REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 84 OF 2017

(Appeal arising from the original conviction and sentence in Kithimani Resident Magistrate's Court

(Hon. G.O Shikwe, RM), in Criminal Case SOA No. 6 of 2015 and judgement delivered on 22.3.2016)

STEPHEN MUNGOKA MWENDANDU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. This is an appeal from the judgment, conviction and sentence of Hon. G.O. Shikwe, Resident Magistrate in Criminal Case SOA No. 6 of 2015 dated 22nd March, 2016. 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 had 4 witnesses. Pw1 (M.W) who was the complainant testified that at 11 a.m. on 2.2.15 she was coming from the river with donkeys and the appellant was on top of a tree and who signaled her but she ignored. Later on her way home, she saw the appellant seated on the roadside and he held her by the left hand and covered her mount and dragged her to a farm and led her to a house where he lay on top of her and removed his clothes and raped her, She called her uncle M who took her to Matuu Hospital and later to Matuu Police Station. The Appellant was a person known to the complainant thus she recognized him.

3. Pw2 was A M and who stated that on 2.2.2015 she was called by the complainant who told her that she had been raped by the appellant who was a person known to her.

4. Pw3 was Benjamin Maingi. He testified on the physical examination carried out on 4.2.2015. PW3 and captured in a P.3 form. The Appellant did not object to its production. He stated that on examination the complainant had bruises and swelling of the labia minora and he concluded that she had been defiled and signed the P3 form on 4.2.2015. He also saw Stephen Mangoka, 32 years old at the time but no conclusion was made. He produced the P3 form as an exhibit.

5. Pw4 was Pc Patrick Mwau, who confirmed that on 3.2.15 a complaint was brought by the complainant's aunt at Matuu Police Station and that the suspect was arrested on 4.2.15 at midnight.

6. 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 and stated that on 3.2.2015 police came and arrested him and he did not know anything about the charges. On 31.3.2016, he was sentenced to 20 years and filed his memorandum of appeal on 16.6.2017 wherein he challenged the conviction.

7. The appeal was canvassed by way of written submissions.

Appellant's submissions

8. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. The age and identification were not established to the required standard. It is also his case that the trial court went into error in failing to find that the charge sheet was defective. Further he submits that essential witnesses did not testify and crucial exhibits were not produced therefore the appeal should be allowed, the conviction quashed and the sentence set aside and he be set free.

Submissions by the Respondent

9. The state submitted that age was proved to the required standards by the birth certificate. On the issue of penetration, it was submitted that the same was established by the clinical officer who confirmed the presence of bruises and swelling of the labia minora and torn hymen, which 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 complainant observe and positively identify the appellant and therefore the question of wrong identification does not arise. He quoted the case of **Anjononi v R (1981) eKLR.** On the issue of failure to consider the evidence of the appellant, it was submitted that the ground is devoid of merit. On the issue of the defective charge sheet, learned Counsel submitted that Section 134 of the Criminal Procedure Code spells out the contents of a good charge sheet, and quoted the case of **Sigilani v R (2004) 2 KLR 480** that stated that the principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offences the appellant was charged with were 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 call crucial witnesses, counsel submitted that Section 143 of the Evidence Act provides that the prosecution is not obligated to call a particular number of witnesses. He quoted the case of **Bukenya and Others v Uganda (1972) EA 549**. 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 uphold the conviction and sentence of the trial court.

Analysis

10. This being a first appeal, the court is under 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.

11. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into two grounds:

> ***1. That the trial Magistrate erred in law and grossly misdirected himself by convicting the Appellant for the offence of defilement in the absence of clear establishment as to the elements of the offence and commission thereof by the appellant;***
>
> ***2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective; and***

12. In cases of defilement, the prosecution must prove the following elements namely:-

1. *The age of the victim*
2. *The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and*
3. *That the perpetrator is the Appellant.*

13. I have given due consideration to this appeal and the rival submissions. It is undisputed that the complainant was a person below 18 years. What is in contention is the issue of penetration and the identification of the appellant as the perpetrator. In the circumstances I find that the issue for determination by this court is; Whether or not the prosecution proved its case beyond reasonable doubt as regards the three key essential ingredients of the offence of defilement.

14. **Analysis of evidence on penetration**

Penetration was presented vide evidence of the P3 form and the account of the victim as well as the doctor. P3 form was filled by Dr. Maingi on 4.2.2015. It is dated 3.2.2015. He testified on the physical examination carried out on 4.2.2015. PW3 (Benjamin Maingi) testified on the contents of the document. The Appellant did not object to its production. He stated that on examination, the victim had bruises and swelling of the labia minora and concluded that she was defiled and signed the P3 form on 4.2.2015. He also saw Stephen Mangoka, 32 years old at the time and that no conclusion was made. He produced the P3 form as an exhibit.

15. The P3 form indicates that, "*the hymen was torn, not fresh.* The Complainant went to the hospital about two days after the incident had happened which is 48 hours after. It was noted, however, in the P3 Form that her labia minora was bruised, and the torn skirt is indicative of a struggle. 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.

16. **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, stated as follows:-

> ***"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?***

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 <u>The Queen vs Manuel Vincent Quintanila</u> [1999] AB QB 769."

17. The doctor herein in examined the complainant. Therefore, the findings in the P3 Form of a bruised labia minora and a torn hymen support penetration. The court ought to take into account this evidence in totality and not in isolation of other factors surrounding the case. The victim testified that on 2.2.15 she was coming from the river with donkeys and the appellant was on top of a tree and who signaled her but she ignored. Later on her way home, she saw the appellant seated on the roadside and he held her by the left hand and covered her mount and dragged her to a farm and led her to a house where he lay on top of her and removed his clothes and raped her, She called her uncle M who alerted her aunt who took her to Matuu Hospital and later to Matuu Police Station. The Appellant was a person known to the complainant and thus she recognized him. The incident took place during the day and there was thus no issue of mistaken identity.

18. The appellant denied defiling the victim. He stated that on 3.2.15 police came and arrested him and he did not know anything about the charges.

19. 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 Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and I see no reason to disturb the finding. He also considered the surrounding circumstances that earlier in the day the appellant had been making advances to the complainant and this places the appellant at the scene of crime, coupled by the fact that the appellant was well known to the victim.

20. With regard to identification of the appellant as the perpetrator, the evidence of the complainant that earlier in the day the appellant had been making advances to her and then stalking her later near the river placed the appellant at the scene of crime and she also identified him. The complainant stated in her evidence that the appellant was someone known to her and thus she was able to name him and positively identify him as the perpetrator. The appellant's defence that he was arrested for no apparent reason did not dislodge evidence of the prosecution. It did not transpire at all that there had been any differences between appellant and the complainant.

21. From the evidence, all the three critical ingredients for the offence of defilement that is: age and penetration and identity of the accused 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 date in question and who has not controverted the same. The conviction of the appellant by the trial court was sound and I see no reason to disturb the same.

22. As regards the issue of sentence, the appellant was convicted of defilement because there was evidence on record to sustain a conviction and he was sentenced to 20 years imprisonment under section 8(3) of the Sexual Offences Act. The evidence on record shows that at the time of the commission of the offence, the complainant was 16 years and not 15 years. The appellant suffered no prejudice with regard to the conviction. With regards to the age of the complainant, and the sentence meted thereof I find that the error can be cured by recourse to section 382 of the Criminal Procedure Code. Since the same did not occasion any prejudice to the appellant in any way.

23. According to Section 8 (4) of the Sexual Offences Act the same provides as follows:-

"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

24. From the evidence on record, and the above analysis and since the victim was 16 years at the time of commission of the offence, the applicable section in terms of sentencing ought to have been Section 8(4) and not 8 (3) of the Sexual Offences Act, and that the appropriate sentence ought to have been 15 years instead of 20 years as ordered by the trial court.

<u>Determination</u>

25. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal on conviction has no merit and is dismissed. However the appeal against sentence has merit and is allowed. The appellant's conviction is upheld and the sentence meted out against him is hereby set aside and substituted with a sentence of 15 years imprisonment from 31.3.2016.

It is so ordered.

Dated, signed and delivered at Machakos this 15th day of January, 2019.

D. K. KEMEI

<u>JUDGE</u>