



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 45 OF 2018

BENEDICT MANGALE MWERO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an Appeal from the Judgement of Hon. R. K. Ondieki, SPM delivered on 24th August, 2018 in Kilifi SPM Court Criminal Case No. 6 of 2017, Republic v Benedict Mwangale Mwero]

JUDGEMENT

1. The Appellant, Benedict Mangale Mwero, was in the main count charged with defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006. The particulars stated that on 27th November, 2016 and 3rd January, 2017 at Kilifi town within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the anus of MRS, a child aged 16 years.
2. 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, 2006. It was stated that on the date and place mentioned in the main count the Appellant intentionally and unlawfully touched with his penis the vagina and anus of MRS, a child aged 16 years.
3. At the conclusion of the trial, the Appellant was convicted and sentenced to fifteen years imprisonment. Aggrieved by both the conviction and sentence he appeals to this court on ten grounds which can be reduced to a complaint that the trial court convicted him on insufficient evidence.
4. As is required of this court, being a first appellate court, I will proceed to reassess and reanalyze the evidence adduced at the trial in order to arrive at my independent decision.
5. The mother of the complainant who testified as PW1 told the court that on 4th November, 2016 she was asleep in her house when neighbours woke her up and told her that a man had been seen leaving the complainant's room. She knocked the door to the complainant's room and upon opening the door the complainant confirmed to her that a man had indeed left the room but had come to borrow money from her.
6. PW1 further testified that they went to the police station and then to hospital where the complainant was examined. It was found that both the vagina and anus had been penetrated. She was also treated for gonorrhoea. They recorded statements and the accused was later arrested and charged.
7. Cross-examined PW1 testified that the complainant is the one who informed her that it was the Appellant who defiled her. Further, that the complainant told her that the Appellant was known as BJ in the social circles.
8. The complainant testified as PW2. Her testimony was that on 3rd January, 2017 the Appellant called her at night and told her he wanted to come to her home as he had a word for her. When the Appellant arrived he asked her for Kshs.400 but she gave him Kshs.100. In the process the Appellant started touching her buttocks before removing her panties and inserting his penis in her anus. Her testimony was that the Appellant sodomised her twice; on 27th November, 2016 and 3rd January, 2017.
9. Cross-examined by the Appellant, PW2 insisted that the Appellant went to her house at about 9.00pm after calling her. He defiled her at 10.00pm and left between 2.00am and 3.00am.
10. PW3 George Mwaragwa testified that on 4th January, 2017 he woke up at 3.00pm and went out. That is when he saw PW2 sitting outside their house. He saw a boy flee from the house and gave chase but did not manage to arrest him. The mother of PW2 woke up and he accompanied her to Kilifi Police Station to report the matter.

11. Responding to questions put to him during cross-examination the witness told the court that he did not identify the person who fled from PW2's house.
12. PW4 Dr. Suchira produced a post-rape care form filled for the complainant on 5th January, 2017. She stated that the patient was examined on 4th January, 2017 and no physical injuries to her genitalia were noted.
13. During cross-examination the witness told the court that the complainant was sodomised on 3rd January, 2017. The outer genitalia was normal but the hymen was broken. She reiterated that no injuries were noted.
14. PW5 Corporal Clara Bingo told the court that on 4th January, 2017 a report of defilement was made at Kilifi Police Station and she referred the victim to Kilifi County Hospital for examination. A P3 form was also issued and duly filled. She recorded statements from witnesses who told her the Appellant used to go to the house of the complainant and sodomise her. PW5 produced in court the complainant's birth certificate showing that she was born on 19th July, 2001.
15. In his defence the Appellant stated that the complainant was his girlfriend in 2016 and they used to meet casually. At one time the mother of the complainant found him talking to her and vowed to jail him if he continued being her daughter's boyfriend.
16. The Appellant also testified that in December, 2017 he went to talk to the complainant at her home. A neighbour saw him as he was leaving and chased him. He fled. The next day he received a call from the police that he had stolen a mobile phone. In January 2017 the complainant called him for a rendezvous at [Particulars withheld] Primary School where upon arrival he was arrested by police officers.
17. The advocates for the parties relied on their written submissions in support of their positions.
18. It is the duty of the prosecution to prove each and every ingredient of the charge. In determining whether to convict an accused, the trial court should consider the evidence as a whole. If the prosecution case is found credible then a conviction should ensue. Where the evidence is unbelievable, the benefit of doubt should be given to the accused.
19. Before proceeding to make my findings on the evidence that was adduced I will address the submission by counsel for the Appellant that the prosecution case did not prove its case because the Appellant did not call out for help. Counsel submitted that defilement is a scary encounter which involves the use of force, unwillingness and reluctance especially on the victim's side. His submission was that the complainant never screamed or called for help to attract the attention of his mother and neighbours.
20. It is important to state that unlike the offence of rape which requires proof that there was no consent from the victim, lack of consent is not one of the ingredients of the offence of defilement. Therefore, whether a child willingly invites a person to have sex with him or her, that person cannot escape a conviction for defilement. The offence of defilement is founded on the fact that a person under the age of 18 years is incapable of giving consent on sexual matters. The fact that the victim may have approved of the sexual engagement is therefore not a defence to a charge of defilement.
21. The only defences recognized by the law is where it is proved that the child deceived the accused that she was over the age of eighteen years or where the accused reasonably believed that the child was over the age of eighteen years. There are however strictures around these defences which are difficult to surmount and the best advice is that before a person decides to have consensual sex with a human being who appears to be a child they should ask them for a birth certificate or a national identity card. Short of that, sex with a child will land one in jail.
22. It was important to make that point before proceeding to consider the evidence. It is not disputed that the child was born in 2001 and at the time of the alleged offence in November 2016 or January 2017 she was about 16 years of age. She was under 18 years of age and was therefore a child as per the provisions of the Children Act, 2001 which the Sexual Offences Act, 2006 refers to as the defining statute of the term "**child**".
23. Having proved that the complainant was a child, the prosecution also needed to prove the other two ingredients of the offence of defilement namely penetration of the victim and the identity of the penetrator.
24. A bird's-eye view of the testimony paints a picture of an unbelievable story. The mother of the complainant talked of an incident that occurred on 4th November, 2016 at night. That incident is similar to an incident which the complainant and PW3 claimed occurred on 3rd January, 2017 at night.
25. The charge sheet talked of defilement on 27th November, 2016 and 3rd January, 2017. The prosecution was therefore required to prove that the complainant was defiled on the two dates. It failed to do so.
26. Even leaving the issue of dates aside, PW1 did not talk of the complainant reporting any defilement to her. The complainant told her a man had gone to borrow money from her. Indeed, the complainant told the court that the Appellant went to borrow money from her
27. PW1 and PW3 did not identify the person they saw emerging from the complainant's house. Apart from the testimony of the Appellant who said that he was lured into a police trap by the complainant, no prosecution witness testified how the Appellant was identified and arrested.
28. The evidence on penetration was scanty. PW4 produced a post-rape care form. Nothing unusual was noted upon the examination of the complainant. No P3 form was produced and there is therefore no medical opinion as to whether the anus of the complainant was penetrated.

29. It is also noted that the mother of the complainant talked of both the vagina and anus being penetrated which was contrary to the complainant's allegation that the Appellant entered her anus.

30. In **Arthur Mshila Manga v Republic [2016] eKLR**, where similar circumstances prevailed, the Court of Appeal in allowing the appeal held that:-

“From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM herself.”

31. As already stated, the medical evidence was of no use as there was no opinion from the medical officer who filled the P3 form and neither was the P3 form produced. The post-rape form that was produced was prepared by Julius Kirema Lintari and not PW4. The evidence of PW4 was therefore not of much assistance to the court.

32. In finding the Appellant guilty, the trial magistrate held that:

“Whereas the accused do not deny having gone to the victim that night, the victim on the other hand says that indeed the accused sodomised her. She was taken to the hospital when things were still hot and found to [have] been defiled as evidenced by the P3 Form. Further, it is admitted by the accused that the victim was his girlfriend and at one time warned by the mother to the victim to stop the relationship. The victim told the court that the accused had gone to her house at 9pm and was seen leave the house between 2am and 3am. Having found to have been defiled and there being no other man that night apart from the accused, there is no doubt that the accused was the assailant.”

33. With respect to the trial magistrate, I find all his findings in the cited passage not supported by the record. A perusal of the record shows that PW4 only produced a post-rape care form. Even the handwritten record does not show that a P3 form was produced. The statement therefore that a P3 form confirmed defilement was erroneous.

34. The Appellant never admitted being at the house of the complainant either on 4th November, 2016 (as per the evidence of PW1) or on 3rd January, 2017 (as per the evidence of the complainant and PW3). His testimony was that he was in the house of the complainant in December, 2017. I assume he meant December, 2016 as he was arrested in January, 2017. Be that as it may, nobody apart from the complainant identified the Appellant. The trial magistrate's statement that the Appellant was seen fleeing the house of the complainant is without evidentiary foundation. That leaves us with the evidence of the complainant.

35. The Court of Appeal gave interpretation of the proviso to Section 124 of the Evidence Act in **Arthur Mshila Manga** (supra) as follows:-

“It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone.... However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”

36. The trial magistrate never stated whether he believed the testimony of the complainant. In view of that failure there was nothing on record stating why he believed the complainant was a truthful person.

37. My own review of the record gives me the impression that the complainant may not have told the truth. When a man was seen leaving her house, she told her mother that the man had gone to her house for money. She however later changed the story and stated that the man had penetrated her anus. This kind of evidence when considered along with the other evidence on record leaves one in doubt as to whether the Appellant actually penetrated the complainant. The doubt created by the prosecution evidence ought to have gone to the Appellant.

38. For the reasons stated, I find the Appellant's appeal merited and allow it. The conviction is therefore quashed and the sentence set aside. Consequently, the Appellant is forthwith set at liberty unless otherwise lawfully held.

Dated and Signed at Nairobi this 9th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th day of June .2019

R. Nyakundi,

Judge of the High Court