REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 82 OF 2016

DNN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

(Being and appeal arising from conviction and sentence in Chief Magistrate's court Kwale in Criminal Case Number 1120 of 2014 dated 5th July, 2016 by Hon P. K. Mutai, R M)

The Appellant, DNN was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual offences Act No 3 of 2006 in the main count.

The particulars were that;

> **"On the 20th day of September, 2014 at [particulars withheld] in Shimoni Sub –Location in Msambweni District of the Kwale County, the appellant intentionally caused his penis to penetrate the vagina of MH, a child aged 9 years".**

The appellant was also charged with an alternative charge of committing an indecent act on a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006.

The particulars were that;

> **"On the 20th day of September 2014 at [particulars withheld] in Shimoni Sub-Location in Msambweni District of Kwale County, the appellant intentionally touched the vagina of MH, a child aged 9 years with his penis".**

The Appellant pleaded NOT GUILTY to both counts and the matter proceeded to full trial whereby he was convicted and sentenced to serve life imprisonment.

Aggrieved by the said conviction and sentence, the appellant has filed this appeal in which he has cited the following grounds in his amended grounds of appeal.

> **(a) That, the learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that the charge sheet as drafted against me was not proper hence defective.**
>
> **(b) That, the learned trial magistrate erred in law and fact in convicting and sentencing me without considering that the medical evidence as adduced before court totally failed to prove this case beyond reasonable doubt.**
>
> **(c) That, the learned trial magistrate erred in law and fact by convicting me on relying on the prosecution evidence which was full of contradictions hence not reliable.**
>
> **(d) That, the learned Hon. trial magistrate erred in law and fact by convicting and sentencing me in reliance of the prosecution evidence which called collaboration hence not reliable.**
>
> **(e) That, the leaned trial magistrate erred in law and fact by failing to consider my reasonably defence evidence.**

The appeal proceeded for hearing on 16th October, 2017 whereby the appellant opted to rely on his written submissions except for printing

out that the court showed he was arrested on 3.10.2014 while the incident is alleged to have occurred on 20.9.2014. He also pointed out that the doctor's report indicates that the offence occurred on 23.9.2014. He argued his grounds of appeal in consolidation.

The appellant submitted that the particulars of the charge sheet were at variance with the evidence that was adduced with regard to the date of incident and age of the victim.

He also submitted that the medical evidence that was adduced was not credible as the medical office who treated the victim at shimoni dispensary and prepared the medical notes marked as exhibit P4 was never disclosed. He also pointed out that the P3 form indicated the date of incident as 27.9.2014 which is contrary to the particulars of the charge which indicates that it happened on 20.9.2014. He then pointed out that the treatment notes indicate that the victim was taken to the dispensary on 6.10.2014 which was even after the P3 form had been filled.

Further, the appellant submitted that the breaking of hymen is not only caused by penetration as there are many other factors since a bicycle riding contribute to the same.

He then stated that on examination, the victim was found to be HIV Negative and yet he was found to be HIV Positive. The appellant stated that there was a lot of contradiction in the evidence of the prosecution with regard to the date of incident in the particulars of the charge, the P3 form and treatment notes, hence rendering the said evidence incredible. Also, as noted contradiction is in the victim's age with regard to the particulars of the charge and P3 form. All in all, the prosecution's evidence was not properly corroborated.

The appellant contended that his defence evidence was never considered by the trial magistrate, hence a doubt was created, providing the appellant the benefit of doubt.

The respondent on the other hand, through M/s Ocholla, the state counsel, submitted that they were opposed to the appeal. The learned state counsel submitted that she agreed with the appellant in his submissions that according to the P3 form the offence of alleged to have occurred on 23.9.2014 and not 20.9.2014 as indicated in the particulars of the charge. She however explained that this information is part of the P3 form is usually given if the complainant who in her evidence stated that she could not recall the exact date and time when the incident happened. M/s Ocholla submitted that an error in the charge sheet is available under section 382 of the Criminal Procedure Code. She cited the case of OBEDI KILONZO KEVOGO VRS REPUBLIC, 2015, where the said court was faced with a similar situation where the date of offence on the charge sheet was at variance with the facts which were read to the appellant in a defilement case. That in dismissing the appeal, the court of appeal held that the error was curable under section 382 of the Criminal Procedure Code as it was not a material error.

As this is a first appeal, this court is required to conduct a fresh evaluation of all the evidence and arrive at an independent conclusion as to whether or not to uphold the conviction and sentence of the appellant. In doing this, regard must be given to the fact that this court had no chance to see or hear the witnesses testify (see the case finding in the case of OKENO VRS REPUBLIC (1973) E . A 32).

The prosecution called four (4) witnesses to give evidence.

Pw1, who is the complainant in this case was aged 9 years and therefore a minor and so a voire dire examination had to be conducted in her case. The trial magistrate indicated that she understood some elements of the truth and had her sworn. She told court that she was in class three (3). She went ton to testify that on 20.9.2014, she was relaxing at her house when D, who is identified as the appellant herein called and asked her to accompany him to the forest to the charcoal place. She then suggested that they ask her mother for permission which they did and she was allowed to accompany the appellant, Pw1 said that when they got to the forest, the appellant asked her to remove her under wear, which she refused and he forcefully removed her skirt and underwear. That he forced her down and did "tabia Mbaya to her after removing his own clothes. She screamed and he threatened to kill her. He even warned her against telling her mother what had happened. Pw1 said that she bled onto her clothes and she slowly walked home. That her mother reported the matter to the chairman after she had told her what had happened to her. The appellant was arrested as Pw1 was taken to hospital for medical examination and treatment.

PW2, TB testified that on one Saturday she woke up at 8.00 am and saw her child with charcoal.That when she asked her where she was from, the child told her that she had gone to get the charcoal with D (the appellant herein) Pw2 said she asked her child where D was and she told her he was at the charcoal place. She went onto state that two days after, she noticed that her child was walking around funnily and asked her neigbour to talk to her after she asked her what was wrong and she had said nothing. That it is the neighbour that the child told the D, the appellant had done "tabia mbaya to her. " Pw2 said that she and a neighbor looked at the child and saw she had a wound on her private parts. She went and reported the matter to the chairman as this was the 2nd case where the appellant had done a similar thing. From there they went to Shimoni police station where they were issued papers and told to go hospital. They went to Msambweni district hospital. She identified the papers they were given by the police, the child's skirt and two panties to court.

Pw3, PHILLIP KIBET CHEMI, a clinical officer based at Msambweni District hospital testified how on 4th October, 2014,he examined MH, the complainant and Pw1 who was said to be 5 years old and had been defiled. He found that;

-She was in fair general condition.

-Had no tears on her cervices

-Vaginal examination revealed and absent hymen.

-An intact labia

-Foul smelly discharge from the vagina

-No venereal disease,

-HIV test was negative and so was syphilis and pregnancy test

- No spermatozoa

- No red blood cells in urine.

From the absent hymen and foul smelling vaginal discharge, Pw3 concluded that the penetrative act had happened.

Pw3, went on to state that he also examined the appellant and found

-He was HIV positive

-Nothing in the urine

-Negative for syphilis

Being HIV positive, Pw3 referred the appellant for counselling and ARVS. He then place the complainant on HIV prevention for a month.

He identified a burial permit for the compliant who was indicated to have died on 24th April, 2015 at Msambweni. He said that he was not aware of the cause of her death. He produced the P3 form he filled, the treatment notes and burial permit as exhibits P5 and 6 respectively.

Pw4, no. 232924 CHIEF INSPECTOR ADDULLAHI TATU, confirmed that the case was reported to his station and as OCS, he instructed PC Lucy to investigate the same. That P.C Lucy and another went to collect the appellant upon being informed that he had been arrested by members of public. He also stated that P.C Lucy took the complainant, who was accompanied by her mother, for medical examination and a P3 form was filled. That the appellant was then arrested. He produced a clinic card indicting that the complainant was 9 years old and exhibit P3.

After the close of the prosecution case, the appellant was placed on his defence and he opted to give unsworn statement in defence. He called no witness.

According to the appellant in his unsworn statement in defence, although he was in court for a case of defilement he did not know what offence he was arrested and charged for on 3.10.2014. He said that the witness lied in court due to the dates they said the incident happened and when the complainant recorded her statement to the police and was treated.

The appellant pointed out that the statement in the OB indicated that on 15the September 2014, a report was made of and incident that happened on 20th September, 2014. He said he was arrested on 3rd October, 2014 and taken to hospital on 4.10.2014. And that according to the investigations diary he was taken to the police station on 13th October 2014 vide OB 17/3/10/14. And according to the doctor, the incident happened on 27th September, 2014.

DETERMINATION.

To determine this appeal, I have considered the grounds of appeal, submissions thereon, and the evidence that was adduced in the trial court, cited authorities and the law. I find that the main issue for determination as raised by the appellant, is whether the prosecution rendered evidence that was sufficient enough to prove their case beyond reasonable doubt.

With the regard to the issue of the charge in the main count being defective, the appellant submitted that the charge sheet has invariances in the terms of the date of the incident and the real age of the victim.

The particulars of the charge in the main count which the appellant was convicted and sentenced for were as follows;

> **"On the 20th day of September, 2014 at [particulars withheld] in Shimoni Sub –Location in Msambweni District of the Kwale County, the appellant intentionally caused his penis to penetrate the vagina of MH, a child aged 9 years"**

During the voir dire examination and evidence in chief, Pw1 the complainant told court that she was 9 years old, which brings the question of whether she was 9 years old in 2014, when the incident allegedly occurred on 2015 when she testified before court. Also in her evidence in chief, Pw1 stated that;

> **"On 20th September, 2014 is was from school and I went back home. We were told to go back to school and wash classroom. I went from school to the mosque to swali and after that we were told to sit and listen to wisdom from the teacher. I went home later and slept. I woke up on Saturday and sat there waiting and relaxing……"**

From the corrative by the complainant (Pw1), the question that arises from is whether the incident referred in the particulars of the charge that is alleged to have happened on 20th September, 2014 or what the complainant stated had happened the day after the 20th September,2014.

Pw2, mother to the victim testified that the complainant is 9 years old and that the incident happened on a Saturday, without indicting the date.

When cross examined, Pw2 said that the appellant was arrested on 13th September 2014 and 3rd October, 2014 which dates are clearly before and after the date of the incident as indicated in the particulars of the charge. Pw3, testified that he examined the complainant on 4th October, 2014.

He indicated that she was 8 years old then in the information that is in the P3 form (Exhibit P1) which is dated 3rd October, 2014 and it shows that the complainant was defiled on 27.9.2014.

Pw4 No. 232924 Chief Inspector Abdulahim Tatu, the OCS Shimoni police station that the case was first reported to their station vide OB No 153/10/2014 that the appellant who was caught by members of public, was booked in vide OB No. 17/3/10/2014/.

The framing of charges is provided for under section 134 and 135 of the Criminal Procedure Code.

From these provisions, there is need form clarity in the framing of the charge sheet.

In particular, section 134 of the Criminal Procedure Code states;

> **"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary from giving reasonable information as to the nature of the offence charged".**

I have perused the charge sheet in the instant case and find it does not present any credibility, confusion or defect of any kind. The same is clear and brought out the offence with which the appellant was charged with.

What can be said of the charge sheet is with regard to the particulars of it and the evidence that was presented by the prosecution clearly, the particulars of the charge have not been supported by the evidence that was presented through the prosecution's witnesses, in terms of when the incident allegedly occurred and the exact age of the victim at the time. In fact, the inconsistency is even glaring in the evidence of all the witnesses.

The inconsistency in the evidence of the witnesses and particulars of the charge renders the same worthless and un corroborative. The court therefore finds that the totality of the invariances and or inconsistences in the evidence that was adduced and the particulars of the charge amounts to the same being rendered incredible, unreliable hence insufficient to sustain conviction of defilement against the appellant. In fact, he inconsistences have created a doubt in my mind as to whether the appellant committed the offence as alleged and be ought to have benefited from the doubt.

I accordingly order that the appellant's appeal be and is hereby allowed subsequently, conviction that was entered against the appellant for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act is quashed and sentence of life imprisonment imposed upon him set aside.

Further, the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Delivered, dated and signed this 6th day of June, 2019.

LADY JUSTICE D. O. CHEPKWONY

In the presence of;

Ms Ocholla counsel for the state

Court Assistant – Beja

Appellant present in person.