



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 17 OF 2016**

**VICTOR CHEMBE KATUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Conviction and Sentence of Hon. Y. A. Shikanda, SRM**

**delivered on 27<sup>th</sup> October, 2015 in Malindi CM Criminal Case No. 198 of 2012, Republic v Victor Chembe Katui)**

**JUDGEMENT**

1. The Appellant, Victor Chembe Katui, is currently serving 20 years imprisonment following his conviction in respect of the main count for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act, 2006 ("the Act"). The particulars of the charge stated that on 18<sup>th</sup> February, 2012 in Kilifi County the Appellant unlawfully caused his penis to penetrate the vagina of PK a girl aged 13 years.

2. Being aggrieved by both the conviction and sentence the Appellant appeals to this court on the grounds amended on 8<sup>th</sup> October, 2018 as follows:-

**“1. That the learned trial magistrate did not consider that the charge sheet does not disclose the offence of defilement thus the charge is inaccurate.**

**2. That the learned trial magistrate failed in the rule of law by admitting the evidence of the complainant forgetting that she was not a reliable witness thus the sentence was based on unsound evidence.**

**3. That the learned trial magistrate erred in law and fact by not considering that the medical evidence had double (sic) to sustain my conviction and sentence.**

**4. That the learned trial magistrate erred in law and fact by not considering that the investigations done in this case were shoddy hence breach of section 109 of the Evidence Act.**

**5. That the learned trial magistrate did not consider that my defence was reliable to award me the benefit of doubt.”**

3. In summary the Appellant's case is that he was convicted on a defective charge based on inadequate evidence and without consideration of his defence.

4. This is a first appeal and this court is required to reassess and reevaluate the evidence adduced at the trial in order to reach its own conclusion on the same. In doing so, the court is required to give allowance to the fact that, unlike the trial court, it never saw nor heard the witnesses testify and did not therefore have the benefit of observing their demeanour.

5. The complainant testified as PW1 and told the court that on 8<sup>th</sup> February, 2012 at about 5.00pm she was going back home from buying paraffin at the shop when the Appellant who is a neighbor followed her and reminded her of his undying love for her. She did not answer him but he persisted, and at some point he told her to follow him. She followed him to the bush where she removed her clothes and the Appellant removed his clothes and they had sex. She thereafter proceeded home. On reaching home her mother asked her why she was late and she kept quiet. Her mother insisted on an answer and that is when she revealed what she had done with the Appellant.

6. The matter was reported to the police at Gongoni from where she was referred to Malindi District Hospital for examination. She identified a P3 form and birth notification form during her testimony and told the court that the name K belonged to her father.

7. CM the co-wife of the mother of the complainant testified as PW2. She told the court that the complainant was born on 12<sup>th</sup> November, 1998. Her testimony was that on the material day at about 6.00pm she sent the complainant for paraffin at a shop which was about 100 metres from their home. The complainant came back at about 7.00pm crying and upon enquiry the complainant told her that the Appellant had forced her to have sex with him. The complainant gave her a headscarf and a pair of shoes which the Appellant gave her in appreciation of what they had done.

8. PW2 told the court that the following day she went and reported the incident at the complainant's school. She also reported the matter to the Assistant Chief. The complainant was later taken to hospital by her father.

9. After PW2 concluded her testimony, the complainant was recalled and she identified the shoes and headscarf that the Appellant gave her after having sex with him.

10. PW3 Police Constable Gideon Wambua testified that on 16<sup>th</sup> March, 2012 he was at his place of work at Marereni Police Station when at about noon the complainant who was accompanied by her father went and reported to him that on 18<sup>th</sup> February, 2012 she was coming back from the shop when she met a neighbor known as Victor Chembe who caressed her before pulling her to the forest and forcefully having sex with her. He booked the report and issued her with a P3 form to take to Malindi District Hospital. After the P3 form was filled he directed administration police officers from Gongoni to arrest the Appellant. On 28<sup>th</sup> March, 2012 the Appellant was escorted to the police station by administration police officers from Gongoni. He re-arrested and charged him.

11. PW4 Ibrahim Abdullahi stated that he examined the complainant and filled a P3 form for her on 24<sup>th</sup> March, 2012. The hymen was broken and there was an indication that the girl had experienced habitual sex. He produced the P3 form as an exhibit.

12. Isaiah Dhendha Bashora, the Assistant Chief of Shomela Sub-Location, testified as PW5.

13. PW6 Mumba Mwangandi was the deputy head-teacher at the complainant's school at the time of the alleged offence.

14. JMKM, the grandfather of the complainant, testified as PW7.

15. In his defence the Appellant told the court that it was the complainant who forced herself on him and he was overpowered by the devil and he had sex with her.

16. Submitting in support of his appeal, the Appellant stated that the charge was defective because it only stated that he contravened Section 8(3) of the Act which Section provides the punishment but did not indicate that he contravened Section 8(1) of the Act which enacts the offence of defilement.

17. The Appellant cited the decision in **Kagundi Muthuli v Republic, Mombasa H.C. Criminal Appeal No. 527 of 2010**, where it was held that:-

**“The Appellant was charged with defilement contrary to S. 8(3) of the Sexual Offences Act. S. 8(3) provides for the penalty for this offence but does not create the offence. The provision which creates the offence is S. 8(1) of the Act. Thus the charge sheet ought to have read S. 8(1) as read with Section 8(3) of the Sexual Offences Act. It is a misnomer to charge a suspect and cite only the penalty for the offence. This is a defect which is fatal and renders the subsequent proceedings a nullity.”**

18. The prosecution did not address the issue of the defectiveness of the charge. In my view, the correct position is the one stated by the Court of Appeal in **John Irungu v Republic [2016] eKLR; Criminal Appeal No. 20 of 2016 (Mombasa)** that:-

**“In Amedi Omurunga v. Republic, Cr. App. No. 178 of 2012, where, in a charge of defilement reference was made only to the punishment section, this Court held that the defect was curable. We are in agreement with the first appellate court that the failure to refer to section 8(1) of the Act did not occasion a miscarriage of justice in view of the clear statement of the particulars of the offence and therefore cannot form the basis for interfering with the decisions of the two courts below.”**

19. Indeed that the Appellant knew the offence he was facing was confirmed by the questions he put to the witnesses at the trial. I therefore find that he was not prejudiced by the failure to cite the provision which created the offence with which he was charged. The fact that the section providing the punishment was cited means that the punishment could lead him to the section that enacted the offence he was alleged to have committed.

20. Having cleared the issue of the legality of the charge, I will now proceed to determine whether the charge laid against the Appellant was proved beyond reasonable doubt. In a charge of defilement, the prosecution has a duty to establish penetration of the victim by the accused. The prosecution is also required to prove that the victim is a child, that is to say a human being under the age of 18 years. As for the punishment to be imposed, the prosecution must establish the actual age of the child.

21. The prosecution set out to prove that the Appellant defiled the minor on 18<sup>th</sup> February, 2012. I must state from the outset that the prosecution's case is replete with contradictions that the only conclusion is that the crime did not occur.

22. Starting with the evidence of PW2, it is clear that the same contradicts that of PW1. PW2 told the court that the PW1 arrived home crying. The testimony of PW1 was that she was not crying. PW2 talked of being given a headscarf and shoes by the complainant who told her those were gifts the Appellant gave her in appreciation of the sex. PW1 never mentioned these items until she was recalled to identify

them.

23. The story of the gifts kept changing with PW3 stating that he had received a report from **[Particulars Withheld]** Primary School, where the complainant schooled, that she had been given gifts by the Appellant and the teacher confiscated them. He stated that he never confirmed this fact.

24. The evidence of PW3 established that the gifts were not given to the complainant on the day of the alleged defilement. It also confirmed that the gifts were never given to PW3 who was the investigating officer to retain them as exhibits. Still on the gifts, PW5 talked of an allegation that the Appellant used to seduce the child with gifts.

25. PW6 told the court that the grandmother of the complainant reported to him that the complainant had formed the habit of spending nights away. He was requested to interrogate her. Upon interrogation the complainant told him that she use to have sex with the Appellant. The complainant also disclosed to him that the Appellant bought her a headscarf and shoes.

26. PW7 who lived with the complainant in the same compound stated that he did not receive any information concerning the Appellant on 18<sup>th</sup> February, 2012. This is the day the defilement is alleged to have taken place.

27. It is also noted that no explanation was offered as to why it took long before the matter was taken up with the authorities. When the prosecution case is considered as a whole it becomes very clear that the allegation that the Appellant defiled the complainant on 18<sup>th</sup> February, 2018 was not proved.

28. The impression I get is that it was suspected that the Appellant was having a sexual liaison with the complainant but they had not been caught red-handed. There was therefore a conspiracy to have the Appellant fixed hence the disjointed evidence adduced by the prosecution. The evidence was however not sufficient to lead to a conviction notwithstanding what the Appellant said in his defence. It is always the duty of the prosecution to prove its case against the accused beyond reasonable doubt. That burden never shifts except in very limited instances which are normally clearly specified by the law.

29. In conclusion, I find that the prosecution did not prove the case it set out to establish and the benefit of doubt ought to have been given to the Appellant.

30. In the circumstances I find the appeal merited and I allow the same. The conviction is therefore quashed and the sentence set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

**Dated and Signed at Nairobi this 24<sup>th</sup> day of April, 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 13<sup>th</sup> day of June 2019**

**R. Nyakundi,**

**Judge of the High Court**