



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 8 OF 2018

JOSEPH MBADI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 404 of 2016 of the senior Principal Magistrate's Court at Mariakani – N.S. Lutta, SPM)

JUDGEMENT

1. This is an appeal against conviction and sentence. The Appellant Joseph Mbadi was charged with the offence of defilement contrary to Section 8 (1) as read with (3) of the Sexual Offences Act, (the Act). The particulars being that:

“The Appellant on 09th June, 2016 at 1000 hrs (particulars withheld), Kwale County, unlawfully and intentionally caused his penis to penetrate the vagina of NK, a child aged 13 years.”

2. The Appellant was faced with the alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Act. The particulars being that:

“The Appellant on 9th June, 2016 at (particulars withheld), within Kwale County, intentionally and unlawfully touched with his penis the vagina of NK, a child aged 13 years.”

3. The Appellant pleaded not guilty, was tried, convicted of the principal count and sentenced to serve twenty years imprisonment. Being aggrieved with both the conviction and sentence he filed this appeal whose amended grounds in summary are: that the trial court did not consider that the perpetrator was unknown to the victim making the conviction and sentence unsafe; that the trial court did not consider that the medical evidence had no link to the present matter making the sentence imposed unsafe; that the trial court failed to consider that the arrest had no link to the present matter; that the investigations were poorly done hence the case was not proved; and that the trial court failed to consider the alibi defence which was reasonable so as to accord him the benefit of doubt.

4. The parties relied entirely on their written submissions to dispose of the appeal. The Appellant submitted in brief that the alleged victim was not a trustworthy witness as she claimed to know the Appellant but referred to him as a Maasai though he is a Duruma. Further, that she had informed the clinical officer that she had been defiled at a friend's house by an unknown person. To buttress this point he relied on the decision in the case of **Ndungu Kimanyi v Rep (1976-80) 1 KLR 1442**.

5. The Appellant challenged the medical evidence stating that no lacerations, discharge, blood, infection or spermatozoa was noted hence the indication on the P3 form that the injuries were 24 hours old was false and that the hymen was missing due to a past history of rape. The Appellant also pointed out that the prosecution failed to summon crucial witnesses in particular the schoolmate who allegedly escorted her and a negative inference ought to be drawn as per **Bukenya v Uganda [1972] EA 549**. Further, that sections 144 and 150 of the Criminal Procedure Code were not complied with and the prosecution never offered a reasonable explanation for the omission.

6. The Appellant also submitted that the alleged victim's father implicated him over a previous dispute between them hence the arrest had no link to the present case. Finally, the Appellant asserted that the trial court did not adequately consider his defence of alibi. He stressed that it was not his duty to prove that his defence was true but to create reasonable doubt. He relied upon the decision of **Essentale v Uganda [1986] EACA**.

7. The State through the DPP submitted that all the ingredients of the offence had been proved as held in **Dominic Kibet Mwareng v Republic [2013] eKLR**. The ingredients being: age was proved by PW2 N.K. who testified that the alleged victim was 13 years, the doctor

corroborated this in the P3 form, PW3 also indicated this and so did the birth certificate; defilement was proved by PW2 backed by PW3 TMM, PW1 MM and the P3 form; the perpetrator was known to PW2 save for his name and that he was a barber, DW1 stated that he was a barber and DW2 DNM stated that he worked near the business premises of DW1 and PW2's father. It is further submitted that the court considered the defence of the Appellant which did not shake the prosecution's case.

8. This is a first appeal. The court is therefore obligated to look into the evidence afresh, reconsider and re-evaluate it then reach its own conclusion keeping in mind that the trial court had an opportunity to observe the demeanour of the witnesses - see **Okeno v R [1972] KLR 19**. The court must also be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles - see **Chemagong v Republic [1984] KLR 611 and Gunga Baya & another v Republic [2015] eKLR**.

9. The prosecution's case was that NK the alleged victim was defiled at a friend's house by the Appellant. NK testified that on the material date, feeling unwell she headed to hospital and on her way she met a schoolmate, E, who offered to escort her. On their way they met two men whom her friend spoke with. NK was treated and on their way back the friend requested that they go by her place so that she could change out of her school uniform. The two boys they had met earlier on came by and one left with her friend while she was left with the Appellant. She had seen him before as he was a barber near her father's place of work.

10. The Appellant is said to have held her, covered her mouth, removed his belt, tied her legs, removed her clothes and defiled her. When she got home she informed her father who took her to hospital and reported the matter to the police and they were given a document to be filled at the hospital. She held no grudge against the Appellant whom she said is her father's friend. In cross-examination she stated that she knew the Appellant worked as a barber near her father's place but did not know his name and that it was a Maasai boy who went with her friend.

11. PW3 TMM is PW2's father. He testified that his daughter was 13 years of age and had left for school on the material day but failed to turn up home until about 6 p.m. She informed him that she had fallen ill and had been escorted to hospital by her friend called E and was defiled at E's house. She further informed him that the assailant was a person she knew who worked near his place of work. They reported the matter, took her for treatment and were issued with a P3 form. The Appellant who had been his friend was then arrested. He identified him in court. At cross-examination he stated that their work places are close to each other and that he had known the Appellant who ran a barber shop for close to two years but that the complainant did not know the Appellant as she had recently joined him.

12. The medical evidence was produced by a clinical officer PW1 Mary Mwaka, who testified that NK had been defiled by an unknown person. PW1 saw the treatment notes. PW1 testified that the examination revealed that there was no hymen, no lacerations and no infection and that NK had disclosed that she had also been raped years back. She appeared confused and was crying and PW1 believed her and basing on her history found she was defiled.

13. The investigating officer, PW4 Corporal William Kapkama testified that the incident was reported on the material date and a P3 form issued. The investigating officer stated that a friend lured NK to someone's house where she was defiled by the Appellant. NK knew the suspect well. He was a barber and she led the police to him. NK was thirteen years at the time as per the birth certificate produced.

14. In his defence the Appellant testified that though aware of the charges he faced he did not commit the offence but rather that the alleged victim's father had vowed to teach him a lesson after his (PW3's) wife left him and went and married elsewhere.

15. DW2 Daniel Njogu Muchoki testified that he knew about the disagreement between PW3 and the Appellant. PW3 had claimed that the Appellant had had an affair with his wife and vowed to fix him. DW2 informed the court that on the material date the Appellant was at his place of work which is near DW2's business premises and that he was there throughout the day. In cross-examination he stated that he worked near both PW3 and the Appellant and could see their business premises and that the Appellant ran a barber shop.

16. The onus lay on the prosecution to prove its case beyond reasonable doubt - see **DPP v Woolmington (1935) UKHL 1**. It was their duty to prove the ingredients of the offence of defilement.

17. The charge indicates that the offence of defilement was contrary to Section 8 (1)(3) of the Act. There is no such provision and the better drafting of such a charge ought to have the phrase "as read with" inserted between the sub-sections. I must however hasten to add that no prejudice was occasioned to the Appellant as he knew and understood the offence with which he was charged.

18. Section 8 (1) and (3) of the Act provide that:

“(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.”

19. The ingredients of the offence therefore are the age of the victim, penetration and identity of the perpetrator.

20. The alleged victim ought to have been a child at the time of the offence. According to Section 2 of the Act the term 'child' is defined to have "the meaning assigned thereto in the Children Act, 2001 (No. 8 of 2001)" which in turn defines a child as: "Any human being under the age of eighteen years". PW2, the alleged victim at *voire dire* indicated that she was 13 years. Her father, PW3 also informed the court that she was 13 years. The birth certificate indicated that she was born on 20th June, 2003 and was thus thirteen years at the time of the alleged defilement. Hence the element of age was sufficiently proved.

21. Penetration is defined under Section 2 of the Act as **“the partial or complete insertion of the genital organs of a person into the**

genital organs of another person”.

22. NK stated that the Appellant defiled her. The trial court did not put on record the words she may have used to describe or demonstrate the alleged act. In my view it would be better if the trial court uses the exact words or indicate the gestures used to describe or demonstrate the alleged act in such cases so as to leave no illusion that the alleged victim or witness testified and not that the court filled in the gaps.

23. The question is whether sufficient evidence was adduced to support a conviction? By virtue of the proviso to Section 124 of the Evidence Act, the trial magistrate was entitled to convict the Appellant if he believed that the complainant was telling the truth. However, as per the said proviso, reasons had to be recorded in the proceedings as to why the court was satisfied that the victim was telling the truth. The Court of Appeal alluded to the need for compliance with this requirement when it held in *Dennis Osoro Obiri v Republic* [2014] eKLR; Criminal Appeal No. 279 of 2011 (Nairobi) that:

“22. The trial magistrate specifically recorded that she could not find any reason why PW1 would have framed the appellant, if indeed he was not the one who had defiled her. In our opinion, this is as good as stating that the trial magistrate found PW1 trustworthy and her evidence reliable. This was more the case when the evidence of PW1 was looked at against the appellant’s defence. We also find from the judgment that the trial magistrate made specific reference to the section 124 of the Evidence Act, meaning that she was alive to her duty under the provision.”

24. This was not the case in the appeal before me. Nevertheless, in line with my duty to reassess the evidence, I will look at the evidence that was adduced in order to determine whether from a reading of the evidence as recorded by the trial court the complainant was a reliable witness.

25. Looking at the evidence of the complainant as already reproduced in this judgement one finds consistency in the same. It is apparent that the complainant was set up for defilement by her friend E.

26. As was established in the Ugandan case of *Bukenya & others v Uganda* [1972] EA 549 where the evidence called by the prosecution is barely adequate, the court may infer that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution case. One may thus wonder why E. was not availed as a witness. This court cannot speculate but the evidence adduced by the complainant shows that E. was a party to the crime. I do not think her evidence would have added any value to the prosecution case.

27. Indeed the evidence of the complainant was supported by that of PW1, the medical officer who stated that she believed the medical history given to her by the complainant although no injuries were noted. The complainant actually told her about a previous defilement thus confirming that the complainant was honest.

28. PW3 corroborated the complainant’s testimony in that the complainant was late from coming from school and straightaway told him what had happened.

29. Turning to the defence case, I note that DW2 stated that he was with the Appellant on the day of the alleged offence. The applicable law where an accused raises the defence of alibi was succinctly stated in the Ugandan case of *Uganda v Sebyala & others* [1969] EA 204 as follows:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

30. The Court of Appeal in *Victor Mwendwa Mulinge v Republic* [2014] eKLR explained that it is upon the prosecution to prove the falsity of an accused’s defence of alibi.

31. In the instant case, DW2 claimed that the Appellant was at his place of work on the date of the alleged defilement. There was also the issue of the alleged parting of ways between PW3 and his wife. I find the defence case unbelievable. The Appellant talked of PW3’s wife running away with another man hence creating bad blood between him and PW3. He did not explain why the act of PW3’s wife running away with another man could cause bad blood between him and PW3. DW2 added another twist by claiming that it was the Appellant who had an affair with PW3’s wife. There comes the contradiction between the testimony of the Appellant and his witness thus rendering the story about the genesis of the alleged bad blood between the Appellant and PW3 unbelievable.

32. Secondly, the Appellant never at any time raised the issue of the bad blood between him and PW3 when cross-examining PW3. He also did not put any such question to the investigating officer when cross-examining him. To me, the Appellant simply made up the story to escape the consequences of his criminal actions. I reject his defence.

33. In conclusion, I find the conviction safe. The sentence of twenty years imprisonment is the minimum sentence provided for the offence the Appellant committed. I thus find the appeal without merit and dismiss it.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT