



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 41 OF 2019

BETWEEN

PATRICK HASSAN KWATEMBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Sexual Offence Case No. 177 of 2016 delivered by Hon. E. Kanyiri, SRM on 27th November, 2018).

JUDGMENT

Background

1. The Appellant was charged with the offence of defilement contrary to Section 8(1)(2) of Sexual Offences Act and an alternative count of indecent act with a minor contrary section 11(1) of the said Act. The particulars for the main charge were that the on the 12th day of December, 2016 in [particulars withheld] Sub-county within Nairobi County intentionally caused his penis to penetrate the vagina of MG a girl aged 7 years old. The particulars of the alternative charge were that he indecently and unlawfully torched the vagina of MG, a girl aged seven years. At the conclusion of the trial he was convicted of the main count and sentenced to serve life imprisonment. Dissatisfied with both the conviction and sentence he preferred the present appeal.

2. He framed the grounds of appeal as follows: that the learned magistrate erred in law and fact in,

- a. Failing to find that the charge sheet was defective;*
- b. Finding that the penetration was not established;*
- c. Failing to find that the evidence was riddled with inconsistencies and contradictions;*
- d. Failing to consider his defence; and*
- e. Failing to adhere to Section 169 of Criminal Procedure Code.*

Summary of evidence

3. The prosecution called a total of six (6) witnesses to prove its case. **PW1, MG**, the complainant a girl aged seven years gave a sworn testimony. This was after the trial court conducted a *voire dire* examination. It was her testimony that on the material date, 12th December, 2016 she was asleep in the house. She later woke up and found a man she identified as Hassan with her. **PW5, PM**, a minor aged 10 years corroborated the abduction of PW1. It was his testimony that as he was playing near PW1's home at about 5.00 pm, he saw the Appellant carrying PW1 out of the compound. He insisted that the Appellant puts PW1 down but the Appellant refused insisting that he said he was her (PW1's) uncle. In a bid to assert himself, he yanked the leg of PW1 who did not respond. The Appellant swung a yellow bag containing clothes at PW5, hitting him on his chest and he fell down.

4. In a bid to ascertain the Appellant's intentions, he followed the Appellant in the company of some of his friends. They saw the plot that the Appellant went into. They resolved to report it to PW2, PW1's mother.

5. When PW1 asked the Appellant what he was doing there and who he was, he threw her against a wall and left the house. He later came back and brought her french fries. She fell asleep shortly after eating. She woke up to a lot of pain in her genitalia.
6. Her mother **PW2, FG** had left her at home and found her missing. She began looking for her using the help of some neighbors. At this point **PW5** led them to the general direction that he had seen the Appellant proceed in. She found the complainant shaking and they proceeded to MSF Hospital for treatment. The neighbors who had accompanied her to the scene notified the police. **PW5** gave a description that led to the arrest of the Appellant at a spot he frequented.
7. **PW3, Celina Nambu**, a Clinical Officer at MSF Hospital gave evidence on behalf of her colleague, Emmy Kosgei who was on annual leave. She testified that they attended to the complainant on the 12th December, 2016 at 11.35 pm. On examination, she had a bruise on her right hand with localized tenderness. Her genitalia looked shiny as if oil had been used. Further, there was redness on the vulva walls. The hymen was pink and had an old notch at the 3.00 O'clock position. In support of these findings, she prepared a medical certificate and filled out a Post Rape Care Form, Exhibit 3.
8. **Dr. Shako (PW4)** based at Nairobi Surgery examined the complainant on 11th of January, 2017. It was her finding that she had normal hymen structure for her age. She also had a notch at the 3.00 and 6.00 O'clock marks. She prepared the P3 Form, Exhibit 4. She stated that the notch could be a result of a healing wound or a birth mark.
9. The Appellant was arrested at a place he frequented. It was the testimony of PW5 that he knew the Appellant as he often went to chew khat at a certain place near the estate. It was further his testimony that he escorted neighbors to the place where he knew the Appellant would be and the group arrested him. The investigating officer **CPL Lilian Atieno (PW6)** testified that she found the Appellant already arrested and placed him in the cells at Shauri Moyo Police Station.
10. When placed on his defence the Appellant opted to give a sworn statement. It was his defence that he was arrested by a mob while at a family party in his aunt's home. That he and three other men were met by some people who urged them to follow them. They were then informed of a case of defilement but the victim was unable to identify any of them as a culprit. Later, the complainant's father and a group of people arrested him and he was thereafter charged accordingly.

Submissions

11. The Appellant was represented by learned counsel, Mr. Ashioya whilst the Respondent was represented by learned State counsel, Miss Kimaru. It was the submission of the counsel for the Appellant that the charge sheet was defective. Counsel submitted that the defect was on account of the variance of the charge with the evidence adduced. He cited the case of **Jason Akunu Yongo V R (1983) eKLR** to buttress this assertion.
12. He submitted that there was no evidence on record that supported the element of penetration. He also took issue with the identification of the Appellant, stating that the complainant did not see her attacker. His contention was that the mere fact that the Appellant was last seen carrying the complainant and later the complainant was found in an abandoned house was insufficient and inconclusive evidence that he must have defiled her.
13. Counsel for the Appellant also submitted that there were contradictions and inconsistencies in the witness accounts of what exactly transpired. It was his submission that PW5 testified to following the abductor without success. He added that PW5 testified that the abductor was known to him but later changed and referred to him as a stranger. Further that PW5 testified that he reported the fact of abduction of PW1 to PW2, the complainant's mother but that PW2 testified that she found her daughter missing from their home after she started looking for her.
14. It was his submission that PW5 stated it was the father of the complainant who first came into contact with her. However, it was the testimony of the complainant that when she became conscious she could not recognize those that were around her. He added that at this time the father of the complainant was not anywhere near the scene yet it was said that he was the first person to arrive at the scene.
15. Counsel also challenged the medical evidence adduced by the prosecution. It was his submission that the medical officer, Dr. Shako admitted that another object other than a genital organ could have occasioned the injuries. That therefore, the element of penetration was not established. He urged that the conviction be quashed and sentence set aside.
16. Miss Kimaru contended that the charge sheet was not defective. She admitted that the complainant did not state what object inflicted injuries onto her genitalia. She however explained that the witness spoke the truth because she was asleep when the ordeal happened and could thus account for what was inserted in her genitalia. That when she woke up she was in the company of the Appellant and her genitalia were sore. She cried out at which point people came to her help.
17. Miss Kimaru submitted that the complainant demonstrated that she knew the Appellant. The evidence of the complainant was corroborated by PW5, a minor who saw the Appellant carrying the complainant near where she was playing. When PW5 insisted that the Appellant puts the complainant down he asserted that he was her uncle. PW5 pulled her leg but the complainant was non-responsive indicative that she was likely under drugged-induced sleep. Therefore, the Appellant was the last to be seen with the complainant. Miss Kimaru contended that the simple fact that the complainant could not tell what was used to interfere with her genitalia did not disprove penetration. It was her view therefore, that the charge sheet was not defective.
18. On further proof of penetration, Miss Kimaru reiterated the evidence of PW3 and PW4. It was her submission that PW3 found that the complainant had bruises on her right hand. Further that she had reddened vulva walls and a notch at the 3.00 O'clock mark. PW4 on the other hand examined the complainant a month after the ordeal and observed that her hymen was absent and the notch at the 3.00 to 6.00 O'clock mark was still present.

19. It was the submission of Miss Kimaru that age was also proved. She stated that the complainant was born on 12th December, 2009. This was established through the production of a birth identification card.

20. It was her conclusion that the inconsistencies highlighted were minor and did not water down the strong prosecution case. She urged the court to uphold the conviction. As regards the sentence, she submitted that although life imprisonment was befitting, she urged the court to substitute it with determinate sentence.

21. Mr. Ashioya in rejoinder reiterated that the inconsistencies were weighty and definitely weakened the prosecution case. He urged that court not to consider the assertion that the minor was drugged as that would be tantamount to introducing new evidence.

Analysis and determination

22. After a careful reevaluation of the evidence and the respective rival submissions, I find that the only issue for determination is whether the case was proved beyond a reason doubt.

23 The prosecution in a case of defilement is enjoined to prove three key elements. Firstly, is proof of the age of the complainant. The testimony of PW2, her mother and documentary evidence namely the Acknowledgment of Birth Notification sufficiently established the age of the minor as seven years.

24. Secondly, is proof of the element of penetration. PW1 in her own words testified that when she woke up she found herself with pain in her genitalia. When she was taken to hospital an examination revealed a tear of the hymen at 3.00 O'clock. The same was confirmed by PW3, a clinical officer at MSF Clinic where PW1 was first treated. The witness was categorical that there was interference with the genitalia of the minor. Her evidence was further corroborated by that of PW4, Dr. Shako of police surgery who, despite the fact that she examined PW1 a month after the incident found a tear of the hymen at both 3.00 and 6.00 o'clock mark. She was quick to explain the discrepancy by the fact that the position of the tear can change when it is healing. There is therefore, no doubt that penetration was established.

25. Of course, no one saw the Appellant defile PW1. Nevertheless, the medical evidence overwhelmingly corroborated her testimony and that of PW5, the minor who saw the Appellant abduct her. I have no doubt in my mind that PW1 was defiled. The question is whether the Appellant was culpable; was he positively identified?

26. It was the testimony of PW5, P.M. that he saw someone he described as the Appellant carrying the complainant. It was his testimony that he knew the Appellant from the locality. Further, that he confronted the Appellant and asked him to put her down which he refused. He told PW5 that he was PW1's uncle. PW5 attempted to yank the complainant's leg to which she did not respond. At this point the perpetrator hit him with a bag on his chest. He later led some neighbors to the where the Appellant headed to, leading to his arrest.

27. On her part, PW1 testified that when she woke up she found the Appellant with her in what seemed like an abandoned house. She was named him as Hassan, a clear indication that he knew him by name. This was therefore identification by way of recognition. On asking where she was and insisting that he takes her back home he got irate threw her on a wall and left. He returned later with French fries which she ate and fell asleep again. This time she woke up with pains from her genitalia and the Appellant having since left.

28. No doubt PW1 corroborated the testimony of PW5 as regards to the person who abducted her and later found with her. The PW1 testified that she woke up to a strange place with the Appellant after falling asleep at home. PW2 testified that she came home to find her daughter PW1 missing. PW5 confirmed seeing the Appellant leaving the plot where PW1 lived with PW1 in his hands. I find that there is scarcely more speculation as to whether the Appellant was identified. I find in the affirmative that the Appellant was positively identified as the culprit. No one else could have committed the heinous act under these circumstances.

29. I accordingly hold that the conviction of the Appellant was safe and I uphold it.

30. On the issue of sentence, the Appellant was sentenced under **Section 8(2) of the Sexual Offences Act** to serve life imprisonment. The Respondent urged that a lesser sentence be considered in line with **Francis Kariokor Muruatetu v Republic [2017] eKLR**. I underscore the fact that defilement is a very serious offence. Further, the circumstances of this case were grave. The Appellant took advantage of the vulnerability of the minor then only aged seven years, induced her into sleep and defiled her. As fate would have it, PW5 was the God-sent angel who saw the direction the Appellant took to go and commit the crime, finally leading to his arrest. The psychological trauma the Appellant created in PW1 will haunt her for the rest of her life. A deterrent sentence is therefore called for.

31. I do agree with the Respondent that a determinate sentence is the proper way to go. In sum, I substitute the life sentence with 40 years imprisonment effective from the date of arrest, 12th December, 2016. It is so ordered.

Dated and delivered at Nairobi This 4th March, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2.

Mr.

Momanyi

for

the

Respondent.