



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 118 OF 2018

ERASTUS KUNZA MUNENE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mavoko delivered on 01.11.2018 by the Senior Principal Magistrate C.C. Oluoch in Mavoko SPMCC Criminal Case SO.12 of 2017)

BETWEEN

REPUBLICPROSECUTOR

VERSUS

ERASTUS MUNZE MUNENE.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of **Hon. C.C Oluoch, SPM** in Criminal Case **SOA No. 12 of 2017** delivered on **1.11.2018**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The offences were alleged to have been committed between 9th and 14th December, 2017. He pleaded not guilty to both charges.

2. The appeal was lodged on 15.11.2018 that is within 14 days after delivery of judgement in the trial court. The appellant has on record an amended petition of appeal that was lodged on 9.12.2019 pursuant to requisite leave of court. The appellant's case is three-fold. Firstly, that the prosecution case was not proven to the required standard. Secondly that the sentence was harsh and excessive. The appellant amended the grounds of appeal and challenged the trial court for failing to allow the appellant an opportunity to mitigate before sentencing him and failing to consider the appellant's conduct before the commission of the offence.

3. The appellant sought that the conviction of the appellant be set aside and that the appellant be granted a non-custodial sentence.

4. The appellant's counsel submitted that failure to accord the appellant an opportunity for mitigation was unconstitutional and offended the tenets of fair trial procedure. Reliance was placed on the case of **Isaac Andanche Omollo v R (2019) eKLR**. Counsel urged the court not to grant an order for retrial but to set the appellant at liberty in order to avert a correction of a loophole in the prosecution case. It was the appellant's submission that the birth certificate, PRC form and P3 form were not identified by the complainant and they were not tendered by the makers. It was counsel's case that the complainant behaved like an adult hence aided in the commission of the offence; reliance was placed on the case of **Martin Charo v R (2016) eKLR**. The appellant challenged the evidence of the prosecution witnesses as being contradictory, for the complainant testified that she was in class 6 whereas Pw2 testified that the complainant told her that she was in class 7. Further counsel pointed out to court that the complainant testified that the appellant defiled her while she was staying with him and Pw2 and Pw3 testified that the complainant informed them that the appellant lived with her as wife and husband. Counsel submitted that the P3 form was not comprehensive because a Mr Muema also had sex with the complainant.

5. The state's submissions are not on record.

6. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was MMP. A voir dire conducted on her satisfied the court that she was possessed with sufficient intelligence and understood the enormity of an oath. She testified on oath that she was aged 14 years and born in 2004. She told the court that a sister to her neighbor called Muema requested her to take care of her brother's house and she went there where she met the appellant who informed her that he wanted her to be his wife. She stated that she went to the appellant's house together with Ngina who was a neighbor to Muema and the said Ngina left her in the appellant's house where she slept and he used to defile her. She testified that she lived with the appellant for three days and then met Muema whom she lived with for a week and he also defiled her. She told the court that Muema assaulted her and she reported the matter to Ngina's grandmother who alerted the landlord following which she and the appellant were arrested and taken to Mlolongo Police station. She told the court that she went for treatment after arrest. On cross examination, she testified that she went to the appellant's house after spending two days in Muema's house.

7. **PW2** was **Davis Kilundu Malonza**, who received a report on 13.12.2017 that a minor was living with a man and on inquiry from Pw1 he discovered that she was living with Muema who handed her over to the appellant whom she lived with as wife. He testified that the appellant admitted cohabiting with Pw1. On cross examination, he told the court that he was not aware that Pw1 was assaulted.

8. Pw3 was Pc Jane Muthoni who testified that the appellant was brought to the police station on 14.12.2017 on complaints that he was living with a minor. She was examined at Nairobi Women Hospital and a P3 form as well as a PRC form were filled She told the court that she had the birth certificate in respect of Pw1 that was produced as evidence.

9. **Pw4** was **Rose Wavinya** who testified that Pw1 is her child and that she noted that she was missing on 3.12.2017.

10. **Pw5** was **Peter Wanyama** who testified of the examination that was carried out on Pw1 at Nairobi Women Hospital by Evalyne Njambi whose handwriting he was familiar with and he produced the PRC form that was filled by her under Section 33 of the Evidence Act. He testified that the examination revealed that PW1 had no hymen and that there was evidence of penetration. He testified that the information on the PRC form was indicated in the P3 form that was tendered as evidence.

11. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. He gave an unsworn statement. He told the court that on 6.12.2017 he found Pw1 outside his house crying and who informed him that Muema had assaulted her and she requested the appellant for accommodation. He testified that he was arrested on 9.12.2017.

12. The court found that the age of Pw1 was proven vide the birth certificate and that at the time of commission of the offence, Pw1 was 13 years and 4 months; that penetration was proven vide medical evidence on the PRC form, P3 form and the account of Pw1; that the appellant was properly identified by Pw1 and the admission of the appellant that he was cohabiting with Pw1 and in placing reliance on the case of **Ambrose Mwawindo Ngatu v R (2016) eKLR** found that the prosecution proved its case against the appellant and he was convicted of defilement and sentenced to 20 years imprisonment without giving him an opportunity to mitigate.

13. Having looked at the Appellant's and State's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:

a. Whether or not the prosecution had proved its case beyond reasonable doubt.

b. Whether the sentence was excessive

c. Whether there are procedural infractions that would vitiate the trial.

d. What orders the court may issue?

14. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. That the victim was below 18 years of age.

b. That a sexual act was performed on the victim.

c. That it is the accused who performed the sexual act on the victim.

15. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case and his defence was not considered. The prosecution has not responded to the appeal. A perusal of the list of exhibits in the trial court showed a birth certificate, a P3 form as evidence of penetration in the names of **Pw1**. There is no eye witness account of the incident save for the account of Pw1 who gave evidence that is rather uncertain.

16. The appellant stated that he gave Pw1 accommodation after she had been chased by Muema.

17. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see **Rex v. Summers, (1952) 36 Cr App R**).

18. The prosecution had the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the

accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v Uganda [1967] EA 531*). By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

19. The evidence as narrated by Pw2, 3, 4 and 5 is largely hearsay and circumstantial. The direct evidence is the account of Pw1 as corroborated by the P3 form. In this regard I find that there is no doubt as to the age of the victim and the element of penetration. I however am not satisfied with the evidence of identity of the perpetrator

20. Section 143 of the Evidence Act provides that: “**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**”(emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, I am not satisfied that the victim was telling the truth, because her evidence is contradictory. She told the court that she lived with the appellant then went to Muema; she later changed her story to another version that as narrated to Pw2 that she lived with Muema who handed her over to the appellant. The trial court did not satisfy itself of the danger of a conviction based on evidence of a single witness and the need for corroboration as well as did not satisfy itself that the single witness was telling the truth. The Proviso to Section 124 of the Evidence Act is that “**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**”

21. With regard to the identity of the appellant there is circumstantial evidence in addition to the account of Pw1 that I find hard to believe. The appellant’s version of the story creates circumstances suggestive that there was a meeting between the appellant and Pw1 but there was no sexual contact; the contradictory evidence of Pw1 casts doubt in the prosecution evidence and as such the same shall be resolved in favour of the appellant.

22. I am cognizant that the absence of a hymen cannot in itself prove penile penetration but having considered the evidence on record the same has left doubt in the minds of a reasonable and prudent person in the involvement of the appellant in the offence charged and a real possibility that the unlawful sexual act did not take place.

23. In these premises, I am unable to agree that there was proof of the prosecution case. It was not safe to convict on the basis of the evidence as presented by the prosecution in the instant case. The complainant kept on giving different versions on the alleged incident. It was further worsened by the fact that she claims to have had sex with one Muema before turning to the appellant. The introduction of another man raised some doubt about the complainant’s honesty and truthfulness in her complaint. It was therefore unsafe to base the conviction on such shaky evidence.

24. Having arrived at the above finding, I see no need to delve into the other remaining issues for determination as they now remain moot. The result is that the appeal succeeds. The conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **14th** day of **May, 2020**.

D. K. Kemei

Judge