



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL No. 65 OF 2017

ERIC MUTISO NZIU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Resident Magistrate's

Court (Hon. C.K. Kisiangani, RM), in Criminal Case SOA No. 1333 of 2014 and judgement delivered on 01.9.2016)

JUDGEMENT

1. This is an appeal from the judgement, conviction and sentence of Hon. C.K. Kisiangani, Resident Magistrate in Criminal Case SOA No. 1333 of 2014 on 1st September, 2016. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. The age, penetration and identification were not established to the required standard. It is also his case that the trial court was not availed with DNA and hence the case was not medically proven. Further he submits that the birth certificate was not produced and thus the age was not proven and therefore his appeal be allowed, the conviction quashed and the sentence set aside and he be set free.

3. The state submitted that age was proved to the required standards by the age assessment of the complainant. On the issue of penetration, this was established by the clinical officer who in confirming the torn hymen and pregnancy of the complainant, it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. With regard to the identification of the appellant, Learned Counsel submitted that the same is undisputed because the complainant admitted being married to the appellant. The state submits that the appellant has not raised sufficient reason to warrant interference with the decision of the trial court and therefore the appeal be dismissed and that the court uphold the conviction and sentence of the trial court.

4. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

5. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into two grounds:

1. That the trial Magistrate erred in law and grossly misdirected herself by convicting the Appellant for the offence of defilement in the absence of clear establishment as to the elements of the offence and commission thereof by the appellant;

2. That the trial magistrate erred in failing to consider the defence of the appellant

6. In cases of defilement, the prosecution must prove:

1. The age of the victim.

2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

3. That the perpetrator is the Appellant.

7. I have given due consideration to this appeal and the rival submissions. It is undisputed that the appellant was well known to the complainant. What is in contention is the issue of identification of the appellant as the perpetrator and the age of the complainant. In the circumstances I find that the issue for determination by this court is; Whether or not the prosecution proved its case beyond reasonable doubt.

8. Evidence on penetration was presented vide evidence of the P3 form and the account of the victim. The P3 form was filled by Dr. Mutunga who testified on the physical examination carried out on the complainant. The Appellant did not object to its production. He testified that on examination she had a broken hymen and that she was pregnant. He concluded that she was defiled and signed the P3 form on 3.10.2014. He also testified on the age assessment that was conducted on the complainant by Dr. Njane where she was found to be aged 15 years and produced the same together with the P3 form as exhibits.

9. The victim testified that the appellant is her husband and that she was born in 1997. She testified that she is aged 18 years. It was her testimony that on 7.8.2014 she was married to the appellant and was living with him and he was arrested because he did not pay money to Jackson Muinde and Sammy.

10. Pw2, J M testified that the victim was his daughter and that he had noticed that she was missing from 7.8.2014 at which time she was 14 years. He testified that she married against his will to the appellant. He maintained that she was born in late 1999.

11. Muinde Masissi Mutua was Pw3 who testified that he was informed on 12.8.2014 that the victim was missing and she was found in the home of the appellant whereupon the appellant was charged.

12. Sammy Mutua Mbuvi was Pw4 and who testified that he was informed on 12.8.2014 that the victim was missing and she was found in the home of the appellant whereupon the appellant was charged.

13. Pw6 was Sergeant Lorna Kemuma who testified that she received a report of defilement of the victim and she escorted the appellant and the victim to the hospital for examination. She escorted the minor for age assessment where it was established that she was aged 15 years and that she was confirmed pregnant.

14. The appellant was found to have a case to answer. He testified that the victim is his wife as they had been living together for two months after she dropped out in class seven. Dw2 testified that he knew that the victim and the appellant were living together as husband and wife but he knew that the victim was a minor. Dw3 reiterated that the appellant and the victim were husband and wife and they lived together. The appellant was found guilty of defilement and sentenced to 20 years imprisonment.

15. From the account of the appellant, there is no plausible explanation or defence or evidence to controvert what evidence is against him. The aspect of the age of the victim is non-existent. From the foregoing, I did not have the benefit of seeing the witnesses during their testimony. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant and convicted him. Nevertheless I am not satisfied that the age of the victim was proven though it is clear that she was a minor. In her decision, the learned trial magistrate addressed the issue of age and referred to the case of **Hilary Nyongesa v Republic (2010) eKLR** where Mwilu J (as she then was) stated as follows:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved...”

And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim”

16. In the case of **Musyoki Mwakavi v Republic [2014] eKLR** it was held that: _

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”

17. In the case of **Francis Omuroni v Uganda. Court of Appeal Criminal Appeal No. 2 of 2000**, it was held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

18. What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother’s evidence of the complainant’s age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as 15 years and in the circumstances, I do not find it prudent to disturb the finding of the trial magistrate.

19. I do note that the Appellant faulted the Trial Magistrate for convicting him yet he was not subjected to DNA profiling pursuant to **Section 36** of the **Sexual Offences Act**. It is however instructive that whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

“...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word ”may”. Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the

minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

20. Similarly, it was unnecessary for DNA to be conducted in this case where the Appellant was arrested at the scene of crime. Again the appellant was positively identified by the complainant. The appellant in his defence evidence admitted that the complainant was his wife with whom he had cohabited for two months. Indeed, in AML vs. Republic [2012] eKLR the Court expressed the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

21. From the evidence, all the three critical ingredients for the offence of defilement that is: age and penetration and identity of the appellant have been met and i find that there is sufficient evidence on record to sustain a conviction against the appellant who due to the evidence on record has been placed at the scene of the crime on the date in question and has not controverted the same. The conviction of the appellant was therefore safe

22. According to Section 8 (3) of the Sexual Offences:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

23. From the evidence on record, and the analysis of the appellant, the victim was 15 years at the time of commission of the offence. Therefore the sentence of 20 years was within the law.

24. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal on conviction and sentence has no merit and is dismissed. The appellant's conviction and sentence is hereby upheld.

It is so ordered.

Dated and delivered at Machakos this 9th day of July, 2019.

D.K.KEMEI

JUDGE