



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 14 OF 2019

JOSEPH KIPKOSGEI KOSANE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of R Amwayi delivered

on 11th February 2019 in Sexual Offences Case Number 58 of 2017

at Chief Magistrate's Court MOLO)

J U D G M E N T

The appellant Joseph Kipkosgei Kosane is charged with **Defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No 3 of 2006**

“On the first count it was alleged that on the diverse dates between 1st February 2016 and 6th July 2017 in [Particulars Withheld] village in Kuresoi District within Nakuru County he intentionally caused his penis to penetrate the vagina of IC a child aged 14 years.

In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. That on the 6th day of July, 2017 in [Particulars Withheld] village in Kuresoi district within Nakuru County intentionally touched the vagina of IC a child aged 14 years with his penis.

By a judgment delivered on 11/2/2019 the learned trial magistrate found him guilty of defilement under Section 8(1) as read with 8(3) of the Sexual Offences Act and sentenced him to 20 years' imprisonment.

Aggrieved by the conviction and sentence he filed this appeal and later relied on the following amended grounds: -

- a. THAT the learned trial magistrate erred in law by imposing the statutory minimum sentence under section 8(3) of the sexual offences act No 3 of 2006 that of 20 years but failed to note that since the Supreme Court's decisions in **Francis Karioko Muruatetu – vs – Republic** the courts are no longer bound by statutory minimum sentence.
- b. THAT the learned trial magistrate erred in points of law and fact by holding that for the prosecution case was proved against the appellant whereas the age of the complainant was not properly ascertained to justify the charges or the sentence passed.
- c. THAT the learned trial magistrate erred in points of law and fact by holding that the case for the prosecution was proved against the appellant whereas PENILE PENETRATION was not adequately proved in evidence.
- d. THAT the learned trial magistrate erred in points of law by failing to evaluate the appellants defence properly
- e. THAT, the learned trial magistrate erred in law by failing to conduct a voire dire to PW 1. This prejudiced the whole process.

He also filed written submissions in which relying on certain authorities, he contested that;

a. The age of the complainant was not proved.

On KAINGU ELIAS KASOMO Vs Rep Cr App. No 504 of 2010; where the superior court observed that,

“the age of the victim of a sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will depend on the age of the victim”.

b. penile penetration was not proved.

P.K.W VS REP where the court of appeal gave the view that courts ought to take on the fact of a broken hymen. On the question “is hymen only ruptured by sexual intercourse?”. The Court observed;

“Hymen also known as vaginal with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to reason/assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. Those include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examination can also rupture the hymen when a girl engages in vigorous physical activity like horse riding, bicycle riding and gymnastics, there can also be a natural tearing of hymen”.

c. On the failure to conduct voire dire examination.

MARIPET LOONKOMOK VS REP (2016) eKLR court of appeal held that;

“it follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true as this court recently found that; “in appropriate case where voire dire is not conducted but there is sufficient independent evidence to support the charge... the court may still be able to hold the conviction”.

d. on failure to consider his defence

OUMA VS REP 1986 KLR where the court of appeal held that;

“At the time of evaluating the prosecution’s evidence, the court must have in mind the accused person’s defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt the benefit of that doubt always goes to the accused person. That did not appear to have been done in this case”.

e. on the proof of prosecution beyond reasonable doubt

On **OKETHI OKALE AND OTHERS VS REP 1965 EA 555**; the court of appeal held that;

“in every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in the counsel’s speeches.... The burden of proof in criminal proceedings is through out on the prosecution and it is the duty of the trial judge to look at the evidence as a whole. I submit it was a great misdirection for the learned trial magistrate to conclude that by the actions of the appellant locking himself in his house could be an inference of guiltiness”.

He also submitted that the medical evidence was not properly before the court relying on **FRANCIS KARANJA vs R [2014] eKLR**, the court held that;

*“as regards the report from the health centre; I do agree with the findings in **Juma Kalio vs Rep criminal app No 71/2000** where the court held that, the author of the medical report should be called to produce it. Failing which the prosecution should make an application to the court and if allowed, the appellant be allowed to respond to the application as to whether or not he has any objection to the production of the treatment notes”.*

On the credibility of the complainant’s testimony he relied on **PAUL KANJA GITARI VS REP [2016] eKLR Cr. App No 13 of 2014**; the court of appeal observed that;

“What we find troubling about this case is that, J.M.K did not on her own violation make a complaint that the appellant had defiled her. Her testimony was that after the “bad things” she went home where she met her aunt who beat her up to reveal what transpired. It was the appellant’s testimony that J.M. K’s testimony was procured by threat”.

And that the prosecution failed to call crucial witnesses and that meant they would not have supported its case. **BUKENYA UGANDA 1972 E.A** where the superior court held that,

“the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. The court has a right and duty to call witness whose evidence appears to be crucial to just decisions of the case to be arrived at. Under the criminal proceedings code. Section 150, gives courts powers to summon anyone whose evidence may be crucial for a just decision”.

In response to his written submissions Ms. Wambui for the state made oral submissions that;

- i. Age was proved through the evidence of the complainant and that of her parent.
- ii. Penetration was proved by the complainant’s and medical evidence.
- iii. That by the time the complainant testified she was 17 years old and voire dire was not necessary she also relied on **Maripet Loonkomok vs R [2016] eKLR**.
- iv. That appellant was known to complainant for 5 years and hence he was not a stranger.
- v. That sentence was lawful.

The issues for determination are whether on the evidence adduced before the trial court, *the ingredients of defilement were proved, whether voire dire ought to have been conducted and if not, the effect of the same, whether in the totality of the evidence the prosecution proved its case beyond a reasonable doubt, and whether the Muruatetu principle ought to apply in the appellant case with regard to his sentence.*

The appellant is entitled to a revisit of the evidence on record and for this court to arrive at its own conclusions. See **Okeno vs Republic (1972) EA 372** where it was stated

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTILAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusion 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 witness.”

- i. On VOIRE DIRE and AGE

It is trite law that for a child of tender years the court is required to conduct voire dire examination by Section 19 of the Oaths and Statutory Declaration Act, which states

Evidence of children of tender years

(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

We have numerous authorities and precedents that voire dire ought to be conducted where the witness/complainant is a child of tender years. This is to establish whether the child is intelligent enough to understand the duty of speaking the truth, or that the child understands the nature of an oath. The complainant testified on 5/3/2018. The record shows that the trial magistrate in view of establishing her age put a question to her: -

“Court: - Inquires the age of the complainant”.

“Complainant: - I am 14 years old. I was born in the year 2001”.

The record continues to state: -

“PW 1 Female minor aged 17 years old sworn and proceeds in Kiswahili”.

Hence no voire dire was conducted. Was that prejudicial to the appellant? It learned trial court appears to have proceeded on account of the complainant’s age at the time of testifying, where in her testimony on oath the complainant reiterated that she was born in 2001.

This was supported by the evidence of PW 5 No 101947 PC Esther Liyavule the investigating officer who in the course of investigations obtained the complainant’s clinic card which indicated she was born on 22/8/2001.

In his submissions the appellant argued that the charge sheet indicated that the complainant was 14 years old, she stated she was 14 years,

and in the same breath that she was 17 years old and that in absence of a medical age assessment the age was not proved. Further, that in any event the PW 5 was not competent to produce ‘medical evidence’ on the age of the complainant. On this he relied on **Francis Karanja vs R** where the court held that the author of the medical report ought to have been called to produce it. He also relied on **Kaingu vs R** on the fact that proof of age is critical in a defilement case.

What is evident is that the charge sheet describes the age of the complainant as 14 years. She said she was 14 years but born in 2001 and a clinic card produced by PW 5 showed she was born in 2001. In convicting the appellant, the trial court found him guilty under Section 8(1) as read with 8(3) of the Sexual Offences Act which states;

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

I found no inconsistencies on the evidence as to age of the complainant taking into consideration her date of birth. The offence was allegedly committed in between February 2016 and July 2017 when she was aged between 14 and 15 years old. She was not yet 15 when the offence was committed. There is consistent evidence established by a clinic card that complainant was born in 2001, She said so and the investigating officer in her investigations established as such. Hence, age was established, and at the time of testifying the complainant was not a child of tender years. In addition, she gave sworn testimony.

Nevertheless, the key ingredient to defilement is penetration. Within the Sexual Offence Act age is only a factor to be considered in the determination of the sentence. Hence if penetration is proved the factor of age would contribute to the number of years the appellant could be sent to prison for.

“ON PENETRATION”

Section 2 of the Sexual Offences Act defines penetration as: - *“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”*

According to the complainant the appellant had been their neighbor since 2011. In 2016 on a date she would not recall, she and her friend S.C went to appellant’s house. He had sexual intercourse with her in the presence of SC, and when he tried to do the same with SC she resisted. That her brother PW 2 IKK came and found them there and SC hid under the bed, but IKK saw her. That she the complainant then left with IKK for home. After that the appellant had sexual intercourse with her 2 times more.

She said on these occasions he removed her clothes, her pants, removed his trouser and did bad manners to her and had forceful sexual intercourse with her. That she never told her parents and it is her brother who reported to her father.

She said on 5/7/2017 no sexual intercourse took place. On the other hand, her brother IKK testified that on 5/7/2017 about 8.00 am he was at home heading to school when he heard his sister IC the complainant herein screaming and talking to the appellant in the appellant’s home. He said he heard all this while near his own home as appellant’s house was about 300m from his home. He testified that he went to check what was happening but when he got there his sister hid under the bed. That when he asked her what was wrong with her she began to cry from under the bed and that is when they both left for home and he reported to their parents. He testified that she told him nothing had happened to her. He also testified that the appellant was later arrested. That his sister disappeared, leading to the arrest of his mother and appellant.

On cross examination he said he found the appellant cooking. On re-examination he said appellant was cooking, that his sister IC was seated on the bed but when he knocked she hid under the bed.

According to **PW 5 no. 101947 PC Esther Liyavule** the investigating officer the complainant told her she had gone to visit the appellant’s daughter who was her friend. That she found the appellant was alone, and was cooking supper. That the appellant asked her to sleep in his house that night but before they would sleep her brother IKK arrived and found her seated on the appellant’s bed. That her brother ran home and informed his parents. She testified that complainant reported that appellant had penetrative sex with her severally before the matter was reported.

The clinical officer **Judy Chemng’eno PW 4** testified that the victim IC was 14 years old. That she told her that she had an “affair” for 13 months with a 72-year-old man. On medical examination she found that everything was normal, but the complainant’s private parts indicated that she was sexually active. No bruises were found but the hymen was broken.

In determining whether this appeal has any merit all the circumstances of the offence must be considered in arriving at the conclusion whether the penetration actually happened.

The complainant testified that sexual inter course happened times before 5/7/2017 on dates she would not recall but **all** in the presence of her friend one SC. This SC was not called; she was never ever interviewed by the investigating officer yet she was the eye witness. The investigating officer also stated that the complainant was visiting the appellant’s granddaughter. This granddaughter was not named/interviewed. The contradiction between her testimony and that of IKK, that he found the complainant hiding under the bed and ran home to tell his parents; while his is that he left with his sister and the complainant’s version that it was her friend SC who hid under the bed creates scenario that seems to suggest some degree of untruthfulness.

The IKK's story further contradicted the complainant's in that she said that on the 5/7/2017 she and SC went to appellant's house together found appellant in the company of one Charles, took tea and left. There is no mention that her brother came and found her in the house alone with the appellant.

His narration of the events of 5/7/2017 and those of his sister have no connection and at all, as according to her the alleged defilement took place in on unknown different dates.

According to PW 3 No 104918 PC James Kapel Ebenyo – the appellant was escorted to Langwenda Police Patrol Base by members of the public on 6/7/2017 at 11.00 a.m. He was in the company of the complainant and her father yet her own father did not record any statement/give any evidence in the matter It is noteworthy that the parents, to whom the report was made have not testified whether it is true indeed that a report was made to them by IKK and as to what the action they took upon receiving the report.

The failure to call SC, the eye witness and the parents of the complainant left some yawning gap in the prosecution case. **See Bukenya vs Uganda**

The only evidence for alleged defilement was the contradictory evidence of PW 1, PW 2 and PW 5, which is highly unreliable. See Paul Karanja Gitari vs R, P.K.W vs R where it was held that a rupture/broken hymen is not conclusive evidence of defilement

In his defence the appellant testified that he was cooking when 2 children went to his house and told him they were hungry. That the complainant's brother called a crowd, and the appellant locked himself in the house. He was later arrested and taken to Keringet police station. He denied the offence. In **OUMA VS REP 1986** KLR the court of appeal held that;

“At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt the benefit of that doubt always goes to the accused person. That did not appear to have been done in this case”.

The appellant's defence looked at in the reflection of the case for the prosecution bears the possibility of truth. The prosecution by not calling the eye witness, by presenting contradictory and inconsistent evidence left a reasonable possibility of the defence being true.

The prosecution created the scenario of her word against his word. They laid no basis upon which the testimony of the complainant could be believed under the proviso to s. 124 of the Evidence Act. There was no evidence of recent sexual intercourse to establish when it had happened and whether it was with the appellant. The complainant's testimony was not supported by any other testimony and it was upon the prosecution to prove their case beyond a reasonable doubt. These are the words of the court in **OKETHI OKALE AND OTHERS VS REP 1965 EA 555**; the court of appeal held that;

“in every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in the counsel's speeches.... The burden of proof in criminal proceedings is through out on the prosecution and it is the duty of the trial judge to look at the evidence as a whole. I submit it was a great misdirection for the learned trial magistrate to conclude that by the actions of the appellant locking himself in his house could be an inference of guiltiness”.

The mere fact that the appellant locked himself in the house when the crowd came was not proof that he was guilty of the offence. The prosecution had the burden to establish that he had indeed committed the offence as alleged.

CONCLUSION

1. Age of the complainant was proved
2. The failure to conduct voire dire was not fatal to the case, as at the time of giving evidence the complainant was not a child of tender years.
3. The appellant's defence created a doubt in the case for the prosecution and had the learned trial court considered the same, this doubt would have been resolved in his favour.
4. Penetration by the appellant was not proved. The case for the prosecution was riddled with contradiction and inconsistencies and failure to call the eye witness can only be held against the prosecution.
5. I find that the conviction was not safe. I allow the appeal. The conviction is quashed and the sentence set aside.
6. Appellant is to be set at liberty unless otherwise legally held.

Dated, delivered and signed at Nakuru this 9th October 2020

Mumbua T Matheka

Judge

In the presence of: VIA ZOOM

Edna CA

For the state: Ms. Rita

Appellant