



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 150 OF 2015

SMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. G. N. Opakasi RM delivered on 6th October, 2015

in Engineer SRMCR No. (S.O.) 562 of 2014)

JUDGMENT

1. The Appellant was charged for the offence of defilement of a girl JNM, aged five (5) years, contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. The particulars are that on 6th June, 2014 at [Particulars Withheld] Village Kinangop, he intentionally caused his penis to penetrate the vagina of JNM, a girl aged five years. There was an alternative charge of committing an indecent act.

2. After hearing four prosecution witnesses and the defence, the trial court convicted the accused and sentenced him to life imprisonment.

3. He has filed this appeal challenging the lower court's decision on the following grounds:

- *that the charge sheet used against him was defective;*
- *that his fundamental rights were violated;*
- *that the charge was not proved beyond reasonable doubt, in particular, the medical evidence; and*
- *That his defence was not properly considered.*

4. The evidence in this case is as follows. JNM, the complainant, underwent a voir dire examination and gave unsworn testimony. She came from school and went to her Aunty, Mama S's house. After changing from her uniform she had lunch and went with a friend to look for firewood. On returning her grandmother had not come back home. She started washing her clothes and went to her grandmother's house. Still her grandmother had not returned but she found the accused there. He is a shamba boy. The accused told her to go into the house and she did.

5. The accused got into the house, told JNM to remove her trouser as he removed his. He told her to lie on the bed, and then put his thing for urinating inside her (pointing her genitalia). She felt pain and the accused left. After that she went to Mama S's house, who asked her what she was doing at her grandmother's house. JNM told her grandmother, and later her mother, what had happened. Her mother, who lives in Engineer, came and they went to Engineer Hospital and the police station. They were then told to go back to the hospital.

6. The accused did not cross-examine the complainant saying he had no questions for her.

7. PW2 JG, the complainant's mother testified that she received a call on 8th June, 2014, at about 8.00pm from her mother who told her that her daughter had been defiled. Her daughter was staying with her mother. On 9th June they went to Murungaru Health Centre where they were told to report at Murungaru AP Post. A police officer accompanied them to hospital and JNM was examined and treated. She was told

to report at Kinangop Police Station which she did on 10th June. She was given a P3 Form which she took to hospital. She was also given a PRC form both of which she marked for identification.

8. The accused had no question on cross-examination.

9. PW3 Dr. Maingi from Engineer Hospital testified that he examined JNM. He produced the P3 Form as P. Exhibit 1 and the PRC Form as P. Exhibit 2. He stated that the complainant was defiled in the 1st week of June. The exact date was not known. His examination revealed her hymen was broken, but she had no discharge. A high swab revealed no spermatozoa. The hymen was approximately 1 week old. He said that an old broken hymen would form tags but that was not the case here. His report was dated 11th June, 2014. He gave JNM's age as 5 years.

10. In cross-examination, he reiterated that the exact date of the offence was not known, but he estimated it to be about one week. He also said that because of different anatomies of victims, there need not necessarily be injury during intercourse.

11. PW4 PC Philip Gateri was the Investigating Officer. He was at the police station when the complainant and PW2 reported the incident. He referred them for treatment after the OB was booked, and gave them a P3 Form. He also recorded their statements, and asked the officer at Murungaru AP Post to arrest the accused. The accused had no cross-examination questions for PW4.

12. In his defence the accused gave unsworn testimony. He said that the complainant is his cousin's daughter, his niece. He alleged that the complainant's mother was due to pay him Shs 4,500/= for working on the shamba and milking cows. According to him, he had told her to keep part of his salary every month, and it had accumulated to Kshs 18,000/=. He wanted to buy a heifer with the savings. When he asked her for the money she refused and told him he would see what would happen to him.

13. The accused then went to work for a neighbour. On returning from work he found about 20 boys who beat him and took him to the police station. He said he was surprised to learn he had been charged with defilement.

Defective Charge Sheet

14. The appellant complains that he was charged with defilement under **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**, yet the Appellant and complainant are uncle and niece.

15. The DPP argues that the complainant's mother is the Appellant's cousin and hence the Appellant's cousin's child does not fit into the description of niece for purposes of incest under the Sexual Offences Act.

16. The only evidence of a relationship between the accused and the defendant came from the defendant. He said "*the complainant is my cousin's daughter*" and that the complainant was his niece.

17. **Section 20 (1)** of the **Sexual Offences Act** defines incest as that relationship where:

"Any male person [commits] an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, grand daughter, sister, mother, niece, aunt or grandmother."

18. In this case, the accused would have committed incest if JNM had been his niece, that is his brother's or sister's child. That is not the case here, as the complainant is admitted to be his cousin's daughter. Thus, the charge of defilement is in order, and the ground fails.

Whether the Appellant's Fundamental Rights were violated

19. The Appellant submits that he was arrested on Tuesday 10th June, 2014 and arraigned on Friday 13th June, 2014. That this was a detention exceeding 24 hours and violated his rights under **Article 49 (2) (f)** of the **Constitution** to be brought before a court within 24 hours.

20. The DPP submits that the accused fully and freely participated in the proceedings and cannot now allege violation of his rights which he did not raise then. They also argue that it is not for the appellate court to deal with that issue as it was not raised at trial. The DPP cited **Julius Kamau Mbugua v Republic [2010] eKLR** where the Court of Appeal held:

"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused."

However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked to, or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages." (Emphasis added)

21. I agree with and am bound by the Court of Appeal decision.

Whether the offence was proved beyond reasonable doubt

22. The Appellant's complaint is that the medical evidence was not sufficient to convict the accused and that the complainant was taken to hospital after 72 hours. Further, that there was no indication that the complainant had an abnormal walking style, nor did she exude pain or scream. He cited the case of **Ben Maina Mwangi v Republic HCCRA No. 47 of 2007** where the court said:

“Considering the complainant’s age compared to the Appellant, if any attempt was made to penetrate the complainant’s genitalia, it would be expected that the complainant must have felt pain if not excruciating pain, there is no way she could avoid screaming and bleeding.” (Emphasis added)

23. On this issue, the Respondent's submission is that the evidence of SY was corroborated by the medical evidence. The doctor who testified was the one who examined JNM. He found that JNM's hymen had been broken; that the breakage was approximately one week old which he determined from the absence of tags; that absence of tags means that the breakage was not old. He also said the breakage was not fresh because there was an absence of bleeding.

24. These aspects fit into the timeframe of the offence. The child reported to hospital about 72 hours after the alleged date of the incident. Further, JNM in her testimony gave clear evidence of what had happened to her, and how the Appellant who was a shamba boy had put his thing for urinating into her genitals. The Appellant did not cross-examine her or offer any evidence to contradict her evidence.

25. In his unsworn statement, the Appellant did not bother to say anything about where he was on the material date. He however admitted that he was the shamba boy which corroborated JNM's testimony. The only twist his evidence brought was the fact that he and PW2, the complainant's mother, had an alleged outstanding pay dispute, although even that did not arise after she testified because he did not cross-examine PW2 at all. In addition, the defence of the Appellant was duly taken into account by the learned trial magistrate and she found that it amounts merely to a denial of the offence. I agree with this finding.

26. In my view, the evidence against the accused person is overwhelming and there is no basis to impugn it. The ground also fails.

Disposition

27. Accordingly, all the grounds of appeal fail and the appeal is hereby dismissed.

Administrative directions

28. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

29. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

30. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 3rd Day of November, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

- 1. Ms Maingi for the DPP**
- 2. Simon Mburu Mburu - Appellant in person in Naivasha Maximum Prison**
- 3. Court Clerk - Quinter Ogutu**