



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 207 OF 2017

ALEX MUTISO MUMO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal Case Number 1169 of 2017 in the Chief Magistrate's court at Mombasa– Hon. E.Kagoni (SRM))

JUDGMENT

1. The appellant herein, **Alex Mutiso Mumo**, was charged and convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 27th July 2017 in Changamwe Sub- County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of LMA (particulars withheld) a girl aged 11 years old.
2. The prosecution presented the evidence of 4 witnesses in support of its case as follows:
3. The complainant (PW2) then aged 11 years was at home alone when the appellant, who is her neighbour, called her to his house where he pushed her to his bed, locked the door and defiled her.
4. PW3, the complainant's mother testified that she left PW2 at home to go and visit a friend only to come back later and realize that the complainant, who was born on 5th August 2006, had been defiled by the appellant who was then arrested by the area chief and escorted to Changamwe Police Station. PW 2 was issued with a P3 form and treated at Coast General Hospital.
5. PW1, Doctor Gabriel Mugolla, a medical officer from Coast General Hospital produced the P3 form signed on 17th August 2017 as exhibit 1 and Post Rape Care (PRC) form – (exhibit 2).
6. According to PW1, the complainant had a broken hymen and laceration at the vaginal and anal opening. PW 4 PC Jackline Orioki was the investigating officer. She produced the complainant's clinic card (exhibit 2) on which it was indicated that the complainant was born on 5th August 2006.
7. The appellant tendered an unsworn statement in his defence wherein he acknowledges that the complainant was his neighbor's child but denied that he committed offence. His testimony was that the was on the material day, in his house when the complainant came into his house and sat on chair but shortly thereafter, only for the PW3, with whom he claims he had a grudge, came to him and alleged that he had defiled her daughter.
8. At the close of the trial, the appellant was convicted and sentenced to 30 years imprisonment thereby triggering the instant appeal in which he has set out the following grounds of appeal:

1. That the learned trial magistrate erred in law and fact by making a finding of conviction and sentence without considering that, the same was unlawful because the charges of defilement wasn't proved to the required standards.

2. That the learned trial magistrate erred in law and facts by failing to see that, the prosecution was governed by mass contradiction.

3. That the learned trial magistrate erred in law and fact by failing to consider, the source of my arrest wasn't established to have any connection with this offence in question due to the fact that, those who arrested me were never called and testify to clear the doubt of my arrest.

4. ***That the learned trial magistrate erred in law and facts convicting me without considering that, Section 150 CPC was not put into consideration for the witness mentioned in the court record were not summoned to support the prosecution case.***

5. ***That the learned trial magistrate erred in law and facts by not considering my defence.***

9. At the hearing of the appeal, the appellant, through his written submissions, argued that the prosecution's case was not proved to the required standards because a crucial witness named by PW3 as her sister, who allegedly discovered that PW2 had been defiled was not called to testify in court thereby casting doubt on whether the alleged defilement took place. For this argument the appellant relied on the decision in the case of **Bukenya vs Uganda, Uganda Criminal Appeal No. 68 of 1972** wherein it was held:

“Whenever the evidence called is barely adequate the court may infer that evidence of the uncalled witness if called would tend to be adverse to the prosecution”.

10. The appellant further submitted that the medical evidence (P3 form) did not support the charge of defilement as the complainant was allegedly defiled on 27th July 2017 and taken to hospital the next day on 28th July 2017 yet in part 2 of the P3 form the approximate age of the injuries is shown as “3weeks” meaning that the defilement was committed earlier than 27th July 2017.

11. Mr. Isaboke, learned counsel for the state, similarly filed written submissions in opposition to the appeal in which he states that the appeal is unmerited as the prosecution proved all the ingredients of defilement beyond reasonable doubt.

12. As the first appellate court the duty of this court is to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings. See **Okeno v Republic** [1973] E.A. 32; **Pandya vs. R** (1957) EA 336, **Ruwala vs. R** (1957) EA 570.

Analysis and determination.

13. I have considered the instant appeal and the submissions made by the appellant and the state counsel. The main issue for determination is whether the prosecution proved the case against the appellant beyond reasonable doubt. In other words, did the appellant defile the complainant?

14. The critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration and the positive identification of the assailant. (See the case of **Dominic Kibet Mwerang Vs Republic** (2013) eKLR).

15. On proof of age of the complainant, I note that her clinic card which was produced as an exhibit during the trial showed that she was born on 5th August 2006, the offence is alleged to have been committed on 27th July 2017, I am therefore satisfied that the complainant's age 11 years was proved to the required standards.

16. On identification of the appellant as the perpetrator of the offence and penetration, I note that the appellant was well known to the complainant as a neighbour. PW2 testified as follows on identification of the appellant.

“I know the accused person (points at the accused) I do not know his name. He is a neighbour. We live in the same plot.”

17. The offence is reported to have been committed during the day between 2pm and 6pm at the time when PW3 stated that he had left the complainant at home on mission to visit a friend. I am therefore satisfied that the complainant was able to properly identify the appellant as her attacker.

18. Turning to the issue of penetration, PW2 testified as follows on her encounter with the appellant:

“Accused called me and requested to send me. He was standing at the door of his house. I went to where he was. When I got close he got inside his house and asked me to get in. I got in and pushed back the door. He did not lock it. He took me to his bed and made me lie down. I tried to scream. He told me not to scream and threatened to beat me. He then proceeded and “akanifanyia tabia mbaya” while lying on the bed he removed his trouser and applied saliva on his “kitu ya kukojoa” then inserted it in my anus and vagina.”

19. I find that the complainant's testimony was consistent, compelling and was not dislodged on cross examination. The complainant's testimony was corroborated by the evidence of PW1, the medical doctor who, upon examining the complainant noted that her hymen was broken and that she had laceration on both vaginal and anal openings. The doctor also produced as P exhibit 2, the Post Rape Care (PRC) form dated 28th July 2017 which also showed that the complainant had broken hymen and lacerations on the vagina and anus.

20. I note that the P3 form was however filled on 17th August 2017, 3 weeks after the incident. I therefore find that appellant's claim that the P3 form showed that the offence was committed 3 weeks prior to 27th July 2017 does not hold any water as the P3 form itself shows the exact date when the complainant was defiled and the mere fact that P3 form was filled 3 weeks later does not take away the fact that the complainant was defiled.

21. I have considered the appellant's unsworn testimony in his defence and I find that it consisted of mere denial that did not water down the otherwise watertight evidence of the prosecution witness.

22. On sentence I find that Section 8(1) and (2) of the Sexual Offences Act under which was charged stipulates as follows:-

(1) *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

(2) *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

23. I find that even though the Section provides for life sentence this court cannot tamper with the sentence imposed by the trial court with a view to enhancing it in view of the fact that there was no cross appeal on the sentence and further that that the appellant was not, prior to the hearing of the appeal, warned of the possibility that his sentence may be enhanced should the appeal be dismissed. This is the position that was adopted by the Court of Appeal in the case of **EGK vs Republic [2018] eKLR** wherein the court observed:

*“Be that as it may, we note that the first appellate court enhanced the appellant’s sentence from 40 years imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of **JJW vs Republic [2013] eKLR** wherein it states:-*

“We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

24. Having regard to the findings in this judgment I find that the instant appeal is unmerited and the order that commends itself to me is the order to dismiss it.

Dated and signed at Nairobi this 4th day of March 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8th day of April 2019

NJOKI MWANGI

JUDGE

In the presence of:

Appellant present

Ms Marindah for the Director of Public Prosecution.

Mr Oliver Musundi – Court Assistant