



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HCCRA NO.52 OF 2018

MM..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. Z.J. Nyakundi dated 29/07/2015 in Mutomo SRMCR No. 16 of 2015.)

JUDGMENT

1. **MM** the Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The complainant MM2 was aged four (4) years. Upon conviction he was sentenced to serve life imprisonment.

2. Being dissatisfied with the judgment, he filed this appeal citing the following grounds:

- a) **That**, the honourable trial Magistrate erred in matters of law and fact by failing to note that the charge sheet as it is was defective for non-conformity with the evidence adduced.
- b) **That**, the honourable trial Magistrate erred in matters of law and fact by failing to note that vital and essential prosecution's witnesses were not availed in court to testify.
- c) **That**, the honourable trial Magistrate erred in matters of law and fact by failing to conduct a *voire dire* as required in law and stipulated under section 19 of the Oath and Statutory Declarations Act Chapter 15 Laws of Kenya.
- d) **That**, the honourable Magistrate erred in matters of law and fact by failing to note that the medical evidence as tabled before the court was insufficient to prove penile penetration of the complainant.
- e) **That**, the honourable trial Magistrate erred in matters of law and fact by failing to find that penetration by the accused person was not proved to the requisite threshold.
- f) **That**, the honourable trial Magistrate erred in matters of law and fact by failing to find that the prosecution's evidence was so inconsistent and contradictory and thus could not sustain conviction.

3. A summary of the case before the trial court is that Pw1 is the mother of the minor MM2 who never testified. She was away from her home on 28th February 2015 night when she received a call from one Koki who did not testify. The said Koki informed her that MM (*Appellant*) was disturbing the children. She went home and found her children at the home of one Kasumuni.

4. Pw2 **KM** a minor whose age is unknown is a sibling to MM2. The witness said the Appellant who is their uncle found them eating while MM2 was on the big seat. He removed her pant and inserted his penis into her vagina. He went to Kasumuni's house and reported to her what the Appellant had done to MM2. Kasumuni too came to their home and took them to her house. Pw2 had also called Mbindyo (Pw5) who came and chased away the Appellant after being told what he had done to MM2.

5. Pw4 **Susan Syengo** a neighbor received two reports from Pw1's children. After the 2nd report, she went with the children to their home. In the house MM2 told her the Appellant had defiled her. She asked him why he was doing that but he never responded as he was very drunk. She went with the children to her house and they waited for their mother (Pw1) to come. When she came she asked MM2 to explain to her what had happened.

6. It was Pw1's evidence that when she checked MM2's private parts she found sperms there. She informed the assistant chief who referred her to the police. She then took the child to hospital and she was treated. She identified the P3 form, PRC form and child health care card

which were later produced as EXB1 – 3 respectively. According to Pw3 **Joseph Mbithi Musyoka** the report to the police was made by Pw1 on the same date of incident.

7. Pw7 **No. 102152 PC Ruth Wafula** testified on behalf of the investigating officer PC. Roselyn Neelim. She said the report to the police was made on 1st March 2015. Pw8 **Daniel Mulwa** examined the child on 1/3/2015 and filled the P3 form (*EXB1*). The child had been treated at Mutomo health centre on allegations of defilement. He found the child to have a broken hymen, no vaginal discharge, no laceration or tear. The urinalysis and high vaginal swab were normal. To him the missing of a hymen was an indication of defilement.

8. In his unsworn defence the Appellant stated that on 28/02/2015 he passed near the gate of Mwanthi and he heard children screaming. He entered the compound and found Pw1 not there.

He then met Pw5 who told him to go and sleep. On reaching home, he was arrested on an allegation of defilement.

9. At the hearing of this appeal the Appellant relied on his written submissions which I will summarize. The submissions clearly expound on the grounds filed. He submits that from the evidence he ought to have been charged with the offence of incest. So to him the charge is defective.

10. He has also submitted that there was no proof of penetration. He referred to the evidence of Pw8 on this and said the broken hymen alone was not proof of defilement. He referred to a number of authorities to support this.

11. It is also his submission that the prosecution failed to call crucial witnesses in contravention of section 150 of the Criminal Procedure Code and section 146 of the Evidence Act. The witnesses not called were Koki and Kasumuni. On this he cites the case of **Juma Ngondia – vs- R (1982 – 88) KAR 454; Bukenya & Others –vs- Uganda (1972) E.A 549 and Donald Majiwa & 2 Others –vs- R (2009) eKLR.**

12. He also submits that there were inconsistencies and contradictions in the evidence of the minors. Their evidence ought not to have been believed. He asks this court to give him the benefit of doubt.

13. In its brief submissions, the Respondent through learned counsel Mr. Mamba states that if there was any defect in the charge sheet the same is curable under section 382 of the Criminal Procedure Code. Secondly that the minor was aged four (4) years and there was proof of penetration. To him the sentence was not biased in any way.

Analysis and determination

14. This being a first appeal this court has a duty to re-analyse, re-evaluate the evidence on record and come to its own conclusion. It must also bear in mind that it did not see nor hear any of the witnesses and so give an allowance for that. See **Okeno –vs- R 1972 E.A 32; Kiilu & Anor –vs- R (2005) I KLR 192.**

15. I have considered the evidence on record, the grounds of appeal, submissions by both parties and cases cited by the Appellant. One main issue I wish to address before any other is whether the complainant (*MM2*) testified or not. On 4th May, 2015 when the matter came for hearing the court prosecutor made an application saying: -

“State – the minor victim is four (4) years old. Am applying that the mother RM be appointed as intermediary.

Court: *Upon hearing the application by the State, RM be and is hereby appointed as intermediary to testify for and on behalf of MM2.”*

16. Article 50(7) of the constitution which protects fair trial provides thus:

“In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.”

17. Before the appointment of an intermediary, the court must first of all declare the witness to be vulnerable through a process. Section 31(2) of the Sexual Offences Act provides that:

“The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of –

a) Age

b) Intellectual, or physical impairment

c) Trauma

d) Cultural differences

- e) *The possibility of intimidation*
- f) *Race*
- g) *Religion*
- h) *Language*
- i) *The relationship of the witness to any party to the proceedings*
- j) *The name of the subject matter of the evidence; or*
- k) *Any other factor the court considers relevant.*

18. Who then is an intermediary and what is his or her role? Section 2 of the Sexual Offences Act defines an intermediary as follows:

“intermediary” means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.

The role of an intermediary is provided for under section 31(7) of the Sexual Offences Act which states

Section 31(7)

“If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may –

- a) *Convey the general purport of any question to the relevant witness;*
- b) *Inform the court at any time that the witness is fatigued or stressed; and*
- c) *Request the court for a recess.*

19. In the case of **M.M. –vs- R Criminal Appeal No. 41 of 2013 (2014) eKLR** the Court of Appeal stated thus:

“We have seen that in Article 50(7) of the constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to the court through the intermediary. The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the question or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross examination; to monitor the witness emotional and psychological state and concentration and to alert the trial court of any difficulties.”

20. From the provisions cited above and the finding in the above cited case it is my view that there is a procedure for appointment of an intermediary. Secondly, the intermediary is to give the court the evidence of the vulnerable witness and not his/her own evidence. In the present case an application was made by the prosecution based on the age of the victim, and the same was granted.

21. What followed is what was absurd. The victim was not in court and so the court never saw her. What her mother (Pw1) told the court was her own evidence and not that of the victim. My finding is that no complainant testified in this case.

22. Guided by the case of **M.M. –vs- R (supra)** I will consider the evidence from the other witnesses for purposes of making a determination on the three main ingredients of an offence of defilement which are:

- i. Proof of age of complainant.**
- ii. Proof of penetration of the victim’s genitalia.**
- iii. Identification of the perpetrator.**

23. On the 1st ingredient the minor MM2 was said to be aged four (4) years. A child health card (EXB3), shows her date of birth as 9th February, 2010. As at 28th February 2015 she was five (5) years old.

Proof of penetration of the victim’s genitalia.

24. Pw1 left her children (*whose ages are not given*) at home as she went for a chama meeting. She came back home well after 8:00 pm.

when she found her children at Kasumuni's home. She looked at MM2's private parts and found sperms.

25. Pw4 **Susan Syengo** testified saying that she is the neighbor who rescued the children from the Appellant who was disturbing them. Despite having been told of the alleged defilement she never found it necessary to check MM2's private parts. It is also not clear whether Pw4 **Susan Syengo** is the same person as Kasumuni. This is an issue that should have been clarified by the trial court and prosecution during the hearing, but it was never done. The Appellant has raised a big issue on Kasumuni's failure to testify.

26. Pw2 **KM** whose age is unknown but was in class one (1) then said he actually saw the Appellant insert his penis into MM2's vagina as she sat on a seat while the rest were eating. It appears that MM2 was not eating. He used a torch to see what the Appellant was doing. One wonders what light was there before he used the torch. Be it as it may Pw1 saw sperms on MM2's private parts and Pw2 saw the actual penetration being performed.

27. It was Pw1's evidence that she reported the matter and took MM2 to hospital the same night. Even Pw5 said Pw1 called her while at the police station and he followed her there the same night. The evidence on record from the P3 (EXB1) shows that the report was only made on 1st March 2015 which was the next day.

28. There were no treatment notes from Mutomo health centre produced to confirm the treatment. How was the PRC (EXB2) and P3 (EXB1) prepared without treatment notes? The said EXB2 produced is a very unclear photocopy. I wonder how the learned trial Magistrate was able to read the findings in it. This EXB2 was filled on 1st March 2015.

29. In his evidence Pw8 **Daniel Mulwa** the clinical officer who filled the P3 form (EXB1) stated that he filled it on 1st March 2015 using the PRC (EXB2). I have examined the P3 form (EXB1) and it shows that the same was filled and signed by Pw8 on 14th April 2015. Infact at page 2 of EXB1 he has noted that the injuries were two (2) weeks, four (4) days old. He has however not indicated what injuries they were. Even if there were any, then they were inflicted in the last week of March 2015 and not 28th February 2015, according to the P3 (EXB1).

30. In his evidence, Pw8 told the court that besides the missing hymen there was:

- No vaginal discharge.
- No laceration or tear.
- Urinalysis – normal.
- High vaginal swab – normal.

The only reason why he concluded there was defilement was the missing hymen.

31. MM2 was a four-year-old child alleged to have been defiled by an adult. There were no tears/lacerations, epithelial cells, discharge, bleeding e.t.c. but only the hymen was missing. Clearly how was this possible? Would the penile penetration leave no damage to MM2's genital area and just break the hymen? The hymen would also break with no sign of the slightest bleeding?

32. Pw1 said she saw sperms in MM2's genitalia with her naked eyes but the high vaginal swab done within 24 hours revealed nothing. The Appellant in his defence admitted having been at Pw1's home that night. When Pw5 told him to leave and go to sleep, he complied. There is no dispute that the Appellant is an uncle to MM2 and Pw2. Pw5 admitted having found the Appellant at Pw1's gate.

33. I have very carefully analysed the evidence adduced and my finding is that the Appellant in his very drunken state may have been disturbing the children as reported to Pw4 but he did not defile MM2 as claimed.

34. Defilement of a four-year-old child by an adult as the Appellant cannot miss the eye of examination by the medical staff. I think it is also high time that our medical practitioners besides telling us of a missing hymen indicated to the court whether the hymen was freshly torn or not. A missing hymen *per se* is not proof of penile penetration as there are many causes of a missing or broken hymen in a child.

35. In conclusion, I find that the medical evidence does not support the claims by Pw1 and Pw2. There is also no evidence to support the alternative count. Having no proof of penetration or even an attempt to penetrate, I will not deal with the issue of identification of the perpetrator.

36. My finding is that the learned trial Magistrate erred in convicting the Appellant on such contradictory evidence.

37. The upshot is that the appeal is merited and I allow it. The conviction is quashed and sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, at Makueni High Court.

.....

H. I. Ong'udi

Judge