



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 11 OF 2018

ZAKAYO AKASIVIA IMBUGUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. W. K. Onkunya, SRM dated 16th November, 2017 at Chief Magistrate's Court at Kisumu in Criminal S.O No. 06 of 2016)

JUDGEMENT

The Trial

1. On 16th November, 2017; the Appellant was convicted for the offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years imprisonment.

The Appeal

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the amended grounds of Appeal filed on 13th December, 2018, Appellant raised 4 grounds **THAT:**

- 1. He was convicted on a defective charge sheet in contravention of Section 214(1) of the Criminal Procedure Code**
- 2. The prosecution case was marred with contradictions and inconsistencies**
- 3. The prosecution case was not proved beyond reasonable doubt**
- 4. The defence statement was not given *due consideration***

3. When the Appeal came up for hearing on 13th December, 2018, Appellant indicated that he was relying wholly on the amended grounds of appeal and submissions filed on 13th December, 2018. Mr. Muia, learned counsel for the state submitted that the prosecution case had been proved beyond reasonable doubt in that Complainant's age was proved by way of a certificate of birth whereas the identity of the appellant as the assailant was proved by the fact that he was not a stranger to the complainant. It was further submitted for the state that the evidence of defilement was corroborated by medical evidence.

Analysis

4. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that. (See **Okeno v Republic [1972] EA 32**) and **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR**.

The prosecution's case

5. The prosecution called 5 witnesses in support of the charge. PW1 CAN the Complainant stated that on 12th March, 2016 at about 8.00 pm, she went to the shops and on the way met the appellant who lived about 100 metres away and whose name she knew as Zakayo. She said that appellant followed her to their house and finding her alone in the house since her parents and siblings were away, defiled her. She stated that she reported the matter to her father the following day and was escorted to hospital where she was examined and the appellant was

thereafter arrested and charged.

6. **PW 2 SNO**, Complainant's father stated that complainant was born on 7th June, 2006 as shown on the certificate of birth **PEXH. 1**. He recalled that on 13th March, 2016 he was informed by a teacher one Joel Owino and two other people that the complainant had been defiled. He stated that on the evening of the same date, he questioned the complainant who told her that accused had defiled her.

DW3 Davidle Dorcas Mudaki stated that one Mrs. Nyamweno who was her neighbor in [particulars withheld] Village informed her sometimes in January, 2016 that one Zakayo had been defiling a minor in the village. The witness stated that she looked for the child and her father and advised them to report the matter to police. The witness escorted the minor to hospital where she was examined and was issued with a P3 Form.

7. **PW 4 Dr. Eve Koile** stated when she examined Complainant on 28th March, 2014 after it was reported that she had been defiled on diverse dates in February, 2016. She produced the complainant's P3 Form as **PEXH. 2** which shows that the complainant's genitalia was normal. She also produced as **PEXH. 3** a post rape care form (PRC) made by one Reboth or Rahab which shows that the complainant's hymen was not intact.

8. **PW 5 Sgt Samwel Menganyi** the investigating officer received complainant's report in which she stated that she was defiled on 12th March, 2016 and after investigations caused the appellant to be charged.

The Defence Case

9. When put on his defence, the Appellant gave unsworn testimony and denied the offence. He stated that he was arrested on 28th April, 2016 and was charged with offences that he did not commit. The learned trial Magistrate considered the evidence and finding the charge proved sentenced Appellant to 20 years imprisonment.

ISSUES FOR DETERMINATION

10. The issues for determination before the Court is whether on the evidence presented before the Court, the charge of defilement Contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act 2006 No. 3 of 2006 was proved. In dealing with this Appeal, I will separately consider the grounds of Appeal as follows:-

a. Is the charge sheet defective

11. The appellant complains that the charge sheet was defective in that the date of complainant's birth was stated by PW4 to be 8th June, 2004 whereas the certificate of birth **PEXH. 1** demonstrates that complainant was born on 7th June, 2006. I have read through the proceedings and I did not find any evidence to the effect that any witness stated that complainant was born on 8th June, 2004. And even if that would have been the case, such evidence would not stand in view of documentary evidence to the contrary.

12. It is however worthy to note that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the Complainant. The age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report. In this case, the certificate of birth marked **PEXH. 1** shows that Complainant was born on 7th June, 2006. The complainant was 10 years when she was allegedly defiled. The appellant therefore ought to have been charged under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 which attracts a mandatory sentence of life imprisonment. I will come back to that later at the conclusion of this judgment.

b. Was the prosecution case marred with contradictions and inconsistencies?

13. Complainant's stated that she was defiled on 12th March, 2016. To prove its case, the state relied on the P3 form **PEXH. 2** and a PRC Form **PEXH. 3**. Contrary to the trial court's finding that the P3 form (**PEXH. 2**) filled and produced by PW4 corroborated complainants evidence that she had been defiled; the P3 form shows that no abnormality was detected on and in the complainant's genitalia.

14. The PRC Form **PEXH. 3** which shows that the complainant's hymen was not intact and that she had been defiled was made by one Reboth or Rahab who did not testify. Section 33 of the Evidence Act provides:

“statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible”

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty”

15. Section 77 of the Evidence Act provides:

(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

16. To my mind, in the context of this case, Section 33 and 77 of the Evidence Act contemplate a situation where the officer giving evidence knows the clinical officer, doctor or analyst who prepared the report. In effect the witness should be conversant with the maker's handwriting and signature. It does not contemplate a situation where the officer giving evidence is a total stranger to the clinical officer, doctor or analyst who prepared the report. In my humble view, to allow any officer who is a stranger to the clinical officer, doctor or analyst who did not prepare reports to give evidence on behalf of another clinical officer, doctor or analyst would amount to hearsay. PW4 did not state that she knew the maker of the PRC form, his/her handwriting and signature. She appears to have been a total stranger to the maker of that document. For that reason, I find and hold that the admission in evidence of PRC Form without calling its maker was unprocedural. In placing reliance on the PRC Form and coming to the conclusion that defilement was proved was an error in law and the trial court ought to have rejected it.

c. Was the prosecution case was proved beyond reasonable doubt

17. The evidence on record as stated hereinabove shows that the P3 form (PEXH. 2) filled and produced by PW4 did not corroborated complainant's evidence that she had been defiled. The prosecution case was based on the PRC Form whose maker did not testify and which appears to contradict the doctor's report contained in the P3 form. To that extent, I find that the prosecution case was not proved beyond any reasonable doubt.

d. Was the Appellant's defence considered?

18. Having come to the conclusion that the complainant's case was not proved beyond reasonable doubt, I find that the trial magistrate did not think through the defence which entitled the appellant to the benefit of doubt.

e. Would this court have enhanced the appellant's sentence had it disallowed the appeal?

19. I already stated in this judgment that the appellant ought to have been charged under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 which attracts a mandatory sentence of life imprisonment since the complainant was 10 years old and not 12 as indicated in the charged sheet. The foregoing notwithstanding, this court would not have had the jurisdiction to enhance the sentence had this appeal failed since the appellant had not warned that he was likely to be convicted of a more serious offence in the event that the appeal was dismissed.

Disposition

20. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

T. W. CHERERE

JUDGE

DELIVERED AND SIGNED AT KISUMU THIS 14TH DAY MARCH 2019

F.A.OCHIENG

JUDGE

IN THE PRESENCE OF:

Court Assistant: Felix

Appellant: In Person Present

For the State: Muia