealed traces of infection in her urine.

21. No. 86027 Corporal Lydia Odipo testified as PW4. She stated that she was attached to Kwale Police Station where she was performing general duties. She testified that on 26th January, 2016 at 4:30p.m., the appellant was taken to the said police station by members of the community policing on an allegation of having defiled a girl aged 9 years. She indicated that she took PW1 to hospital for examination and a P3 was filled. She also took PW1 for age assessment. She produced the age assessment report before the Trial Court.

22. The appellant gave a sworn defence statement. He spoke of an unspecified date on a Wednesday when he left home to do some casual work of herding cows. He stated that at 10:00a.m., he left the farm and wanted to milk. He saw his grandmother who asked him why he was grazing on her land. He told her he was grazing the cows in the usual place. He further said there was confrontation and his grandmother got hold of his shirt. A fellow herder who saw them intervened. He told his parents what had happened. His grandmother reported the incident to the village chairman. The appellant indicated that his grandmother complained of him having assaulted her and illegal grazing. He was fined Kshs. 10,000/= by the elders but he did not pay. The appellant said his grandmother took one black hen from him, for having manhandled her. He said the matter was reported to the chief's office and later to the police station. He was then charged with defilement, which he said were strange allegations.

23. The appellant called 1 witness to court. He testified as DW2. His name was Mwachegu Salim from Burami. He stated that on the date in issue he took his cows for pasture. He heard screams and rushed to the scene. He found the appellant and his neighbour fighting and he separated them. DW2 said he did not ask them what had transpired prior to the fight. He left thereafter to look after his cows.

24. The issues for determination are:-

(i) If the appellant was a minor; and

(ii) If the prosecution proved the case of defilement against the appellant beyond reasonable doubt.

If the appellant was a minor.

25. An age assessment for the appellant was done following an order which was made by the Trial Court on 29th January, 2016. The age assessment report which was availed to the Trial Court stated that the appellant was examined and to the best of the knowledge of the examiner, he was *about* 19 years old. The use of the word "*about*" in this court's understanding was that the age which was given was estimation. As Ms Mbaeh correctly submitted, even if the estimated age of the appellant was taken to be 18 or 20 years, he would still fall within the age bracket of an adult. In this court's view, medical personnel were the best suited to determine his age. This court cannot pluck a figure from the blues and put it forth as the appellant's age. This court's finding is that the appellant's age as at the time he was examined was 19 years. As such, the provisions of Section 191 of the Children's Act were not applicable to the appellant as he was not a minor at the time he was charged and convicted.

If the prosecution proved its case beyond reasonable doubt.

26. PW1's evidence was that she was defiled by the appellant on 3 different occasions. The appellant was her neighbour. In his defence statement, the appellant admitted the fact that he was PW1's neighbour. It was PW1's evidence that she informed her grandmother (PW2) about the defilement and that is when action was taken against him.

27. In cross-examination, PW1 stated that the appellant had threatened to kill her if she disclosed about the defilement. She explained that after the defilement she was walking with difficulties and felt a lot of pain. Her grandmother, PW2, gave evidence as to how she sent her granddaughter to the shops on 21st January, 2016 and when she went home she saw that she was walking with difficulties. On interrogating PW1, she told her she had been defiled by the appellant. PW2 took PW1 to Mwaluphamba Hospital for medical examination. PW1 explained to her that the appellant had defiled her on 3 occasions. She described the appellant as their neighbour.

28. The Clinical Officer, PW3, who filled the P3 form at Kwale Hospital found no bruises on PW1's private parts. There were no injuries or discharge either. He noted that PW1 had bruises on her thigh. On being cross-examined, he said PW1's hymen was broken. The Post Rape Care (PRC) form and P3 forms indicate that PW1 had an old scar in her genitalia (where the hymen should have been).

29. In cross-examination, PW3 said that PW1 was taken to Kwale Hospital for medical examination after 5 days but should have been presented to hospital before 3 days had lapsed, after the incident.

30. Looking at the medical evidence, it does not corroborate PW1's claim that she had been defiled in the recent past. There was evidence of bruises on PW1's thigh as per the P3 form but she did not explain how she got the said bruises. The Hon. Magistrate associated the bruises on PW1's thigh with an act of defilement which was an erroneous conclusion in the absence of such evidence from PW1.

31. The appellant was not charged with the offence of having defiled PW1 on the 21st January, 2016 but of having defiled her on diverse dates between the 10th of January, 2016 and 23rd January, 2016. PW1's narration of the events gives the impression that she was defiled on the day PW2 sent her to the shops. She then talked of the appellant having repeated the act again when she went to collect firewood. She also gave account of a 3rd incident when he chased her and defiled her at Mrina's house. PW1 could not recall the date of the 1st alleged defilement. It was PW2 who gave the date as the 21st of January, 2016.

32. If the flow of events happened as narrated by PW1 in evidence and if the 1st alleged defilement took place on 21st January, 2016, it is difficult for this court to understand why no healing bruises or injuries were observed on PW1's private parts on 27th January, 2016 when she was examined in Kwale Hospital.

33. In such a case where the medical evidence was not conclusive about PW1 having been recently defiled as at the time of examination, the prosecutor should have been more prudent. It was known to the prosecution that PW1 had at the first instance been taken to Mwaluphamba Hospital by PW2 for examination. If the medical treatment notes for PW1 from the said hospital had been produced in court, they would have assisted to resolve the doubt the issue of PW1 having been defiled in the sequence she narrated in her evidence.

34. I do concur with the submission made by the appellant that in the circumstances of this case, it was necessary for the prosecution to produce the medical treatment notes of the first treatment PW1 received. The said notes would have shed light on the condition of PW1's genitalia soon after the alleged defilement.

35. This court has had difficulties in understanding how a 9 year old girl could have been defiled on 21st January, 2016 and on 2 occasions thereafter and have no healing bruises or injuries on her genitalia on 27th of January, 2016. The doubts that this court has, must be resolved in the benefit of the appellant.

36. It is the finding of this court that the prosecution failed to prove its case beyond reasonable doubt. I hereby quash the conviction and set aside the sentence for the charge of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act.

37. On whether this court can substitute the charge of defilement with the alternative charge of indecent act, this court's finding is that the evidence adduced by PW1 cannot form the basis of a conviction for the latter offence. The appellant shall therefore be set at liberty forthwith, unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Mwangeka, Prosecution Counsel for the DPP

Mr. Oliver Musundi- Court Assistant