



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 27 OF 2018

MOHAMED ATHMAN ABDI ALIAS ENERGIZER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the Principal Magistrate Court

at Lamu criminal case 450 of 2016, Hon. Njeri Thuku (PM) dated 10th July 2018)

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on the 9th and 10th November 2016 in Lamu West sub-county within Lamu County intentionally caused his penis to penetrate the anus of JH a child aged 10 years.
3. The Appellant pleaded not guilty and at the conclusion of the trial, he was convicted and sentenced to life imprisonment.
4. The Appellant being aggrieved by the conviction and sentence lodged this appeal on the following grounds reproduced verbatim as:-
 - i. That the learned trial magistrate erred in both law and fact by convicting the Appellant to life imprisonment by relying on a charge sheet whose ingredients and particulars were contradicted by the evidence of the complainant in terms of the alleged scene of crime.
 - ii. That the learned trial magistrate erred in law and fact by ignoring and failing to consider the crucial fact that according to the initial report made at the police station by the complainant in the company of his parents, he did not know the person who allegedly defiled him by name though he allegedly knew him physically which circumstances therefore strictly required or called for an identification parade as provided in law.
 - iii. That the learned trial magistrate erred in law and fact by creating and importing her own evidence on the issue of proper identification of the offender contrary to what was on record and therefore circumstantiating a miscarriage of justice.
 - iv. That the learned trial magistrate erred in law and fact by fatally failing to analyze and critically digest the evidence tendered by the four (4) witnesses called upon by the prosecution and the crucial issue raised by the defence during cross-examination, defence hearing and submissions.
 - v. That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant by only analyzing and discrediting the Appellant's defence on the basis of an alibi she dismissed when indeed the prosecution cross-examined the Appellant and all his witnesses.
 - vi. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the prosecution failed to call a crucial witness being the father of the complainant one JHA who is alleged to have identified the Appellant and assisted the police to arrest the said Appellant despite him not being at the scene of the crime hence denying the Appellant an opportunity to test and examine the said witness on the issue of identification.
 - vii. That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant by relying on a Victim Impact Report and/or statement prepared by the probation officer which report was prepared without the knowledge of the Appellant and

further the said report was never given to the Appellant or his defence counsel during or after the hearing of the case hence denying the Appellant an opportunity to test the same and or-cross examine the said probation officer contrary to the provisions of Article 50(1)(j) of the Constitution of Kenya, 2010.

viii. That the learned trial magistrate erred in law and fact by failing to consider and appreciate the Appellant's defence and his final submissions, which were, way credible and overwhelming.

ix. That the learned trial magistrate erred in law and fact by demonstrating and exhibiting bias from the start of the hearing when she attempted to deny the Appellant an opportunity to cross-examine the complainant by misinterpreting the law on cross-examination as provided for under the Criminal Procedure Code.

x. That the learned trial magistrate erred in law by considering the P3 form whose information was contradicting and ambiguous.

5. The Appellant filed his written submissions dated 18th September 2018 in support of his appeal. During hearing on the 17th October 2018, Mr. Omwancha, learned counsel for the Appellant submitted that at the police station the complainant reported that he had been defiled by an unknown person and therefore there was a need to conduct an identification parade to ascertain exactly who the suspect was. He relied on the case of **John Mwangi Kamau vs Republic (2013) eKLR** on the need of an identification parade.

6. Counsel submitted that the complainant's father, JHA, who alleged to have identified the Appellant, led the police to arrest the Appellant. He submitted that the prosecution failed to call the father who was a crucial witness, which denied the Appellant an opportunity to cross-examine him and establish how he knew the Appellant was a suspect despite not being at the scene of the crime. Mr. Omwancha submitted that failure to call a crucial witness was fatal. On this, he relied on the case of **Bukenya & others v Uganda (1972) E.A. 549**.

7. Counsel submitted that the scene of the crime was not established as what was on the charge sheet was contradicting what the complainant stated in his testimony. He submitted that the trial magistrate attacked the defence instead of dealing with issues.

8. Finally, it was submitted that the trial magistrate failed to conduct a proper victim impact assessment as it was prepared by a probation officer and was prepared without the knowledge of the Appellant. Further, the said statement was not given to the Appellant's advocate to give him room for cross-examination contrary to Article 50(1)(j).

9. The prosecution conceded to the appeal. Mr. Kasyoka, for the Respondent submitted that he had gone through the record and found that the victim knew the accused physically only but no identification parade was carried out. He urged that the father of the complainant was not called as a witness yet he is the one who identified the Appellant. Finally, counsel submitted that there were discrepancies such as the medical report, which said there was no penetration. Counsel however, left it to the court to review the evidence and arrive at its own decision.

10. Despite the Respondent conceding the appeal, it is trite that the court should examine the facts for itself in considering merit to the prosecution's concession.

11. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

12. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR**. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence on record.

13. I have considered the grounds of appeal, the respective submissions, and the record and find that the issues for determination are:

- i. whether the charge sheet was defective;
- ii. whether the prosecution proved its case beyond reasonable doubt;
- iii. whether the failure to call the complainant's father as a witness was fatal;
- iv. whether the trial magistrate failed to consider the defence of the Appellant and;
- v. whether the reliance of the trial magistrate on the victim impact report in convicting was prejudicial to the Appellant.

14. On the first issue it is the Appellant's submission that the charge sheet was defective as it contradicted the evidence of the complainant in terms of the scene of the crime. The charge sheet gave the scene of crime as *“at the sea front near the donkey sanctuary”* while the complainant testified that he was swimming at the sea near the donkey sanctuary when the accused took him to the mangrove forest near the sea.

15. Section 134 of the Criminal Procedure Code states as follows:

“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 for giving reasonable information as to the nature of the offence charged.”

16. The Court of Appeal laid out the test in determining a defective charge sheet and the effect of the Appellant’s conviction and held that:-

“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

17. I am satisfied in the present case that the contradictions as to the exact place of the incidents did not prejudice the Appellant and that no miscarriage of justice has been occasioned as a result of the contradictions. The charge sheet and the particulars of the offence were read out to the Appellant and he responded and proceeded to participate in the trial process. The contradictions cannot make the charge sheet defective or the conviction a nullity.

18. 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.”

19. I find that the contradictions in the charge sheet did not materially affect the proceedings in the trial court, and is curable under section 382 of the Civil Procedure Code.

20. The second issue was whether the prosecution proved its case beyond reasonable doubt. On this issue, the elements to be proved are age of the complainant, proof of penetration and identification of the perpetrator. See **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

21. On whether the age of the complainant was proved, **Rule 4 of the Sexual Offence Rules of Court 2014** provides that:-

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

22. In the case of **William Odhiambo Siara -Vs- Republic [2014] eKLR H.C At Kisumu, Criminal Appeal No. 77 Of 2012** the court (Machelule J) held that:-

“It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence.”

23. PW1, UAA, the mother of the complainant testified that JH was 10 years old and she further produced the minor’s birth certificate (Exbt 1) which showed that the minor was 10 years old at the time of the alleged crime. I find that the age of the minor had been sufficiently proved.

24. On the element of penetration, the complainant, JH, testified as PW2 after a *voire dire* examination by the trial Magistrate. He gave his unsworn testimony of how the Appellant on two subsequent days, took him to the mangroves at sea and did bad things to him. He said *“He removed my trouser, he removed his trouser. I was bending and he put his ‘mdudu’ into my bum. The sun had not set...”*

25. During cross-examination by the accused advocate, the complainant reiterated his evidence in examination-in-chief and said that the accused had done bad things to him twice. That the accused took him from the sea front in a boat christened “Princess”, and took him near the mangrove forest in the sea where he removed the complainant’s trousers and did “bad things” to him. When the complainant tried to resist the accused warned him not to say anything.

26. Nicholas Charo Lewa, a clinical officer testified as PW3. He produced the P3 report (Exh 2) and treatment notes (Exh 3) which showed that the anal sphincter had ulcerations (clotted blood blisters). He however stated that such injuries could either be caused by hard stool or penetration.

27. During cross-examination, PW3 stated that the complainant had blood clots in his anus. He admitted it was the duty of the medical officer who filled the treatment notes to ascertain the cause of the clots. In re-examination PW3 stated that the injury could have been caused by hard stool or penetration in the anus.

28. I take note that the P3 did not have any information as to the cause of the blood clots. Further, the evidence of PW3 was not conclusive on the cause of the blood clots whether the same was caused by penetration or they were a result of hard stool.

29. However, where the medical evidence fails to prove or disapprove penetration the court can rely on the evidence of the victim as long as it is satisfied that the victim is telling the truth.

30. In **Arthur Mshila Manga v Republic Criminal Appeal No. 24 Of 2014 [2016] eKLR** the Court of Appeal faced with a similar situation pronounced itself thus:-

“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 the 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.

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. (See MOHAMED V. REPUBLIC [2008] KLR (G&F), 1175 and JACOB ODHIAMBO OMUOMBO V. REPUBLIC (supra). 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.”(Emphasis mine)

31. At the end of the complainant’s testimony in the present case, the trial magistrate found that the complainant was truthful under section 199 of the CPC. In her judgment the trial magistrate stated that she was persuaded by the testimony of the complainant and the medical evidence that the complainant was defiled.

32. After re-evaluating the evidence, I find that the complainant was consistent in his testimony throughout his examination-in-chief and cross examination. He did not waiver and was certain of the incidents that took place and find that he was truthful.

33. The medical evidence presented by PW 3 was inconclusive as to whether the lacerations on the victim’s anus was caused by hard stool or penetration. Seen against the credible evidence of the complainant however the evidence has some probative value and tends to support and corroborate the victim’s evidence that he was penetrated.

34. Having concluded, as the trial court did, that the complainant was defiled, the critical question that remains is who defiled him.

35. It was the complainant’s testimony that on both days of the incident, he had gone for swimming near the donkey sanctuary at the sea front when the Appellant approached him and took him on a boat near the mangroves. He also testified that both times after the incident he took money to the Appellant at the sea front. The complainant testified that he did not know the accused person by name but he had seen him within Lamu and he only came to know that he was called Energizer later. He further testified that when the matter was reported to the police he gave a description to the police as *“a short, light-skinned man with a beard.”*

36. The complainant admitted that he never attended an identification parade but he stated that he saw the Appellant the first day he came to court and was able to point him out in court. He further stated that *“If I see a person once who had done something bad to me and then I see him after a few days, I will know it was him”*

37. PW4, P.C Isaac Wamacho, the Investigating Officer testified that he took over the file from one PC Kimei and learned that the Appellant had been arrested by the tourist police officers and the child’s father who had identified the Appellant. He admitted that where a suspect is not known but is described then an identification parade is to be conducted. PW5 admitted he did not conduct an identification parade as he thought it was not important in this case.

38. It was the Appellant’s submission that the complainant did not know the Appellant and therefore the police were bound to perform an identification parade to test the correctness of the witness identification. He submitted that failure to conduct an identification parade was fatal.

39. Where identification is based on visual identification it is paramount that the court warns itself on the dangers of relying on visual identification. In **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** the Court of Appeal held that:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

40. The importance of conducting identification parades where the accused person is not known to the complainant have been well captured by the courts which have been quick to dismiss dock identification as generally worthless and have held that courts should not be quick to place reliance on it. See **John Kamau Wamatu & another vs. Republic [2010] eKLR** and **Ajode vs. Republic [2004] eKLR**.

41. The Court of Appeal in **James Tinega Omwenga –vs- R- Criminal Appeal No. 59 of 2011[2014] eKLR** pronounced itself as follows:-

“...This is because the purpose of an identification parade is to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident. Therefore, the identification parade conducted by PC Joseph was to

test the correctness the identification of the appellant by M based on the description she had given of the attacker in her initial report. The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.”

42. In the present case, the Appellant was arrested with the help of the complainant’s father. It is not clear how the complainant’s father, who was not called as a witness, was able to identify the Appellant. It was of paramount importance that an identification parade was conducted to test the correctness of identification by the complainant pointing out the Appellant to affirm his identification. Instead the complainant identified the Appellant in court which was dock identification.

43. The description given by the complainant of his assailant as “a *short, light-skinned man with a beard,*” fits the Appellants before me and creates deep suspicion that the Appellant may have been the person who defiled the minor. However, it is trite law that suspicion alone cannot be the basis for inferring guilt which has to be proved by evidence. **See Mary Wanjiku Gichira -vs- Republic- Criminal Appeal No. 17 of 1998;** see also **Sawe -vs- Republic (2003) KLR 364.**

44. It is settled that the standard of proof in criminal cases should be one that carries a high degree of probability that only leaves a remote possibility for the accused. See **Woolmington versus DPP 1935 A C 462 and also Miller Versus Minister of Pensions 1942 A C.**

45. On whether the Respondent’s failure to call the complainant’s father was fatal, it is trite that there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

46. The question is whether the evidence of the complainant’s father would have been crucial in the determination of this case. As I have already determined in earlier in this judgment the evidence of the father was crucial to explain how he was able to identify and assist the police officer in the arrest of the Appellant. In face of the failure to conduct an identification parade, the father’s evidence would have been crucial in corroborating the evidence of the complainant on the issue of identification.

47. In the premise, I find that the evidence adduced on identification was shaky and find that the identification of the Appellant was not beyond reasonable doubt.

48. Having evaluated all the evidence on record afresh, I have come to the conclusion that the conviction was unsafe. The Prosecution failed to prove positive identification of the Appellant. It failed to prove its case against the Appellant beyond reasonable doubt as required by law.

49. For the foregoing reasons, I find that this appeal has merit. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant is set at liberty forthwith unless otherwise lawfully held.

50. Orders accordingly.

Judgment dated delivered and signed at Garsen on this 18th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Mr Gekanana holding brief for Mr. Omwancha - For Appellant

Mr. Kasyoka - For Respondent