



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 136 OF 2018

BETWEEN

HARUN MUCHAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence dated 19th October, 2018 by Hon. E. Ayuka, SRM in Nkubu PMC Cr (S.O) case no. 14 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein HARUN MUCHAI was arraigned before the Principal Magistrates Court at Nkubu on a charge 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 are that on the 15th day of March 2017 at about 11.00am in Imenti South Sub-county within Meru County, intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of LK, a child aged 14 years.
2. In the alternative, he was charged with ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006***. It is alleged that he committed the said offence on 15th March 2017 at about 11.00am in Imenti South Sub-County within Meru County when he intentionally touched the vagina of LK a child aged 14 years with his penis against her will.
3. The appellant pleaded not guilty to the charges. The case went to full hearing during which the prosecution called 4 witnesses. At the close of the prosecution case, the appellant was found to have a case to answer and placed on his defence. He testified and also called 3 witnesses.

Judgment of the Learned Trial Court

4. After carefully analyzing all the evidence on record, the learned trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on the main count. The appellant was found guilty as charged, convicted and sentenced to serve twenty (20) years imprisonment.

The Appeal

5. Being aggrieved by the entire judgment, the appellant brought this appeal which is premised on 9 grounds set out in the Petition of Appeal dated 1st November 2018. The appellant contends that the prosecution case against him was not proved to the required standard of proof because of glaring contradictions and inconsistencies in the evidence which was also uncorroborated and was mainly hearsay. The appellant also contends that the evidence adduced by the prosecution did not support the particulars on the charge sheet. The appellant further contends that the prosecution's failure to call certain critical witnesses was fatal to his case, and that the learned trial magistrate should have found so and acquitted the appellant. The appellant prays that his appeal be allowed, conviction quashed and sentence set aside so that he can be set free.
6. As this is a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to reaching its

won conclusions in this matter. The reason for this is that the appellant on a 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 weight conflicting evidence and draw its own conclusions,**” only remembering and making allowance for the fact that it has no opportunity of seeing and hearing the witnesses. Generally see *Okeno versus Republic [1972] EA 32 and Kiilu & another versus Republic [2005]* *IKLR* 174.

The Prosecution Case

7. From the record, the prosecution case is that the complainant herein, LK who testified as PW1 was born on 17th August 2003 as per the birth certificate produced in court by number[xxxx] Senior Sgt Gitonga Mutinda, (PW4) as P exhibit 1. PW2, MK testified that PW1 is her daughter who was a standard 7 pupil at the material time when she disappeared from home on 13th March 2017. Then on 14th March 2017, PW2 received information from a friend of PW1 that PW1 had been seen at a certain plot within Mitunguu Market, right opposite the Primary school which PW1 was attending at the time. PW1's friend who gave the information to PW2 of PW1's whereabouts was D. D was never called as a witness.

8. PW2 went to the plot where she had been told PW1 was hiding, but on seeing her, PW1 ran away, and in the process she (PW1) dropped a mobile phone. The mobile phone belonged to PW2 and when she checked it, she found love messages exchanged between PW1 and the appellant. PW1 gave the mobile phone to PW1's father who in turn reported the matter to the police. The appellant was arrested thereafter.

9. According to PW1, on 15th March 2017 while she was at Doreen's place which was also appellant's home, the appellant forced her into having sexual intercourse with him. The incident took place in the appellant's sitting room after the appellant had undressed her and also taken off his trousers. On the day after the incident, Doreen, who had wooed PW1 for the appellant took PW1 to her place. From Doreen's house, PW1 was taken to Kinya's house. In the evening of that second day, the appellant went and saw PW1 at Kinya's house and gave her Kshs.500/-. PW1 was escorted to her home by Kinya on 21st March 2017. PW1 narrated her ordeal to both PW2 and her father. She was taken to Kanyakine level 4 Hospital where she was examined and treated.

10. During cross-examination PW1 testified that the appellant threatened her, through his friends Ngugi and Kinya that if she told the truth, she would be killed. PW1 also stated that her parents had demanded money from the appellant in order to drop the charges against him. She also testified that after the sexual intercourse on 15th March 2017, she stayed with Doreen for 3 days. PW1 also denied having any phone on her when she left home

11. When PW2 was cross examined by Mr. Muthoni for the appellant, she conceded she knew the appellant from around 14th February 2017. That though the appellant sold meat, PW2 had never sent PW1 to his butchery to buy meat. PW2 further testified that PW1 disappeared from home on 13th February 2017 and that she made a report of the disappearance at Mitunguu Police Station on that same date. PW2 also testified that when the appellant was released on bond, he visited her on 11th June 2017 and threatened to hide PW1 unless she dropped the charges against him. Finally, PW2 conceded that PW1 and the appellant used to communicate through her (PW2's) mobile number.

12. PW3 was Saberina Kaimatheri, a clinical officer attached to Kanyakine District Hospital. She testified that PW1 was treated at Kanyankine district Hospital some 10 days after the alleged defilement incident on 13th March 2017. The P3 form was filled after 13 days. PW3 testified that on examination of the genitalia, there were no tears or lacerations, though the hymen was absent. Some whitish discharge was noted. The laboratory results revealed no spermatozoa, but epithelial cells were present. Urinalysis examination showed pus cells. Syphilis test was negative. In PW3's opinion penetration had taken place. The P3 form was produced as P exhibit.

13. In cross examination, PW3 testified that PW1 informed her that she (PW1) had been defiled on 13th march 2017 at 6.00pm and that she (PW1) had been given some money by some lady.

14. Number 48809 Senior Sgt Gitonga Mutinda testified as PW4. He testified that on 13th march 2017, a parent of PW1 had reported the disappearance of her standard 7 daughter. He commenced investigations into the matter. On 15th March 2017, PW2 went to the police station and informed PW4 that she (PW2) was now looking for her missing daughter within Mitunguu Market. PW2 managed to find PW1 standing in a house whose door was slightly open.

15. PW4 further testified that when PW1 saw PW2, she (PW1) fled. Later PW4 and other police officers were led to the same house and on knocking on the door, the door was opened for them. On entering the house the appellant was found sitting on the bed. Upon interrogation, the appellant denied any knowledge of PW1. Nothing belonging to PW1 was found in the appellant's house. The appellant was then arrested and taken to the police station for further questioning, after which he was released.

16. On the 18th March 2017, PW2 went back to the police station in the company of PW1, with claims that it was one Doreen who had taken PW1 home. Doreen was apparently a neighbour to the appellant and that it was Doreen who had, in the first place, taken PW1 to the appellant's house. PW1 informed PW4 that the appellant had defiled her on 15th March 2017. PW1 was issued with a P3 form. According to PW4, the appellant identified himself as Harun Muchai, though the names on the appellant's ID read Harun Mwangagi Iguma. PW4 also stated that he arrested the appellant twice. He also testified that PW1 was taken back to her home on 18th March 2017.

The Defence Case

17. The appellant gave sworn testimony and gave his name as HARUN MWANGANGI IGUNA as per his national identity card. He testified that he had operated a butchery at Mitunguu market since 2013. He denied any knowledge of PW1. He stated he was arrested on 13th May, 2017 and arraigned in court on 15th May 2017. He testified that on the date of the alleged defilement, he was in Tharaka Nithi Gatunga area with his boss, Luke Mwiti, DW3 having left Mitunguu Market at 8.00am and returning thereto at 8.00pm. The appellant

alleged that the case against him was a frame-up by PW2 who he had called him and asked him for a rose flower for valentine and that the two were friends. That PW2 would even borrow money from him and that the reason why she framed the case against him is because she refused to pay back Kshs.2,800/- she had borrowed from him; and with the refusal, PW2 promised dire consequences. The appellant also alleged that PW1 lied to court when she alleged that he had defiled her.

18. The prosecution did not cross examine the appellant on his testimony.

19. DW2 was Faith Ngugi Mwangangi, wife to appellant. She confirmed to the court that on the material day, the appellant left Mitunguu for Gatunga in Tharaka Nithi at about 8.00am, and returned home at about 9.00pm. DW2 also alleged the case against the appellant is a frame-up, though she did not elaborate on the allegation.

20. DW3 was Luke Mwiti of Mitunguu, and the appellant's employer. He testified that on the material day, he and the appellant went to Gatunga in Tharaka Nithi where he (DW3) hails from. They both returned to Mitunguu around 8.00pm. DW3's testimony thus supported appellant's contention that he was away from Mitunguu area the whole day when he is alleged to have defiled PW1.

21. James Mureithi Kimathi was DW4. He testified that the appellant was his business friend and that the two of them had rented premises from the same landlord. He also testified that the appellant and his wife DW2, lived together in their house in the same plot where DW4 lived. He stated that the allegations against the appellant were not true.

22. DW2, DW3 and DW4 were also not put through any cross examination by the prosecutor.

Issues for Determination and Submissions

23. From the evidence on record, the prosecution had the onerous task of proving all the three ingredients for the offence of defilement. It was under a duty to prove:-

- a) *age of the complainant and*
- b) *that penetration took place, whether partial or complete and*
- c) *that it was the appellant who caused the penetration.*

24. The parties made their rival oral submissions during the hearing. Mr. Muthomi, counsel for the appellant, hinged his submissions on the nine grounds of appeal. Mr. Gitonga, prosecution counsel, on the other hand submitted that there was more than adequate evidence to support the charge of defilement against the appellant; and that all the three ingredients of the offence were proved beyond any reasonable doubt.

25. It is worth noting at this point, that the appellant had no responsibility to prove his innocence and that it was entirely the duty of the prosecution to show by cogent evidence that each of the three ingredients of the offence of defilement were proved to the required standard.

Analysis and Submission

26. After a careful re-evaluation of the evidence on record, this court is satisfied that the age of the complainant was proved to the required standard. PW2, the mother of PW1 testified and gave the date of birth of PW1 as 17th August 2003. PW2 also identified PW1's birth certificate which was eventually produced as Pexhibit 1. Pexhibit 1 confirms that PW1 was born on 17th August 2003, thus PW1 fell within the age bracket envisaged under **section 8(3) of the Sexual Offences Act**.

27. The second issue for determination is whether there was penetration. The medical evidence, showing missing hymen coupled with presence of pus and epithelial cells confirmed that penetration had taken place. That was the expert opinion of PW3 who filled the P3 form for the complainant and also read through the treatment notes from Kanyakine District Hospital. PW1 herself also stated that during the incident the person had sex with her, though she did not say he inserted his penis into her vagina. That notwithstanding, I am satisfied that through the medical evidence, the prosecution proved the ingredient of penetration as provided under **section 8(1) and section 2 of the Sexual Offences Act, number 3 of 2006**.

28. The final and more troublesome issue is whether it is the appellant who committed the offence. I have turned the prosecution evidence and the evidence given by the defence over and over again and find that there are lingering doubts in my mind as to whether indeed the appellant is the one who defiled PW1. The appellant raised the defence of alibi to which there was no response from the prosecution. I also find that from PW1's own evidence and the connection she had with Doreen and Kinya, she could have landed in the hands of another man who could have defiled her before she was taken home on 21st March 2014. I also find so many glaring contradictions and inconsistencies in the prosecution case that they cannot be taken as immaterial and therefore of no consequence to the prosecution case.

29. It may very well be that this case was a frame-up, considering the undisputed fact that PW2 and the appellant were friends and that she had borrowed money from the appellant which she did not want to pay back. PW1 stated in her evidence that PW2 and the father of PW1 demanded Kshs.50,000/- from the appellant in order to drop the charges though she could not say whether the appellant gave out the money. PW2 denied the allegation but taking the totality of the evidence into account, there may have been such attempts. In my considered view, PW1 and PW2 were not credible witnesses.

Conclusion

30. In view of the fact that the prosecution did not prove all the three ingredients of the offence of defilement, I find there is merit in this appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence of twenty (20) years imprisonment.

31. Unless otherwise lawfully held, the appellant shall be released from prison custody forthwith.

32. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 15th day of July, 2019

F. GIKONYO

JUDGE

In the presence of

1. Otieno C for Muthomi for Appellant
2. Namiti for Respondent
3. Mwenda – Court Assistant