



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 202 OF 2017

ZUMA MWERO KADZENA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal Case Number 105 of 2016

in the Senior Principal Magistrate's court at Kwale– Hon. P.K. MUTAI (RM)

JUDGMENT

1. The appellant herein **ZUMA MWERO KADZENA** was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2016.
2. The particulars of the charge were that on diverse dates of the year 2011 and 7th January 2015 at [Particulars Withheld] village in Kinondo Location of Kwale County within the Coast Region, unlawfully and intentionally committed an act which causes his penis to penetrate the vagina of FMC (particulars withheld) a girl aged 14 years. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
3. The appellant pleaded not guilty to both the main count and the alternative charge and a trial was thereafter conducted in which the prosecution presented evidence as follows:
4. PW1, Juma Ali Gao testified that he knew the appellant as he lived about 12 kilometres from his village and that the complainant used to stay with the appellant. He stated that it was alleged that the appellant had impregnated the complainant.
5. PW2, FMC, was the complainant. She testified that she lived with the appellant from the age of 9 years and that the appellant repeatedly molested her sexually thereby leading to her pregnancy.
6. At the time of her testimony in court, the complainant was 15 years old and she stated that she had a 9 month old baby. On cross examination, the complainant testified that she informed her sister of the sexual assault but that her sister did not take any action.
7. DW3 PC Erick Kimathi investigated the case. He produced the complainant's age assessment report as exhibit 2. DNA test results which established that the appellant is 99% biological father of the minor was marked as (MF1-4).
8. When placed in his defence, the appellant tendered an unsworn statement in which he denied any involvement in the defilement of the complainant and accused the complainant of being wayward and for often straying out of the home until late hours of the night only for her to turn out to be pregnant. He further testified that he later discovered that the complainant was staying with a young man called Bukari Hamisi.
9. At the close of the trial, the trial magistrate found that the prosecution has proved its case beyond reasonable doubt and convicted the appellant on the main count of defilement after which he was sentenced to 20 years imprisonment thereby precipitating the instant appeal in which the appellant has listed the following grounds of appeal in the petition of appeal:-

1. That the Honourable, learned trial magistrate erred in law and in fact in convicting and sentencing me without considering that, the charge sheet as drafted against me was not proper hence defective.

2. That the Honourable, learned trial magistrate erred in law and in basing (sic) my conviction and sentence while relying on the adduced medical evidence without considering that, the same failed to prove their case against me as required by the law.

3. That the Honourable, learned trial magistrate erred in law and in convicting and sentencing without considering that, there was crucial witness who never came into evidence to prove the same.

4. That the Honourable, learned trial magistrate erred in law and in convicting and sentencing me without considering that, I the appellant is implicated in this matter due to the existing grudge.

5. That the Honourable, learned trial magistrate erred in law and in not considering my defence evidence.

10. At the hearing of the appeal, the appellant presented written submissions filed on 29th November 2018 which I have considered. I note that the submissions amount to mitigation as he states that he is a first offender, is remorseful and has since his incarceration, reformed his ways. He also states that he is the sole breadwinner for his family.

11. As the first Appellate Court, the duty of this court is to re-analyse and re-evaluate the evidence adduced before the trial court afresh and to arrive at my own independent findings while bearing in mind the fact that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

12. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

13. I have considered the instant appeal and the submissions of both the appellant and the state. Mr. Mahila, learned counsel for the state opposed the appeal and submitted that under Section 8(1) as read with Section 8(2) of the Sexual Offences Act, the minimum mandatory sentence that can be meted out, upon conviction, is 20 years imprisonment in which case, the trial court had no discretion to mete out any sentence other than the sentence prescribed by the law.

14. The main issue for determination is whether the prosecution proved its case against the appellant to the required standards.

15. In the instant case, I find that the minority age of the complainant was proved to be 14 years as shown in the age assessment report that was produced as P exhibit 2.

16. Turning to penetration, it was the prosecution’s case that the appellant defiled the complainant for a long period of time which defilement resulted into a pregnancy that led to the birth of a baby who was reported to be 9 months as at the time of the hearing before the lower court.

17. The prosecution claimed that DNA analysis was done on all the parties whose results showed that the appellant was 99% the biological father of the minor. Quite unfortunately however the said DNA test results/report was not produced in court as an exhibit as the same was only marked for identification.

18. Be that as it may, in finding that the complainant’s oral evidence on penetration was sufficient to sustain a conviction, the trial court found that it is not mandatory to furnish medical evidence to prove penetration. The trial court cited the decision in the case of **Godfrey Kisai vs Republic** C.A. No. 270 of 2010 (Nyeri) in which it was held:-

“Where available, medical evidence arising from examination on the accused and linking him to the defilement would be inclined. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can probably be convicted for defilement. The court can convict that it satisfied that there is evidence person. Indeed, under the provisions of Section 124 of the Evidence Act, a person can convict an accused in a prosecution involving a sexual offence on the evidence of the victim alone. If the court believes the victim and records the reasons for such belief.”

19. The trial court further noted that the evidence of the complainant was consistent and was not dislodged on cross examination. The trial court also noted that the complainant was a candid witness and was able to prove penetration.

20. I have perused the proceedings of the lower court and I note that the complainant testified as follows the ordeal she went through while

living with the appellant.

“The accused had indicated willingness to educate us. I have a child is now nine months old. The father is the accused. We had sexual intercourse. The accused turned me to be his wife. I am 15 years old. We stayed in one room. I was staying with my brother in the same room. The room was divided. The accused asked me to sleep with him. We slept in the same bed. He inserted his penis into my vagina. The accused inserted the same every night. I informed my teachers about the incident. I confided to Madam Jackline. She summoned me and asked about our relationship. I was by then expectant.”

21. The trial court found that the evidence of the complainant was neither challenged nor disputed by the appellant during cross examination. The trial magistrate had the following to say about the complainant’s testimony:

“Having carefully analyzed the evidence, the complainant struck me as a candid witness. Her evidence was never tainted or discredited or dislodged. At the end of her testimony it remains intact. She was able to prove that the accused penetrated her. The complainant was vulnerable and the accused came in as a guardian and later turned against her. The sexual act was committed in one roomed house. Even in the absence of medical evidence, testimony of the complainant is believable.”

22. Having regard to the above findings by the trial court and I note that the court believed the complainant’s testimony and recorded the reasons for such belief. I am therefore satisfied that the prosecution proved its case against the appellant to the required standards. The appellant was well known to the complainant as her guardian of many years and I therefore find that the issue of mistaken identity cannot arise. I further find that the evidence presented by the appellant, when placed on his defence, amounted to mere denial and the shifting of the blame to one Bakari which did not impeach the otherwise watertight evidence of the prosecution witnesses.

23. For the above reasons, I find that the instant appeal is lacking in merit and I therefore dismiss it.

24. It is so ordered.

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

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court in 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