REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 230 OF 2017

KIBAO NYAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Kagoni, Senior Resident Magistrate, delivered on 11th December, 2017 in Mombasa Chief Magistrates Court Sexual Offence No. 59 of 2015).

JUDGMENT

1. On 23rd November, 2015, the appellant herein, Kibao Nyawa, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of charge were that on diverse dates between 18th day and the 20th day of November at [particulars withheld] area in Likoni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of JK [name withheld] a child aged 16 years in contravention of the said act.

2. The appellant was also charged with the 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 of the charge were that on diverse dates between 18th day and the 20th day of November at [particular withheld] area in Likoni Sub-county within Mombasa County intentionally and unlawfully touched the vagina of a girl aged 14 Tens (sic) years with his penis.

3. The appellant was found guilty of the main charge of defilement and sentenced to serve 10 years imprisonment. He was dissatisfied with the said decision which prompted him to file a petition and grounds of appeal on 28th December, 2017. He raised the following grounds of appeal:-

> (i) That the Learned Trial Magistrate erred in law and fact by convicting him without considering that the charge of defilement was not proved to the required standard of law;
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> (ii) That the Learned Trial Magistrate erred in law and fact by failing to note that the Doctor's evidence did not support the offence of defilement;
>
> (iii) That the Learned Trial Magistrate erred in law and fact by failing to consider that the prosecution did not prove its case to the required standard of law, and
>
> (iv) That the Learned Trial Magistrate erred in failing to consider his defence.

4. The law firm of Omulama E.M. & Company filed written submissions on behalf of the appellant on 29th January, 2019 which were highlighted by Ms. Mukoya Advocate. She submitted that there were contradictions between the evidence of PW1 and PW2 and that the circumstances surrounding the case were not clearly brought out by prosecution witnesses.

5. While conceding to the fact that a court can convict on the evidence of a single witness in a sexual offence under the provisions of Section 124 of the Evidence Act, the appellant's Counsel argued that apart from PW1's evidence there was evidence from witnesses who testified, which did not support her evidence. Ms Mukoya further submitted that the P3 form was filled 3 months after the commission of the offence, while the Post Rape Care (PRC) form was filled 5 days after the commission of the offence. She contended that the Doctor who filled the P3 form did not examine PW1 but just captured the findings reflected on the PRC form, and entered them on the former document. She stated that if the Doctor had carried out the examination, she would have captured different findings such as healed abrasions. Ms Mukoya expressed the view that PW1 seemed to have been sexually active.

6. It was submitted that there was no evidence that the appellant's semen was obtained and that it linked him to the commission of the offence. Counsel for the appellant therefore stated that investigations were not properly done. She further indicated that PW1's Uncle by the name S, was not called to testify on the condition he found PW1 in.

7. In making reference to the provisions of Section 8(5) of the Sexual Offences Act, Ms. Mukoya submitted that it is a defence for an appellant to show that he was deceived into believing that the victim was over 18 years old. She further submitted that no voire dire examination was done to ascertain if PW1 understood the meaning of an oath.

8. She also stated that the charge was defective as the year when the offence was committed was not reflected on the charge sheet. She concluded her submissions by saying that the offence was not proved beyond reasonable doubt.

9. Ms. Marindah, Prosecution Counsel, filed written submissions on 8th February, 2019 on behalf of the respondent. She highlighted the same by submitting that it is common practice for a PRC form to be filled at the first instance and then the same information is thereafter transferred to the P3 form.

10. With regard to failure by the prosecution to call S, she submitted that the prosecution is under no obligation to call a given number of witnesses if it feels that it has called an adequate number of witnesses to prove its case. She stated that PW1 believed the appellant would give her fare to go back home but he took advantage of her by locking her up in his house for 3 days until she was rescued by her Uncle S.

11. With regard to the failure by the prosecution to indicate on the charge sheet the year in which the offence was committed, Ms Marindah urged this court to invoke the provisions of Section 382 of the Criminal Procedure Code to cure the defect. She submitted that the evidence adduced gave the year the offence was committed as 2015. She added that the Occurrence Book (OB) number on the charge sheet shows that the offence occurred in the year 2015. She further stated that the appellant never raised the issue of the said defect in the court below.

12. In response to the issue of failure by the Hon. Magistrate to conduct voire dire examination, Ms. Marindah submitted that the Hon. Magistrate was informed that PW1 was 15 years old and the court directed her to give sworn evidence

ANALYSIS AND DETERMINATION

13. The duty of the first appellant court is to consider, analyze and re-evaluate the evidence tendered before the court below and come to its own independent decision. When doing so, the appellate court must bear in mind that it has neither seen nor heard the witnesses testify and give an allowance for that. In **Okeno vs Republic** (1972) EA 32, the Court of Appeal held as follows:-

> ***"An appellant on 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. 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."***

14. PW1, JK [name withheld] a minor of 15 years of age recounted before the Trial court that on 18th November, 2015 she was at Likoni-Ujamaa where she has gone to look for her mother. She was accompanied by her cousin by the name M. She found her mother had relocated from her previous abode. She met the appellant whom she knew and asked him if he knew where her mother had relocated to and if he had her contacts. PW1 testified that he told her he did not know where she had moved to and offered to give her fare to enable her to go back to Lungalunga. It was PW1's evidence that she parted ways with her cousin who went to her sister's place. She then went with the appellant to his house to collect the fare she had been promised.

15. PW1's evidence was that immediately after going into his house, the appellant pounced on her and forcefully removed her clothes, forced her on the bed and had sex with her. She stated that he covered her mouth and warned her not to scream. He threatened to stab her with a knife, but she did not see any knife in the house.

16. It was her evidence that after defiling her, the appellant did not allow her to leave the house. Her Uncle later on went to the appellant's house and knocked at the door. The appellant opened the door for him and found her in the said house. He asked her how she got there and she explained. She also told him that the appellant had defiled her. Her Uncle by the name S, took her to Likoni Police Station where she lodged a complaint against the appellant. Her mother was called and she found her at the Police Station. The appellant was arrested on that day.

17. PW1 further testified that come the following day, she was taken to Coast Province General Hospital (CPGH) for examination and filling of her P3 form. She stated that on the evening of the day she was found in PW1's house, she went to Likoni District Hospital. She identified her treatment notes from the said Hospital in court as MFI-1, her P3 form as MFI-2 and her PRC form from CPGH as MFI – 3.

18. PW1's mother MM [name withheld], testified as PW2. She stated that PW1 was her first born daughter who was 16 years old as at 15th August, 2017 when she testified in court. She could not recall her daughter's birthday. She indicated that in the year 2015, she was residing with her sister while her daughter (PW1) was residing in Lungalunga with her grandmother. She further stated that on 18th November 2015, she got information that PW1 was at Likoni looking for her. She went there on 19th November 2015 to look for her. On 20th November, 2015 she found PW1 after the appellant's friends told her that she was with the appellant in his house. PW2, her brother by the name of N and one SJ proceeded to the said house but did not find PW1. PW2 testified that PW1 was taken to Bamburi where she was staying. PW1 told her that the appellant had defiled her. They found the appellant whom they arrested and took to Likoni Police Station. She stated that the appellant, Kibao, had been her neighbor at Likoni and she had no differences with him.

19. Dr. Gabriel Mogola of CPGH testified as PW3. He produced a P3 form filled by Dr. Fatuma whose handwriting and signature he was familiar with. He indicated that the Doctor filled the P3 form for PW1 on 26th March, 2016, which was 3 months after the defilement. The age of the PW1 as per the P3 form was 16 years. The findings on the P3 form were that upon examination, PW1 was found with a healing abrasion on the vagina and her hymen was broken. PW3 produced the P3 form as P. exhibit 1. He produced a Post Rape Care form (PRC form) as P. exhibit 2. PW3 indicated that it was filled by a nurse by the name Saida Mwinyi on 23rd November 2015 after PW1 was examined. The findings were similar to those on the P3 form. PW3 also produced as P. exhibit 4, the treatment notes for PW1 who was treated at Likoni District Hospital. The Doctor also produced PW1's age assessment report as P. exhibit

20. PW4, No. 96847, PC Vivian Musombi testified as PW4. It was her evidence that she was assigned this case on 21st November, 2015. It was initially a case of a missing child that had been reported on 19th November, 2015. PW4 adduced evidence that on 21st November, 2015, PW2 with 2 adults and PW1 went to Likoni Police Station where PW2 reported that the missing child she had reported about was the one she was with. PW4 interrogated her that she narrated that she had gone to look for PW2 at Likoni when she met the appellant whom she knew and he offered to take her where her mother was. He instead took PW1 to his house and defiled her. PW4 was informed that PW1 was rescued by her uncle and members of the public. The appellant was then arrested. PW4 stated that the appellant stayed with PW1 from 18th November 2015 to 20th November, 2015. PW4 issued PW1 with a P3 form. Her age was assessed as 16 years.

21. In his defence, the appellant stated that he was a resident of Lungalunga. He indicated that he knew the charges facing him but denied the offence. He indicated that he was set up by his neighbour.

22. The issues for determination are:-

(i) If the charge was fatally defective;

(ii) If the Doctor's evidence supported the charge of defilement;

(iii) If the appellant's defence was considered;

(iv) If there were discrepancies in the evidence tendered by the prosecution;

(v) If failure to call some witnesses weakened the prosecution's case;

(vi) If the prosecution proved its case beyond reasonable doubt; and

(vii) If the sentence was harsh or excessive.

If the charge was fatally defective

23. It is not disputed by the prosecution that the year in which the offence was committed was omitted from the charge sheet. Does it then render the charge fatally defective? Section 134 of the Criminal Procedure Code provides as follows:-

> ***"Every charge or information 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 for giving reasonable information as to the nature of the offence charged."*** (emphasis added).

24. In the present case, the particulars of the main charge and the alternative charge were read out to the appellant by the Trial Court, save for the year when the offence was committed. It can therefore be said that as at the time the charge was read out to the appellant, he did not understand the full particulars of the offences he was charged with. Section 137(f) of the Criminal Procedure Code provides as follows:-

> ***"Subject to other provisions of this Section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer to in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, matter, act or omission referred to."*** (emphasis added).

25. Taking the above provisions of the law into account, it is a fact that the charges as drafted do not with precision depict the year, when the alleged offences in the main charge and the alternative charge were committed.

26. In regard to the defect in the charge, Section 382 of the Criminal Procedure Code provides as follows:-

> ***"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 proceedings."*** *(emphasis added).*

27. When PW1 testified, she indicated that the offence of defilement occurred on 18th November, 2015 when the appellant asked her to accompany him to his house to collect fare to Lungalunga. She was rescued on 20th November, 2015. PW4 in her evidence disclosed that the

offence took place between 18th and 20th November, 2015.

28. The Doctor, PW3 in his evidence stated that PW1 was examined by a Nurse at CPGH on 23rd November, 2015 and her PRC form filled. The P3 form gives the date of the alleged offence as 18th November, 2015 at 1800 hrs. It is therefore clear that through the evidence of prosecution witnesses, the appellant was well informed that the case that he was facing in court was alleged to have taken place on diverse dates between 18th and 20th November, 2015. The charge sheet indicates that the offence was reported at Likoni Police Station on 20th November, 2015 vide Occurrence Book No. 75/20/11/2015. It also shows that the appellant was arrested on 21st November, 2015 and taken to court on 23rd November, 2015.

29. It is therefore my finding that although the charge did not give the particulars of the year when the offence was committed, the appellant was well informed of the said fact when the hearing of the case commenced through the evidence of prosecution witnesses.

If the Doctor's evidence supported the charge of defilement.

30. The appellant's Counsel took issue with the fact that the P3 form indicates that PW1 was examined 3 months after the alleged commission of the offence. She therefore argued that the Doctor who filled the said form could not have observed the same degree of injuries as those that were observed by the medical personnel who examined PW1 5 days after the commission of the offence. This court notes that PW1 was examined on 23rd November, 2015 and the Nurse who examined her noted that her hymen was torn and she had healing abrasions on the fourchette. The Doctor who filled the P3 form on 21st March, 2016 indicated that the injuries on PW1's vagina were 3 months old. The said Doctor described the injuries as healing abrasion/fourchette and the hymen was broken. This court was called upon to make a finding that injuries which were initially observed on 23rd November, 2015 with regard to the healing abrasions could still not have been observed 3 months later, as in Ms. Mukoya's view, the abrasions would have healed by then. It is not possible for this court to draw the conclusion suggested by Ms Mukoya that the abrasions that were visible on PW1's vagina on 23rd November, 2015 would have healed by 21st March, 2016 as the Doctor was the best suited to have been cross-examined on the said issue.

31. With regard to the medical findings, Ms Marindah submitted that the findings captured on a P3 form are usually derived from the PRC form thus the resemblance of the findings in the two reports. This court's considered view is that there was no prejudice occasioned against the appellant by the findings on the P3 form as at the time PW1 went to CPGH for examination, for purposes of filing of the P3 form, she had already been examined and a PRC form filled. Furthermore the P3 form does not include injuries which had previously not been observed by the Nurse who filled the said form. It is therefore my finding that the medical evidence conclusively supported that there was penetration of PW1's vagina.

If the appellant's defence was considered.

32. It is apparent that before arriving at his decision, the Hon. Magistrate did not consider the defence raised by the appellant, save for capturing what he said in his defence. As the first appellant court, I have considered the defence raised by the appellant which is to the effect that he was set up by his neighbours. This court is of the considered view that the said defence cannot stand in light of the evidence that was adduced against the appellant. His defence does not cast any doubt to the prosecution's case. I find the said defence to be without merit.

If there were discrepancies in the evidence by the prosecution.

33. The appellant's Counsel pinpointed that whereas PW1 said that the appellant threatened to stab her with a knife, she at the same time said that she did not see a knife in the house. This court notes that the foregoing cannot be regarded to be a discrepancy as PW1 reported of the threat that was made to her by the appellant and of the observation that she made in the said house, of not having seen a knife therein. The other alleged discrepancy raised was that PW1 said that the appellant was arrested on 18th November, 2015, yet the date given for his arrest on the charge sheet was 21st November, 2015. I have gone through PW1's evidence with a fine tooth comb, nowhere in her evidence did she state that the appellant was arrested on 18th November, 2018. It was her evidence that after the appellant defiled her, he did not allow her to leave his house. PW1 did not disclose the date when the appellant was arrested and I therefore do not see any discrepancy in the evidence of PW1 with regard to the date the appellant was arrested vis-*a-vis* the date reflected on the charge sheet.

34. Ms. Mukoya referred to the general history given on the P3 form as well as the PRC form to the effect that PW1 was going to her Aunt's place when she got lost and met an acquaintance. On the other hand, PW1 in her evidence stated that she had gone to look for her mother at Likoni but found she had relocated. She then met the appellant whom she knew and asked him if she knew where her mother had relocated to and for her contacts. Counsel for the appellant also stated that PW1 testified that after being rescued from the appellant's house, she was taken to Likoni Police Station where her mother found her and the fact that PW2 said that PW1 was taken to her in Bamburi.

35. In responding to the issue of the inconsistencies and contradiction in the prosecution's case, Ms. Marindah relied on the case of **Ahamad Abolfathi & Another vs Republic** [2018] eKLR where the Court of Appeal cited the case of **John Nyaga Njuki and 4 others vs Republic**, Criminal Appeal No. 160 of 2000 in which the Court expressed itself as follows with regard to the issue if discrepancies in the evidence of witnesses:-

> ***"In certain criminal cases particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, minor in nature considering the facts and circumstances of the case."***

36. This court notes that the narration of the facts surrounding the commission of the offence contained on the P3 and the PRC forms was

not in tandem with what PW1 narrated in her evidence in court. I take judicial notice of the fact that the general history given on P3 and PRC forms on how an offence occurred is ordinarily written by third parties and not the victim of an offence. As such, the discrepancy as to whether PW1 had gone to look for her Mother or her Aunt is not a material discrepancy that affects the efficacy of the evidence tendered by PW1.

If failure to call some witnesses weakened, the prosecution's case.

37. The appellant's Counsel in her submissions brought up the issue of the prosecution's failure to call the PW1's Uncle, S, who found her in the appellant's house and PW1's cousin M whom she was with, when the appellant told her to go and collect fare from his house. The Honourable Magistrate did consider the fact that the only evidence that was available on record as to the commission of the offence was by PW1. He took into account that under the provisions of Section 124 of the Evidence Act, he could go ahead to convict on the evidence of a single witness if he was satisfied that the alleged victim was telling the truth. The Hon. Magistrate found no reason to disbelieve PW1 as he found her testimony to be credible and truthful.

38. It is in this court's considered view that failure to call both S and M did not weaken the prosecution's case as the two were not eye witnesses to the commission of the offence. Furthermore, Section 143 of the Evidence Act provides as follows:-

"No particular number of witnesses shall in the absence of any provisions of law to the contrary, be required for the proof of any facts"

Whether the prosecution proved its case beyond reasonable doubt.

39. PW1's evidence left no doubt that she was defiled by the appellant after he fooled her into going into his house to collect money for her fare back to Lungalunga. He detained her in his house from 18th November, 2015 when her uncle rescued her from the said house. The medical evidence produced showed that she had been defiled. The evidence of her mother, PW2, indicated that she was 16 years old as at 15th August 2017. PW1 said her age was 15 years as at the said date. The age assessment report dated 23rd November 2015 gave her age as 16 years. Her age as per the P3 form was given as 16 years. The charge sheet with regard to the main charge gave her age as 16 years. Going by the foregoing facts, it is my finding that the age of the PW1 was 16 years as per the age assessment report. It was therefore proved beyond doubt that she was not legally capable of giving consent to the appellant to have sex with her. She was therefore defiled.

Other issues

40. As to failure by the Hon. Magistrate to conduct *voire dire* examination, Ms Marindah correctly submitted that there was no need for the said examination to be done as PW1 when asked by the court how old she was said that she was 15 years of age. When age assessment was done, it was established that she was 16 years old. I therefore hold that PW1 fell outside the age bracket where a court is required to conduct voire dire examination.

41. Ms Mukoya submitted on the exceptions to the provisions of Section 8(5) of the Sexual Offences Act but failed to tie the appellant's defence to the said provisions by showing how he was deceived by PW1 into believing that she was over the age of 18 years or that he reasonably believed that she was over 18 years old, as at the time the offence was committed.

42. With regard to the appellant's Counsel's submissions that the appellant's semen was not obtained for examination, it is not a mandatory requirement for DNA analysis of a suspect to be done to connect him to a victim of defilement where there is ample evidence to prove a charge of defilement.

43. Having analyzed the facts and the applicable law, I hold that the main charge of defilement against the appellant was proved beyond reasonable doubt and that he was properly convicted. I therefore uphold the conviction.

If the sentence was harsh or excessive

44. With regard to the sentence, the appellant was sentenced to 10 years imprisonment after his mitigation was considered. The Hon. Magistrate noted that the appellant took advantage of the complainant's situation to defile her. The provisions of Section 8(4) of the Sexual offences Act provides as follows:-

> ***"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

45. The above provisions indicate that the minimum sentence under the said provisions of the law is 15 years imprisonment. Although the appellant was sentenced to serve 10 years imprisonment, the prosecution did not file a notice of enhancement of sentence. In the said circumstances the sentence of 10 years imprisonment is hereby upheld. The upshot of the foregoing is that the appeal herein is without merit. It is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF JUNE, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah, Prosecution Counsel, for the DPP

Mr. Oliver Musundi - Court Assistant