



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 40 OF 2019**

**DICKSON BIDII KENGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against both conviction and sentence of the Senior Principal Magistrate's Court of Kenya**

**at Kilifi delivered on the 19<sup>th</sup> February 2019 by Hon. R. K. Ondieki)**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Gekanana for the appellant**

**Ms. Sombo for the State**

**JUDGMENT**

**The background**

The appeal arises from the conviction of an appellant on 19.2.2019 on a charge of defilement contrary to Section 8(1), (3) of the Sexual Offences Act No. 3 of 2006. The conviction arises out of an incident which occurred on the diverse dates between 1<sup>st</sup> February and 29<sup>th</sup> February 2014 at Mweza Sub-Location, Dungicha location in Ganze District within Kilifi County, where the appellant intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of **ZMM** a child aged 15 years.

The Learned Magistrate upon conclusion of the trial and on conviction sentenced the appellant to 20 years' imprisonment. The appellant being dissatisfied with the entire Judgment appealed on the following grounds namely:

- 1. That the Learned trial Magistrate erred in Law and in fact in convicting and sentencing the accused in years of imprisonment.**
- 2. That the Learned trial Magistrate erred in Law and in fact by failing to consider that the evidence adduced was conclusively corroborated.**
- 3. That the Learned trial Magistrate erred in Law and fact by failing to note that there was no proof of penetration and the complainant was not a virgin at the time of the alleged defilement.**
- 4. That the Learned trial Magistrate erred in Law and facts as no scientific test (DNA) was conducted as per the provisions of Section 36 (1) of the Sexual Offences Act No. 3 of 2006 to ascertain whether or not the appellant committed the present offence which was unsuitable to base a conviction.**
- 5. That the decision of the trial court was made without proper jurisdiction and thus based on belief and anticipations not warranted by the evidence on record.**
- 6. That the present case was shoddily, beyond reasonable doubt to justify a conviction.**

**7. That the Learned Magistrate erred in law and in fact in subjecting the appellant to severe sentence considering the underlying facts.**

The essence of the several grounds boils to one critical issue that the prosecution failed to discharge the burden of proof beyond reasonable doubt and the conviction was against the weight of evidence taken together with the defence case.

**The evidence in brief**

The complainant in this case who at the time was aged 15 years gave a detailed description of what the appellant did on diverse dates as specified in the charge sheet of committing an unlawful sexual act which resulted in a pregnancy. It was at the time stated by the complainant that appellant requested her to abort the pregnancy by taking some pills. On agreement between the complainant and the appellant and one **Kazungu Kashuru** administered the abortion pill which allegedly caused a miscarriage.

The appellant therefore made arrangements to take her to the hospital for further medicare and treatment. The complainant admitted having carnal knowledge with the appellant way back in 2013 and at all material times it was consensual with the appellant. The incident was to be escalated to her mother who directed it to be reported to the police station at Bamba. Accordingly, to **PW4** the police station booked the report and issued post care rape form and a P3 Form.

**Dr. Busra** examined the complainant and filled the P3 Form which was produced on his behalf by **Dr. Daisy Juma** of Kilifi County Hospital (PW3). In the findings of the examining doctor, the complainant was found to have a missing hymen, vaginal bleeding due to premature pregnancy termination and also abdominal pains. The P3 Form was admitted as exhibit 2 whereas the postcare rape form exhibit 3. In so far as the prosecution case, that is what transpired.

The appellant was placed on his defence where he elected to exercise his constitutional right under Article 50 (2) (1) to remain silent and not testify during the proceedings.

On appeal **Ms. Barbara Sombo** on behalf of the state submitted and relied on written submissions that there was overwhelming evidence to support the charge, conviction and sentence against the appellant. She contended that all the ingredients of the offence were proved beyond reasonable doubt. In buttressing the state case on the elements of penetration, age, identification and relevance of DNA, learned counsel placed reliance on the following cases: **Mugo Mwangi & Another v R [1984] eKLR, Aml V R [2012] eKLR, Kassim Ali v R Mombasa Criminal Appeal No. 84 of 2005**

On behalf of the appellant **Mr. Gekanana** submissions revolved around the issues on corroboration, and the failure by the Learned Magistrate to appreciate evidence on admission made by the complainant that she experienced sexual intercourse before and that her act with the appellant was consensual. Counsel further submitted that there were inconsistencies on the evidence by the prosecution witnesses as to penetration and identification of the appellant. It was counsel's contention that in absence of DNA profile, this was a case in which one cannot conclusively find that the appellant had carnal knowledge with the complainant.

According to counsel, though the appellant did not testify on his defence he has no burden of proof and there should be no adverse inference to be drawn by the court on the mere fact that there was no rebuttal to the prosecution case.

I have considered the charge, evidence by the prosecution and issues which emerged on appeal. The seven grounds by the appellant though appearing to address seven distinct issues are primarily on the key question:

Whether there was prima facie evidence established against the appellant to secure a conviction? In the course of the analysis it will be of course no doubt to the appellant that all the issues raised have been considered and determined.

**Analysis**

In determining this appeal, the duty of the court is as well illustrated in **Okeno v R [1972] EA 32 at Page 36**. It is not enough to scrutinize the evidence by the trial court but to evaluate and re-examine it so as to draw my own findings and conclusions in the entire conviction and sentence. In doing so one has to make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (**See Peters v Sunday Post [1958] EA 424**)

**The Law**

The appellant was charged, tried and convicted of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act as read with Section 8 (2) of the Act. The Section contemplates that a person is guilty of defilement when he intentionally and unlawfully commits a sexual act with a child who is aged under eighteen years old. The minimum sentence prescribed for defiling a child aged 15 years like the complainant in the instant case is not less than twenty years' imprisonment.

Grounds of appeal 2, 3, 4, 5, 6, the real crux of all these grounds at hand is whether the Learned trial Magistrate had sufficient evidence to find the appellant guilty, capable of securing a conviction for the offence of defilement.

On the first element on penetration, the position of the law is as defined in Section 2 of the Sexual Offences Act. That the duty of the prosecution is to establish that the complainant was partially or fully sexually penetrated by the appellant. It is also trite that the general principle of Law is that on evaluation of evidence a trial court may act and making definitive findings on the testimony of a single witness to convict an accused person.

The approach is consistent with the proviso in Section 124 of the Evidence Act. In the persuasive case of **Woji v Sanlam Insurance Company Ltd [1981] ISA 1020 9A** it does provide a predominant approach to the evidence of young children where the court observed:

**“The question which the trial court must ask itself is whether the young witness, evidence is trustworthy. Trustworthy, as is pointed out by Wigmore on his book of evidence paragraph 568 at 128 depends on factors such as the child’s power of observation, his power of recollection and his power of narration on the specific matter to be testified. In each instance, the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs, while the capacity of narration or communication raises the question whether the child has the capacity to understand the questions put and to frame and express intelligent answers.” (Wigmore on evidence Volume II paragraph 566 at 596)**

**There are other factors as well which the court will take into account in assessing the child’s trustworthiness in the witness-box. Does he appear to be honest. Is there a consciousness of the duty to speak the truth?”**

Then also, the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility as per (**schvener JA in R v Manda 1951 3 SA 158**). At the same time the danger of believing a child where evidence stands alone must not be underrated.

**“Inconsistencies must therefore be measured by the yard stick of seriousness and materiality which must be linked with the overall issue of truthfulness. Not every inconsistency is serious and material and inconsistencies need not affect perse the appreciation by a trial court that a particular witness testimony is true.”**

It has been reiterated in our jurisdiction and is well established that evidence of a single witness, including sworn testimony of a child can proof a fact in issue without corroboration.

However, its only required of the court to warn itself of the risks that may occur in relying on uncorroborated evidence of child witnesses.

In **Abdalla Bin Wendo and Another v R 1953 EACA 166** and **Roria v R 1967 EA 58** the courts identified the following key features when considering and admitting evidence of a single identifying witness to rule out any mistaken identity.

**“Some of the key factors have to do with whether identification was based on recognition. Therefore, prior familiarity of the assailant, the visual observation of the assailant by the victim, the length of time, the victim has to observe and even opportunity to hear the assailant, any special features identified by the victim, the source of light. All these factors go to the quality of identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after along period of observation, or in satisfactory ludicrous by a person who knew the accused before a court can safely convince even though there is no other evidence to support the identification evidence, provided the court adequately warn itself of the special need for caution.”**

The importance of corroboration as independent evidence placed before the court to show that an accused person alone or with others committed the offence was clearly stated in the case of **DPP V Hester 3 ALL ER 1056** where **Lord Morns** stated thus:

**“The accumulated experience of courts of law reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances, and situations in which it is unwise to find settled conclusions the testimony of one person alone. The reasons for this are diverse, these are some suggestions which can readily be made which are only with more difficulty rebutted. These may in some cases be motives of self-interest, or self-exculpation, or vindictiveness. In some situations, the straight line of truth is diverted by the influence of emotion, or hysteria. Sometimes it may be that owing to immaturity, or perhaps to lively imagination gifts there is no true appreciation of the gulf that separates truth from falsehood. It must therefore be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based.”**

In my own analysis, once there is evidence of a single witness to proof a fact the court correctly can convince on uncorroborated evidence. The well-known principle is captured **R v Baskerville 1916 2 KB 658** which the court held:

**“This rule of practice has become virtually equivalent to a rule of Law. It can but rarely happen that the jury would convict after the proper caution by the Judge.”**

In the instant appeal it is on record that the complainant and the appellant seemed to get along well before the charge of defilement was investigated and a prosecution initiated seeking to sustain a conviction. The circumstances of the defilement are well documented in the testimony by the complainant. The force of evidence by the complainant was that the appellant has had consensual sex with her for a long time. Her evidence showed that as a result the sexual intercourse she conceived, the pregnancy which was to be aborted under instructions of the appellant. As regards sexual intercourse and penetration, the medical evidence by **Dr. Daisy Juma** showed there was no hymen, bleedings from genitalia due to abortion. The Learned trial Magistrate admitted the testimony of PW1 on oath and the appellant challenged the evidence through cross-examination. Notwithstanding absence of DNA evidence, PW1 direct evidence and circumstantial testimony from PW3 goes to show sexual intercourse between the complainant and the appellant. In the case of **AML v R {2012} eKLR** the court clearly held that:

**“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”**

In this case there is direct evidence of fact based on the complainant’s personal knowledge and observations made by the Learned trial Magistrate. Again, the inference of guilt has been reasonably drawn from the testimony of PW2, PW3, PW4 and PW5 respectively.

The social interaction by the appellant with the complainant at Kilifi hospital to seek treatment for the aftermath of the abortion drugs confirms the fact of defilement and pregnancy. It also confirmed the evidence by the complainant that the appellant did not want her to keep the pregnancy. Thus the step taken to procure abortion drugs from **Kazungu**.

I therefore, agree with the Learned trial Magistrate that in view of the prosecution evidence there was penetration and the conduct of the appellant before, during and after the sexual act goes along to place the appellant at the scene.

The second element is on age. The complainant who testified stated her age to be 15 years old. The birth certificate provided as Pexhibit 1 shows that the complainant was born on 27.1.1999. In accordance with the dicta in **Alfayo Okello v R {2010} eKLR** the prosecution proved this element to the required standard of beyond reasonable doubt.

If there is a reasonable hypothesis from the proven facts inconsistencies with the appellants innocence then the prosecution has discharged the burden of proof of beyond reasonable doubt. Sometimes moral certainty is used. This principle is well illuminated in the case of **Simon Musoke v R [1958] EA 715:-**

**“In a case depending exclusively or partially upon circumstantial evidence, the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the ignorance of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt. (In Teper v R AC 480) The Court held:**

**“It is necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

The applicant having been confronted with prima facie evidence, failed to explain the direct evidence of the complainant on being the defiler, whose outcome was the pregnancy and further assisting in supplying the drugs to facilitate an abortion. The presumption of fact under Section 119 of the Evidence Act arises that it was the appellant alone who had the knowledge on having carnal knowledge with the complainant. As a result of the sexual intercourse, the complainant conceived and he declined to take responsibility save for arranging for an abortion.

I am satisfied therefore that the charge as laid was proved beyond all reasonable doubt on strong and reliable evidence. I dismiss the appeal on conviction. The sentence that was imposed is legal and no grounds have been ventilated come within the guidelines in **Ogolla S/o Owuor v R {1954} EACA**.

In sum the appeal on both conviction and sentence fails.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF APRIL 2020.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Gekanana for the appellant