REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 72 OF 2017

*(Appeal arising from conviction and sentence by Hon. A. LOROT (SPM), in Machakos Chief Magistrate's Court Criminal Case **S.O.A. No. 23 of 2016** delivered on 18.1.2017)*

MUTISO MAINGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. This is an appeal from the judgment, conviction and sentence of Hon. A. Lorot, Senior Principal Magistrate in Criminal Case SOA No. 23 of 2016 on 18th January, 2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) (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 Evidence

2. The Prosecution called 6 witnesses. PW1 (SNM) who was the complainant testified that she was born in 2006. She testified that she knew the appellant by name, and on the material day at around 6 pm she was on her way from Katute Market where she had gone to buy flour and met the appellant on the way. The appellant came from behind her and closed her mouth and dragged her to a farm and closed her mouth with a coat and removed her underpants and began doing bad manners and later removed his penis and inserted it into her sexual organ and then a student called MSK found him in the act. She ran to tell her mother who apparently knew the appellant and when she inquired of his action, he responded that it was the work of the devil. The complainant's mother called her father and tied the appellant with a rope, then they went to the chief who gave them a note to Kathiani Hospital and at the hospital, she was told that the appellant had not penetrated fully.

3. PW.2 was MSK. He testified that he was a form 4 student who knew the appellant and the complainant. He testified that on 5.9.16 at around 6.30 – 7 pm on his way from school he was passing by a farm when he heard noises and went to inquire wherein he found the appellant on top of the complainant and that the complainant had been covered with a big coat and the appellant told him that he was interfering with his business. Later the complainant ran away and later came back with her mother and the appellant was tied with a rope and taken to the assistant chief who called police officers and he recorded a statement.

4. PW.3 was JSM. She testified that the complainant was her daughter and presented a copy of the birth certificate indicating that she was born on 3.6.2006. She testified that on 5.9.16 at around 5 pm she sent the complainant to the market to buy flour from Kauti Market and later as it was getting late, the complainant came running and she was in a frenzy and when she had calmed down she went towards the direction of the screams that she heard from far away. She found Pw2 and the appellant and the complainant pointed out the appellant as the one who did bad manners to her and she understood it as defilement and because she knew the appellant, she asked him why he had assaulted the girl and who responded that the devil made him do that. She called her husband who came swiftly and they took the appellant to the assistant chief who called the police and took the appellant to Kathiani Police Station. The complainant was taken to Kathiani Hospital and treated and she presented the treatment notes and the P3 form in court.

5. PW.4 was Dr. Donah Magoma Deri. She testified on the physical examination carried out on 5.9.2016. She testified on the contents of the P3 form and the treatment notes. The Appellant did not object to its production. She stated that on examination, the complainant had a perforated hymen and there was blood inside her vagina, she signed the P3 form on 5.9.16. She also examined Mutiso Maingi, 57 years old at the time and there was no bleeding or secretions noted but the rectal examination was unremarkable. She produced the P3 form that she filled on 6.9.2016 as an exhibit.

6. PW.5 was CI George Kipkoros, the OCS of Kathiani Police Station and he confirmed that on 5.9.16 a complaint was lodged by the

Assistant Chief of Kauto Sub-Location that a minor had been defiled and the man responsible was arrested by members of the public. At around 8.30 pm he went to the said assistant chief's office in the company of Pc Sweta and found a large crowd and the appellant who was arrested by the public was present wherein he re-arrested him and charged him with the offence.

7. PW.6 was Pc Sweta an officer based Kathiani Police Station and who confirmed that on 5.9.16 he accompanied Pw5 to the Assistant chief's office where he found a large crowd and the appellant who was arrested by the public for defilement was present wherein he re-arrested him and charged him. The complainant who was present was taken to Kathiani Sub-County Hospital and he took her statement wherein her mother showed him the complainant's birth certificate.

8. The Learned Trial Magistrate confirmed that the appellant had a case to answer and the appellant chose to make an unsworn statement after the Provisions of Section 211 of the Criminal Procedure Code were explained to him. The appellant denied defiling the victim. He stated that on 5.9.2016 he found people quarrelling and they arrested him. The trial court later found him guilty and sentenced him to life imprisonment.

Appellant's submissions

9. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that he was not brought to court within 24 hours of being arrested and neither was he supplied with witness statements thus his right under Article 50(2) (b) and (c) of the Constitution was violated. He relied on the case of **Ndede v R (1991) KLR 567** and **Daniel Chege Magotho v R (2014) eKLR**. He also submits that after it was found that he had a case to answer, he was not given adequate time to prepare for his defense as the court did not adjourn. Further he submits that there are contradictions in the prosecution evidence as to who accompanied the complainant when she ran away to report the incident to her mother. He says that this contradiction goes to the root of the case and should be resolved in his favour and therefore his appeal be allowed, the conviction quashed and the sentence set aside.

Respondent's Submissions

10. The learned counsel for the Respondent submitted that age was proved to the required standards by the birth certificate. On the issue of penetration, this was established by the testimony of the complainant and the eye-witness who was PW2 and corroborated by the evidence of the doctor who in confirming perforated hymen, it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. With regard to the identification of the appellant, Learned Counsel submitted that the circumstances were favourable to enable the eye-witness identify appellant as well as aid in his arrest therefore the appellant was positively identified and thus the ground of failure to prove the case by appellant lacks merit. On the issue of the right to a fair trial, he submitted that appellant failed to raise it before the trial court and therefore the police were not called to explain the alleged delay. Further with regard to witness statements, he submitted that the appellant actively participated in the trial therefore he did not conduct the case as if he was ambushed hence cannot be heard to complain about lack of witness statements. On the issue of the contradictions and discrepancies, learned Counsel submitted that Section 382 of the Criminal Procedure Code provides that the litmus test is the prejudice occasioned, and quoted the case of **Philip Mzaka Watu v R (2016) eKLR** that stated that inconsistency of witnesses is common and the court will consider their veracity and credibility. The offences the appellant was charged with are known in law and he was aware of the charge facing him thus there was no prejudice occasioned to him by the difference in age. On the issue of failure to consider the appellant's evidence, counsel submitted that the appellant had a mere denial to the overwhelming evidence against him and therefore this ground is devoid of merit. On whether the trial magistrate complied with Section 211 of the CPC, the learned counsel submitted that the appellant opted to give an unsworn statement that failed to offer an explanation to the offence he was charged with and thus the statement did not exonerate him from the charges and therefore the procedure under Section 211 was complied with. The state submits that the appellant has not raised sufficient reason to warrant interference with the decision of the trial court and therefore the appeal be dismissed and the court do uphold the conviction and sentence of the trial court.

Analysis

11. This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

12. The court has carefully considered the petition of appeal and submissions presented. From the evidence adduced before the lower court, the Appellant's Grounds of Appeal as well as the Supplementary Grounds, the issues for determination are as follows:-

a) Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Defilement to the requisite standard;

b) Whether the evidence adduced before the lower court proved beyond reasonable doubt that the Appellant was the perpetrator of the offence;

c) Whether there were any procedural infractions by the Prosecutor or the Learned Trial Magistrate that would vitiate the conviction that was recorded against the Appellant.

a. Elements to be proved

13. In cases of defilement, the prosecution must prove:

1. The age of the child.

2. The fact of penetration in accordance with section

2(1) of the Sexual Offences Act; and

3. That the perpetrator is the Appellant.

14. It is undisputed that the complainant was a person below 18 years. The birth certificate that was tendered is conclusive evidence of age and the appellant has no objection to the same. What the appellant questions is the issue of penetration and identification of the appellant as the perpetrator.

Analysis of evidence on penetration

15. Penetration was established by the testimony of the complainant and the eye-witness who was PW2 and corroborated by the evidence of the doctor who in confirming perforated hymen, it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act.

16. To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant.

17. **Maraga and Rawal, JJA**, as they then were), in **P. K.W VS REPUBLIC [2012] eKLR** on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more.

> ***"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?***
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> ***16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to 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 even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."***

Account of the victim and eye- witness

18. The victim testified that on the material day at around 6 pm she was on her way from Katute Market where she had gone to buy flour and met the appellant on the way. The appellant came from behind her and closed her mouth and dragged her to a farm and closed her mouth with a coat and removed her underpants and began doing bad manners. Later he removed his penis and inserted it into her sexual organ and then a student called MSK found him in the act. She ran to tell her mother who apparently knew the appellant and when she inquired of his action, he responded that it was the work of the devil. The complainant's mother called her father and tied the appellant with a rope, then they went to the chief who gave them a note to Kathiani Hospital and at the hospital, she was told that the appellant had not penetrated fully.

19. The eye witness testified that on 5.9.2016 at around 6.30 – 7 pm on his way from school he was passing by a farm when he heard noises and went to inquire wherein he found the appellant on top of the complainant and that the complainant had been covered with a big coat and the appellant told him that he was interfering with his business. Later the complainant ran away and later came back with her mother and the appellant was tied with a rope and taken to the assistant chief who called police officers and he recorded a statement.

20. The appellant denied defiling the victim. He stated that on 5.9.2016 he found people quarrelling and they arrested him.

21. From the account of the appellant there is no plausible explanation or defence or evidence to controvert the evidence advanced by the prosecution witnesses.

22. From the foregoing, I did not have the benefit of seeing the witnesses testify, however from the proceedings and the court record, the trial court was satisfied with the evidence against the appellant. The learned Trial Magistrate rightly relied on the evidence on record to sustain a conviction for defilement.

b. Evidence of identification of the perpetrator

23. With regard to identification of the appellant as the perpetrator, the evidence of the complainant was that there was a man who held her mouth and covered her face with a big coat, the eye- witness stated that on the material day he saw the appellant on top of the complainant and the said Pw2 assisted in the arrest of the appellant and thus the circumstances were favourable for the positive identification of the appellant. In addition, the appellant's evidence indicated that on the material day he was at the scene of the offence and the Appellant in his defence was unable to challenge the uncontroverted evidence that he was confronted with as presented by the Complainant and her witnesses. The appellant was caught in *flagrant delicto* and apprehended by members of public at the scene.

24. From the evidence, all the three critical ingredients for the offence of defilement that is: age and penetration and identity of the appellant have been met. I find that there is sufficient evidence on record to sustain a conviction against the appellant who due to the evidence on record has been placed at the scene of the crime on the material date and has not controverted the same. The conviction of the appellant was

therefore sound in all respects.

c. <u>On whether there were infractions of the Constitution and the applicable law</u>:

25. The Appellant contended that his rights under **Article 50(2) (b) (j) and 25 (c)** of the Constitution had been violated, in that he was not taken to Court within 24 hours of his arrest or soon thereafter as was reasonably practicable. He further submitted that the Learned Trial Magistrate failed to make any inquiry to find out why that was the case. According to him, such inquiry was necessary, as failure to provide a satisfactory explanation would vitiate the entire proceedings before the lower court.

26. It is indeed the case that in **Article 50(2) (b) (j) and 25 (c)** of the Constitution provides that:

> **"A person who is arrested or detained-**
>
> **(a) for the purpose of bringing him before a court in execution of the order of a court; or**
>
> **(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention. or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."**

27. It is indubitable that the Appellant was not taken to court until **7th September, 2016,** after a period of about 2 days; and that the Learned Trial Magistrate did not make an inquiry as to why the delay in the Appellant's arraignment. It is however well settled now that such violations, if any, have no effect whatsoever on the ensuing criminal trial itself. In **<u>Dominic Mutie Mwalimu vs. Republic [2008] eKLR</u>** the Court of Appeal held that:

> ***"...where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity".***

28. I have perused the lower court record and there appears to be no indication that the Appellant brought the matter of delay in his arraignment to the attention of the Trial Magistrate. Had he done so, an opportunity would have been given to the Prosecution to furnish the court with an explanation to enable a determination as to whether the apparent infraction was explicable. As it is, the matter was belatedly raised on appeal. In any event, the remedy for such violations would be in the civil realm and therefore beyond the scope of a criminal trial. Indeed the role of the trial court in such a scenario was aptly set out thus in **<u>Julius Kamau Mbugua vs. Rep CRA No. 50/2008:</u>**

> ***"a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is invoked and affect 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 or where an accused has trial related prejudice as a result of death of an important witness in the meantime and the witness has lost memory, in which cases the trial court could give 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 trial court and which is by Section 72 (6) expressly compensable by damages".***

29. Clearly therefore, the delay in the arraignment of the Appellant before the lower court cannot vitiate the trial process that was conducted subsequent thereto by the trial court. With regard to witness statements, I am unable to find the prejudice suffered by the appellant for as rightly pointed by the prosecution, he actively participated in the trial proceedings. With regard to the contradictions alleged, I do find that the same do not go to the root of the case thus do not affect the conviction of the appellant in any way since the same did not prejudice him and further the same are curable under Section 382 of the Criminal Procedure Code.

<u>The sentence</u>

30. The appellant was convicted of defilement because there was evidence on record to sustain a conviction and he was sentenced to life imprisonment under section 8(2) of the Sexual Offences Act. The evidence on record shows that at the time of the commission of the offence, the complainant was 10 years.

31. According to Section 8 (2) of the Sexual Offences Act:

> ***"A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to***

imprisonment for life."

32. From the evidence on record, and the analysis of the appellant, because the victim was 10 years at the time of commission of the offence, the sentence was appropriate. I am therefore unable to interfere with the same.

Determination

33. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal herein has no merit and is dismissed in its entirety. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated, signed and delivered at Machakos this **17th** day of **January,** 2019.

D.K. KEMEI

JUDGE