



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 14 OF 2018

EMANUEL MAIYU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

From the original conviction and sentence of Hon. C.A. Mayamba (SRM)

in Kilungu Senior Resident Magistrate's Court Criminal Case No. 247 of 2015)

JUDGMENT

1. Emanuel Maiyu the Appellant was charged before the Senior Resident Magistrate Kilungu 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**. The particulars of the offence were that on the 12th day of May 2015 in Makueni County, the Appellant intentionally caused his penis to penetrate the vagina of FNR a child aged 15 years.

2. He also faced an alternative charge of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the Appellant intentionally touched the vagina of FNR a child aged 15 years.

3. After a full trial, he was convicted on the main charge and sentenced to 20 years' imprisonment.

4. Aggrieved by that decision, he filed an amended petition of appeal and listed 12 grounds stating that the learned trial magistrate erred in law and fact by;

a. Convicting him when there was no corroboration on the evidence of the complainant without warning himself of the danger of acting on the uncorroborated testimony of the complainant.

b. Convicting him without warning himself that the evidence and statement of the complainant being a minor was not made voluntarily, was obtained under duress, undue influence and great intimidation.

c. Convicting him without medical evidence.

d. Convicting him on a defective charge sheet.

e. Convicting him on evidence of incredible prosecution witnesses full of contradictions and inconsistencies.

f. Failing to appreciate that the offence of defilement had not been proved beyond reasonable doubt.

g. Delivering a judgment which was not reflective of the facts presented by the parties.

h. Failing to appreciate the law as it relates to the burden of proof required in criminal cases.

i. Failing to appreciate the lack of sufficient evidence in regard to the identification against him.

j. Failing to consider his defence.

k. Shifting the burden of proof to the Appellant.

l. Failing to call crucial witnesses.

5. The prosecution called a total of seven (7) witnesses. The complainant FNR testified as PW1. She said she knew the Appellant by appearance as he used to visit their village and drive her uncle around in his vehicle (taxi). She told the court that she was in possession of a phone and would call the Appellant on her own volition and would happily receive his calls after school. On the material day which was 12th May, 2015, PW1 did not go to school, and the Appellant called her at 1:00 pm and told her he would visit them between 6:00pm and 7:00 pm.

6. At 7:00 pm the Appellant came as promised and picked her near Mutiluni. He was driving his grey probox car. He drove up to Kavutini and stopped. He asked her to sleep with him on the back seat of the vehicle. He removed his trousers and she removed her pants. The Appellant then had sex with her. She explained how he spread out her legs and inserted his penis into her vagina. When he was through they dressed up and he dropped her at Kisimuni and lit the path with the vehicle's headlamps. She slept at her grandmother's home that night since her father was at home.

7. On 13th May, 2015, her grandmother had sent her to Mutiluni when she met the sub chief. He directed her to board a motorcycle and he went with her to his office from where he called her parents. She was later taken to Kilome police station and booked there. The next day after a beating by the mother she explained what had happened. She was later taken to Kilungu sub district hospital.

8. It was her evidence that she had willingly and voluntarily given herself to the Appellant for sex. She further stated that had it not been for the beating she would not have disclosed anything about the incident. She admitted having had sex with one Joseph on a different date.

9. **PW3 RNR** who is PW1's mother confirmed that on the date in issue PW1 had not attended school claiming to be sick. When her husband (PW6) arrived home that evening he reported having seen PW1 boarding a reversing vehicle that evening. She confirmed the arrest of PW1 by the assistant chief and her being taken to Kilome police station. She produced PW1's birth certificate (ExB3) which shows she was born on 4th June 1999. In cross examination she said PW1 had been taken to the police station following her refusal to respond to interrogations. They wanted to know who she had been with.

10. **PW4 Elizabeth** and **PW5 James Kaula** were the head teacher and former teacher of [Particulars Withheld] primary School where PW1 used to school. They had been informed of PW1's presence at the Kilome Police Station. They went and found her there.

11. **PW6 JRM** is PW1's father. He testified of having been notified by his wife (PW2) of PW1's failure to go to school, on 11th May, 2015. He later went home in the evening and actually met PW1 who refused to talk to him. He later saw her boarding a probox vehicle, but he was not able to reach it. On 13th May, 2015, he reported the matter to Kilome Police Station, and also to his area sub chief. PW1, was apprehended and taken to Mutuluni AP. Camp, then Kilome Police Station. On 14th May, 2015 PW1 gave out the Appellant's name and telephone number. She later identified the Appellant as the person she had been with that evening.

12. **PW2 Erick Kiilu** is the clinical officer who examined PW1 and filled the P3 form. He found no injuries in PW1's private parts. He disclosed that PW1 had informed him that she had slept with two men on 10th May, 2015 at different places. He found a broken hymen with no lacerations, tears or blood. According to him there would be no genital trauma if the sex is consensual and the victim is not a virgin. He produced the treatment card and P3 form as exhibits 1 and 2 respectively.

13. **PW7 PC Margaret Bitok** was the investigating officer. She received the defilement report of PW1 by one Kioko. The suspect's name was actually Emanuel Maiyu alias British. He was called to the station from where he was arrested after identification by PW1. She obtained the birth certificate and confirmed her age as 17 years.

14. When placed on his defence the Appellant elected to give a sworn statement. He testified that he was a taxi driver. He confirmed receiving a call from Inspector Kariuki of Kilome Police station on 14th May, 2015 at around 11:00 am. Upon arrival, he was arrested and charged for defilement. He denied committing the offence saying that as a taxi driver, his telephone number was known by many people including the police. It was his evidence that PW1 had denied knowing him.

15. The Appellant further testified that PW1 had admitted to having had sex with two other boys. That PW1's father (PW6) had not identified the car PW1 boarded and he was not the only one with a probox. Further that no one had seen him with PW1. Under cross examination, he said he could not tell exactly where he had been on the material day and on 13th May, 2015 but he knew he had been on duty. He also denied knowing PW1.

16. When the appeal came for hearing, Mr. Hassan for the Appellant submitted on the various grounds of appeal. It was his submission that the acts of arresting, detaining and beating PW1 amounted to child harassment and intimidation. Her statement and testimony were therefore obtained under duress. That evidence obtained in such a manner violated her rights and fundamental freedom as provided for in the Bill of Rights and should not have been admitted. Counsel referred to Article 3 of the European Convention, on human rights and submitted that what was done to PW1 amounted to inhuman treatment.

17. Counsel submitted that the police statement and testimony of PW1 were repudiated hence lacking in evidential value. He relied on **Tuwamoi –vs- Uganda (1967) EA 84 P.88** where the Court of Appeal for Eastern Africa stated;

“a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words, that statement

was not a voluntary one”

18. He cited **Njuguna s/o Kimani & others –vs- R (1954) E.A 316** where the former East African Court of Appeal held that a trial court has discretion to exclude a statement which has been obtained by improper questioning or improper means.

19. He contended that there was no medical observation of defilement made by the doctor hence penetration was not established. He added that PW1 had indulged with two other men earlier than the alleged incident. That to pick on the Appellant only amounted to discrimination.

20. On ground (d), he submitted that the charge sheet was incurably defective for omitting the word ‘unlawfully’ and as such, it did not disclose any offence known in law.

21. Counsel argued that the testimonies of the prosecution witnesses were incredible and full of contradictions and inconsistencies. That the name given by PW1 to the police was ‘Kioko’ yet he was not charged under an *alias* name ‘British’. He took issue with the evidence of PW4 and PW5 with regard to the complainant’s behavior in school. He faulted the prosecution for failing to call APC Kamande and the chief as witnesses. To buttress that argument, he cited the case of **Bukenya and Others vs- Uganda 1972 E.A 549** where it was held that:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

22. He finally submitted that the learned trial magistrate dismissed the Appellant’s *alibi* defence without cogent reasons yet it was unshaken in cross examination. He contends that as a taxi driver, the Appellant could not say exactly where he was at the material time as there was nothing special to cause him to recall his movements on that day. He relied on **Daniel Otieno Yugi –v- Republic – Machakos High Cr. Appeal No. 8 of 2015 where Justice Odunga** stated that;

“Whereas it is true that an accused’s case starts during cross examination, it is my view that the mere fact that the accused does not disclose his defence till the time of his testimony ought not to be used against him particularly where he is acting in person otherwise it may be construed as shifting the burden to the accused.”

23. It was counsel’s submission that the issue of the Appellant’s identity was not well tackled by the trial court. He said PW1 only gave two digits of the phone number allegedly used to communicate and even so, the number was not linked to him. He contended that the prosecution did not establish that there was a telephone conversation between the Appellant and PW1 on the material day. That PW1’s uncle who could have shed some light on this was not called as a witness. Lastly the incident occurred at night but no identification parade was conducted.

24. In opposing the appeal Mrs. Owenga for the State submitted that PW1’s evidence was clear on what the Appellant did to her and no observation was made to the effect that she was untrustworthy. She added that PW1’s explanation was believable despite lack of medical evidence. Further she was also seen by her own father while being picked.

25. Mrs. Owenga submitted that lack of the word ‘unlawfully’ is not sufficient to declare the charge sheet defective. That the Appellant offered a defence and that was an indication that he was aware of the charges facing him. That the Appellant was also aware that PW1 was 15 years old.

26. It was her submission that failure to indicate the alias name did not take away the evidence and that the identification of the Appellant by PW1 was not discredited. According to her, the issue of the name was an afterthought. It was also her submission that the Appellant’s defence was considered and the burden of proof was never shifted by the court.

27. She also submitted that the evidence adduced by the prosecution was sufficient and it was not necessary to call PW1’s uncle as a witness because his testimony had no evidential value.

28. This is a first appeal and this court has the duty to re-evaluate and reconsider all the evidence on record, and arrive at its own conclusion. It has to bear in mind that it did not have the advantage of hearing or seeing any of the witnesses. An allowance must be given for that. **See Okeno –vs- Republic 1972 EA 32 (ii) Kiilu and Anor –vs- Republic (2005) IKLR 174.**

Determination

29. Having considered the grounds of appeal, record of appeal and the rival submissions, I find the following issues to arise for determination;

- a. Whether the charge sheet was defective.
- b. What was the probative value, if any, of PW1’s evidence?
- c. Were the ingredients of defilement proved to the required standard?

Issue no. (a) whether the charge sheet was defective.

30. The Appellant attributed the defect to omission of the word ‘unlawfully’. I am however in agreement with the learned prosecution

counsel that indeed, the omission did not affect the sufficiency of the charge. The record shows that the Appellant participated in the proceedings in a manner indicating that he understood the charge he was facing. There is no known lawful defilement in any event.

31. Section 382 of the Criminal Procedure Code states that: -

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding.”

32. Accordingly, I find that the omission did not in any way occasion a failure of justice.

Issue no. (b). What was the probative value if any, of PW1’s evidence?

33. PW1 categorically stated that, were it not for the beating she received from her mother, she would not have disclosed anything. The evidence shows that she was arrested by the sub-chief and interrogated but she did not open up. She was then taken to Kilome police station and locked up overnight. She stated as follows;

“On 13/05/15 is the day the assistant chief took me to his office using his cycle. He then called one police officer who kept me there in a cell waiting for my father. I was worried....at Kilome, I was put in a cell till 14/05/2015. I was not told why I was put in the cells. On 14/5/2015, my mother beat me up in the presence of my father and an inspector of police. Had they not beaten me, I would have said nothing...I was fearful when they beat me up. I recorded statement on 14/05/2015”

34. Evidently, her statement at the police station was recorded under duress and that is why she retracted it at the trial Court when called upon to testify. I find the case of **Tuwamoi –vs- Uganda (supra)** relevant in defining what a retracted statement is.

35. As to whether a court can act on a retracted statement, the court of Appeal of East Africa stated as follows in **Thiongo –vs- Republic (2004) IEA 333,**

“There is no rule of law that a court cannot act on a retracted and/ or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence that a court should be cautious to act on such a confession unless it is corroborated in material particulars.

36. PW1 was a key witness in this case, and her evidence is crucial in the determination of this case. It is a fact that PW1’s testimony was obtained under duress and intimidation. The birth certificate showed that PW1 was born on 4th June 1999. The incident is alleged to have occurred on 12th May, 2015. She was therefore 16 years less 21 days. She was arrested by the assistant chief, on 13th May, 2015 and taken to Kilome Police station where she was left under the custody of Inspector Kariuki. She slept in the cells.

37. On 14th May 2015, while at the station and in the presence of her father (PW6) and an inspector of police, her mother (PW3) beat her up, in order for her to speak. It’s not clear how serious the beating was but PW1 told the court that it was the beating that made her talk. She therefore confessed because of fear after the beating. She had also been made to spend one night in the cells. What was all this about? PW1 had testified that she had been involved in sex with other men, in her life. She may have had sex with the Appellant but the manner in which her testimony was extracted leaves a lot to be desired.

38. PW1’s evidence was therefore evidence that required other independent evidence to support it. Her father (PW6) was categorical that he had seen PW1 get into a car. He did not identify the said car nor the occupant/occupants of that car. This evidence did not therefore corroborate PW1’s evidence. The investigating officer (PW7) told the court that PW1 identified the Appellant when he came to the police station. Again it’s not shown how this identification was conducted. This also does not give credence to PW1’s evidence.

39. I find that PW1’s evidence being what it was cannot fall under the proviso to Section 124 Evidence Act. And having failed to find any corroborative evidence to support it, I find that it would be unsafe to rely on PW1’s evidence alone to found a conviction.

40. Having found as I have done on issue No. (b), I do not see the need to delve into issue No.(c) since even with proof of penetration without the identification of the culprit no conviction would stand.

41. Finally, I have come to the conclusion that the prosecution case was not proved to the required standard. I allow the appeal, quash the conviction and set aside the sentence.

42. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 6TH DAY OF JUNE, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE