



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 94 OF 2017

JOSEPH MBITHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by Hon. G.O Shikwe, RM in Kithimani Resident Magistrate's Court in Criminal Case S.O.A. No. 63 of 2016 delivered on 18.7.2017)

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. G.O. Shikwe, Resident Magistrate in **Kithimani Criminal Case SOA No. 63 of 2016 on 18.7.2017**. The Appellant was charged with the offence of defilement contrary to Section 8(1) (2) 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. When the matter came up for trial, the prosecution presented 7 witnesses in its bid to prove the charges against the Appellant. Pw1 was MN. A voire dire examination was conducted upon her and when the court was satisfied that she was competent to testify on oath, she was put on the witness stand. She testified that she was aged 9 years and was born on 5.3.2007 and was a class four pupil. It was her testimony that the appellant was her Sunday school teacher and on 8.10.2016 she was at her rural home at Kithyoko when the appellant took her to a tent and made advances on her after which he took her to a Gikonyo's house, threw her on the bed, covered her mouth and eyes and inserted his penis in her vagina. She testified that she told her teacher the following day and thereafter she was taken to Nairobi Women Hospital and treated and was admitted for 3 days. She was given a P3 form and PRC form.
3. Pw.2 was CM who testified that the complainant was her daughter who was born on 5.3.2007. She presented her birth certificate as P.Exh4. She testified that on 8.10.2016 she was at home for a dowry ceremony and the appellant, who was a member of the choir and Sunday school was present and she saw the appellant go with the complainant to the house to fetch her sweater. She testified that it was long before the complainant was seen and she was found in a tent wrapped in a Maasai shuka. It was her testimony that for the week she was withdrawn and it appeared that on Monday she sold her teacher that the appellant had defiled her. She was rushed to Thika Level 5 hospital and later to Nairobi Women's Hospital for specialized treatment that cost Kshs 88,000/-.
4. Pw3 was JM who testified that the complainant was his daughter and that on 17.10.2016 the complainant informed him that on 7.10.2016 the appellant who was a church member had taken advantage of the dowry celebrations and taken the victim to a neighbour's home to fetch her sweater. He testified that after the victim was taken to Hospital and admitted and later discharged, that was when he sought for the appellant and had him arrested. On cross-examination, he testified that he had noticed that his daughter was withdrawn but did not disclose what the problem was.
5. Pw.4 was Edwin Mutembei, a clinical officer at Masinga Sub-County Hospital who testified of an examination that was carried out on the appellant and the victim. No injuries were found on the appellant but however the victim had no hymen and he formed the opinion of defilement. The PRC form was produced under Section 77 of the Evidence Act and the P3 form was tendered and produced by him.
6. Pw5 was No. 85616 Pc Samuel Makau who testified of a report that he received from JM on 17.10.2016 of a defilement. He later received a letter from Masinga Police on 23.10.2016 and arrested the appellant on 24.10.2016.
7. Pw6 was Grace Nzuki who testified that on 8.10.2016 she was among the church members who went to Kithyoko for a dowry ceremony. She testified that at 7.30 pm she noticed that Pw1 was missing and later found her in a tent together with the appellant and who were both covered in a blanket. She later heard that Pw1 had been defiled.
8. Pw7 was No. 10196 Pc Deborah Wafula Richard who testified that on 21.10.2016 the victim together with her mother came to report of a defilement and she took statements and thereafter arrested the appellant. On cross examination, she testified that the incident occurred on

8.10.2016 at 6.30 pm but was discovered on 17.10.2016.

9. The trial court later established that the Appellant had a case to answer and put him on his defence.

The appellant opted to give an unsworn statement and called 3 witnesses. The appellant testified that on 8.9.16 he went for a function together with the choir members and went to the tent to rest and left the venue at 9 pm. However, on 22.9.16 he was arrested. Dw1 was Joshua Mwanzia and who stated that on 8.10.2016 he was at Kithyoko and was there from 7 am to 9 pm.

10. Dw.2 was Peter Kyalo Mbithi who testified that on 8.10.2016 he was at a function at Kithimani and left at 9 pm. He testified that the appellant was present and he was sleeping in a tent.

11. Dw3 was David Mbithi Kivuva, who testified that he received an invitation on 8.9.16 for a function at Kavenge and he arrived at 12 pm and left at 9 pm.

12. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error in failing to find that the charge sheet was defective for the time factor is not indicated in the charge sheet and the word unlawful is omitted. Further, he submitted that an officer from Nairobi Women's Hospital did not testify and therefore his appeal be allowed, the conviction quashed and the sentence set aside.

13. The state submitted that the age of the victim was proved to the required standards by the birth certificate. On the issue of penetration, this was established by the Clinical Officer who confirmed absent hymen and hence it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. With regard to the identification of the appellant Learned Counsel submitted that the evidence of the complainant together with PW.2 and PW.3 positively identified the appellant and that the victim was defiled on 8.10.2016. On the issue of the defective charge sheet, learned Counsel submitted that Section 134 of the Criminal Procedure Code spells out the contents of a good charge sheet. Similarly Section 382 of the Criminal Procedure Code states that the test to be met is whether injustice has been occasioned. The offences the appellant was charged with are known in law and the accused was aware of the charge facing him and thus there was no prejudice occasioned to him by omission of time and the word 'unlawful' from the charge sheet. On the issue of failure to consider the defence of the appellant, he submitted that the ground is devoid of merit for after he was put on his defence, he failed to offer any explanation to the charges he was facing. On the issue of failure to call crucial witnesses, counsel submitted that Section 143 of the Evidence Act provides that the prosecution is not obligated to call a particular number of witnesses. He quoted the case of **Bukenya and Others v Uganda (1972) EA 549**. The state submitted that the appellant has not raised sufficient reason to warrant interference with the decision of the trial court and therefore the appeal be dismissed and that this court should uphold the conviction and sentence of the trial court.

14. 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 bearing in mind that it did not have the advantage of hearing or seeing the witnesses (**see Okeno –vs- Republic [1972] EA 32**).

15. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;

16. In cases of defilement the following ingredients have to be proved:

1. The age of the child.

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

3. That the perpetrator is the Appellant.

17. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 9 years according to the birth certificate. What is in contention is the issue of penetration and identification of the appellant as the perpetrator.

18. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim.

19. P3 form was filled by Dr. Mutembei on 22.10.2016. He testified on the physical examination carried out on the victim and testified on the contents of the document. The Appellant did not object to its production. He concluded that the victim was defiled and signed the P3 form. He also examined the appellant and noted no injuries.

20. The P3 form indicates that, "*the hymen was absent*. 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 on the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v REPUBLIC [2012] eKLR** took this view.

21. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

22. The victim testified that on 8.10.2016 she was at her rural home at Kithyoko when the appellant took her to a tent and made advances on her after which he took her to a Gikonyos house, threw her on the bed, covered her mouth and eyes and inserted his penis in her vagina. She testified that she told her teacher the following day and thereafter she was taken to Nairobi Women Hospital and treated and was admitted for 3 days ; she was given a P3 form and PRC form. The Appellant was a person known to the complainant and thus she recognized him. The evidence of Pw2 and Pw6 placed the appellant at the scene of the crime and so is the evidence of his own witnesses especially Dw2 who confirmed having been with him at the dowry ceremony.

23. The appellant denied defiling the victim. However his defence evidence did not shake that of the Respondent which was quite overwhelming against him.

24. From the foregoing, I did not have the benefit of seeing the witnesses testify but however from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant. The learned Trial Magistrate rightly relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and I see no reason to disturb the finding. He also considered the surrounding circumstances that earlier in the day namely that the appellant at the scene of crime, coupled by the fact that the appellant is well known to the victim. Again the Appellant's witnesses confirmed his presence at the scene of crime and this clearly weakened his alibi defence.

25. The Appellant has raised the issue of a defective charge sheet. However, I am unable to see the prejudice that he has suffered because of the same and thus I find that the issue has no merit and dismiss the same accordingly. He suffered no prejudice at all since he understood the charges he faced and proceeded with the case to the end suggesting he understood the charges. Besides any discrepancies are curable under Section 382 of the Criminal Procedure Code.

26. From the evidence on record, I am satisfied that the same is sufficient 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 date in question positively identified by the victim. The conviction of the Appellant was therefore sound.

27. Section 8 (2) of the Sexual Offences provides that :

“(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.”

28. From the evidence on record, there was no doubt that the victim was 9 years old at the time of commission of the offence, therefore the sentence of life imprisonment was not erroneous.

29. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal has no merit and is dismissed.

It is so ordered

Dated and delivered at Machakos this 13th day of May, 2019.

D.K. KEMEI

JUDGE