



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 71 OF 2016

JOHN KYALO MUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence by Hon. Kahuya, SRM, at the Chief Magistrate's Court

at Machakos in Criminal Case No. 264 of 2015 delivered on 29th September, 2016)

JUDGEMENT

1. This is an appeal from the judgement of Hon. Kahuya, Senior Resident Magistrate in Criminal Case No. 264 of 2015 on 29th September, 2016. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(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.

2. The Prosecution called 6 witnesses. Pw1 was LNK. She testified that she was in form 3, was born in the year 2000 and was 15 years, she presented her birth certificate in court. She testified that the Appellant used to be her boyfriend since 2013 and that on 13/4/14 she left home to visit the appellant at his home and she slept at his place and had sex with him. She testified that she stayed at his house but on 14.4.14 she did not have sex with him and on 15/4/2014, whilst at his house, she was informed that he was arrested because of her. On Cross-examination and re-examination she confirmed that the statement she made on 22/9/2015 was out of her free will.

3. Pw2 was JW and the father of Pw1. He testified that on 13/4/2014 he noticed that his daughter was not at home, and reported this to the police and later was informed by Pw3 that Pw1 had been spotted on board the appellant's motorcycle wherein the appellant was traced. On cross-examination he indicated that he did not know that his daughter was in a relationship with the appellant as he only wanted to find his daughter who was missing.

4. Pw3 was Nzomo Amos, who testified that he was the one who spotted Pw1 on 15.4.2014 and alerted her family who were looking for her.

5. Pw4 was Pc Sang an officer formerly based at Kathiani Police Station and who testified that on 15.4.2014 he took Pw1 and the Appellant to Kathiani District Hospital for medical checkup and then charged the appellant with the present offence wherein the same was withdrawn and the appellant was re-arrested and charged on 15.2.2015 with the present offence.

6. Pw.5 was Pc Warui who testified that on 16/4/2014 after being informed that the appellant who was a wanted man had been found, she proceeded to arrest him for the offence of defilement.

7. Pw6 was Dr. Musyoka from Kathiani Hospital. He testified on behalf of Dr Okerosi who carried out the physical examination on Pw1 on 16/4/2014 who had a history of defilement by a known person. He testified that on examination Pw1 had tattoos on her hands and thighs caused by a sharp object, the outer appearance of the vagina was normal, she was on her monthly periods and had a torn hymen, no spermatozoa was found but there was bacterial infection. She admitted having sexual intercourse prior to the arrest. The P3 form was signed on 16.4.2014 and tendered as an exhibit. He testified of an examination carried out on the appellant that revealed no abnormalities on his external genitalia.

8. The Learned Trial Magistrate confirmed that the appellant had a case to answer and the appellant chose to make sworn statement after the Provisions of Section 211 of the Criminal Procedure Code were explained to him. The appellant testified that he was at church when Pw1 called to see him so as to be carried on the motorcycle but he refused. He testified that three days later he was arrested and he did not know

why the case was fabricated against him. On cross-examination he denied being in a relationship with Pw1. The defence closed its case.

9. The Appellant was later sentenced by the trial court to serve twenty (20) years imprisonment. He was aggrieved by the said conviction and sentence and lodged this appeal. It was agreed that the appeal be canvassed by way of written submissions.

10. It is the Appellant's case that the evidence of the complainant was not corroborated. Counsel vide submissions filed on 1.8.2017 submitted that there is no evidence that it is the appellant who broke the complainant's hymen. He submitted that if the appellant's friends were chanting that the complainant was the appellant's wife, he further submitted that it must have been true. Further he submits that when the court convicts on uncorroborated evidence, the court should form an opinion that the witness was truthful and yet the court did not do so thus the Magistrate's findings were against the weight of evidence. He relied on the case of **Oningoi Parsanka v R (Mks HCCrA 156 of 2012)**.

11. The state submitted vide submissions filed on 8th May, 2018 that all the elements of defilement were proved. He submitted that the age was proved to the required standards by the birth certificate as well as the testimony of the complainant that she was 15 years when the incident happened. On the issue of penetration, this was established by the testimony of the complainant and corroborated by the evidence of the doctor who in confirming the torn hymen and her admission that she had sex with the appellant on 13.4.14, it can be submitted that this is indicative of positive identification of the appellant. The state submits on the issue of corroboration that the evidence that Pw1 knew the appellant well, and the evidence of Pw3 that he saw the appellant together with Pw1, and the evidence of Pw6 corroborated the prosecution's case. On the value of the evidence of the P3 form, counsel submitted that the said form was evidence of penetration as per Section 2 of the Sexual Offences Act. Counsel concluded that the appeal be dismissed and the court uphold the conviction and sentence of the trial court.

12. This being a 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 bearing in mind that it did not have the advantage of hearing or seeing the witnesses (**Okeno =Vs= Republic [1972] EA 32**).

13. The court has carefully considered the petition of appeal and submissions presented. From the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal as well as the Supplementary Grounds are:

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 contradictions in the evidence before the trial court that would vitiate the conviction that was recorded against the Appellant.

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

(i) The age of the complainant,

(ii) The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

(iii) That the perpetrator is the Appellant.

15. 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. Next, the issue of penetration and identification of the appellant as the perpetrator need to be addressed conclusively.

16. It is the submission of the respondent that penetration was established by the testimony of the complainant and corroborated by the evidence of the doctor who confirmed presence of a perforated hymen which confirmed the fact of defilement. The P3 form that he relied on was filled out on 16/4/2014, about 2 days after the incident complained of and further the complainant herself admitted having engaged in sexual intercourse with the Appellant who had been her boyfriend.

17. 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.

18. With regard to identification of the appellant as the perpetrator, the evidence of the complainant was that the appellant used to be her boyfriend since 2013 and on 13.4.14 she left home to visit the appellant at his home and she slept at his place and had sex with him. In the circumstances, the prosecution evidence removed any form of doubt that the appellant was the perpetrator, for he was very well known to the complainant.

19. From the evidence, I do find that all the three critical ingredients for the offence of defilement that is: age and penetration and identity of the accused have been met. I think that the learned magistrate was right in her overall assessment of the prosecution evidence against the appellant. 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. The conviction of the appellant was therefore safe and there is no reason to interfere with it.

20. Section 382 of the Criminal Procedure Code provides that the litmus test is the prejudice occasioned upon the Appellant. The case of **Philip Mzaka Watu v R (2016) eKLR** states that inconsistency may demonstrate veracity and credibility and that if the contradictions are minor then they are curable under Section 382 of the Criminal Procedure Code.

21. Though the appellant has raised this ground, I have perused the lower court record and there appears to be no contradictions in the prosecution evidence that test the credibility of the witnesses and the value of the evidence therein. Clearly therefore this ground fails. In any event if there are any such few contradictions, the same did not prejudice the Appellant in anyway and were curable under Section 382 of the Criminal Procedure Code.

22. The evidence on record shows that the appellant was sentenced to twenty (20) years imprisonment. Section 8(3) of the Sexual Offences Act provides a minimum sentence of 20 years for the offence of defilement if the victim is aged between 12 and 15 years and hence the sentence was the minimum possible in law. I see no reason to interfere with it.

23. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal is devoid of any merit and the same is dismissed. The conviction and sentence by the trial court is upheld

It is so ordered.

Dated and delivered at Machakos this 1st day of April, 2019.

D.K KEMEI

JUDGE