



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 64 OF 2018

WYCLIFFE NTHIWAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. A. Kibiru (Chief Magistrate) in the Chief Magistrate's Court at Machakos in Criminal Case S.O. 3 of 2017 delivered on 20th July, 2018)

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. A. Kibiru CM**, in Criminal Case **S.O.A No. 3 of 2017** delivered on **20.7.2018**. The Appellant was charged with the offence of defilement contrary to Section 8(1)(2) 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. He pleaded not guilty to both charges and was thus taken through a full trial. He was finally convicted of the main charge and sentenced to life imprisonment. The appellant was dissatisfied with the said conviction and sentence and has lodged the present appeal.

2. The appellant's case is twelve-fold. Firstly that the court erred in convicting the appellant on the basis of circumstantial evidence that was not sufficient to warrant a conviction Secondly that the learned trial magistrate misdirected himself in fact and law by not appreciating the evidence of the prosecution witnesses was insufficient to convict the appellant and that not a single witness saw the appellant committing the offence. Thirdly that the learned trial magistrate misdirected himself in fact and law by totally refusing to consider the testimony of the appellant and his narration of the sequence of events and the fact that the victim(minor) had injuries and was indeed sick (requiring medical attention) the night before the alleged offence occurred; Fourthly that the trial magistrate misdirected himself in law and fact by shifting the burden of proof to the appellant when the law required the prosecution to prove the appellant's guilt beyond reasonable doubt by expecting the appellant to offer a plausible alternative explanation. Fifthly, the learned trial magistrate erred in law and fact in relying on the prosecution evidence when the same was marred with inconsistencies and allusion to non-existing exhibits such as bed sheets and diapers stained with blood (which were never availed in court). Sixthly, that the trial court erred in law and fact in relying on the testimony of the prosecution witnesses when it was all hearsay and based on carefully crafted scheme to pin the appellant hence wrongfully convicting him. Seventhly, that the trial magistrate failed to find that the injuries suffered by the victim were inconsistent with injuries inflicted in the course of defilement and / or rape. For instance there were fractures on both femur bones and radius ulna, all of which are inconsistent with the offence of defilement and whose cause was not explained by the P3 form or the treatment notes. The 8th ground was that the magistrate failed to find that there was no penile penetration as required by law in proving the offence of defilement. He further assumed that mere injuries on the victim's genitalia meant that there was penetration by way of the appellant's penis. The 9th ground was that the learned magistrate failed to appreciate the importance of forensic evidence in that it would prove beyond doubt whether the appellant committed the offence or not. The 10th ground was that the magistrate failed to find that the absence of spermatozoa was sufficient indication that there was no penile penetration and the penetration could have been occasioned by any other organ or any other blunt object. The 11th ground was that the magistrate ignored the appellant's submissions in totality thus misdirecting himself and arriving at a wrong conclusion. The 12th ground was that the magistrate failed to find that the offence of indecent act with a child might have been proved rather than the offence of defilement. The injuries on the victim's vagina could have been caused by contact with any other organ of the appellant and not necessarily the penis. Counsel for the appellant submitted that the charge sheet was defective because the date indicated on the charge sheet as the date of commission of the offence indicated that the offence was committed four days after the appellant took plea on 17.2.2017 and that the evidence presented in court supports the commission of an offence on a date different from the one on the charge sheet and he argued that the same occasioned a miscarriage of justice. Counsel submitted that the entire prosecution evidence at trial was circumstantial in nature and none of the witnesses saw the appellant commit the offence. Learned counsel sought reliance in the case of **Rv Kipkering arap Koske & Another (1949) 16 EACA 135** where the court observed the need to consider if there were surrounding circumstances that destroyed the inference of guilt on the part of the appellant. Counsel submitted that the minor was ill the previous day and had injuries that Pw1 was tasked to explain and she stated that the minor had fallen down and got hurt. Learned counsel submitted that the prosecution failed to discharge its burden of proof. It was counsel's position that the prosecution evidence was marred by inconsistencies because Pw4 testified of pampers stained with blood but the same were never produced. Learned counsel posited that the evidence of Pw1 and Pw4 is hearsay; Pw2 opened the gate, Pw4 was not present and Pw3 only saw the minor crying and therefore the prosecution evidence ought to be disregarded. According to

counsel, the injuries suffered by the minor are not consistent with defilement and he drew wisdom from the case of **Bernard Kyalo Mayoli v R (2018) eKLR** where the court observed that penile penetration must be proven. He submitted that a three month old child has nothing to be penetrated and added that in terms of Section 36 of the Sexual Offences Act, forensic DNA ought to have been done. On the alternative charge, counsel submitted that the same might have been proved and not defilement hence the appellant be considered for the alternative charge.

3. The Respondent's counsel opposed the appeal and submitted that with regard to the defective charge sheet that there was no injustice occasioned because the appellant was aware of what charges he was facing. He cited Section 382 of the Criminal Procedure Code and the case of **Obedi Kilonzo Kevovo v R (2015) eKLR** and submitted that the defects are curable under Section 382 of the Criminal Procedure Code. On the issue of proof of the prosecution case, counsel submitted that the age of the victim was proven by the birth certificate; that the appellant was at the scene of crime because he spent at Pw1's home and Pw1 left for work and left the appellant behind with the victim and this was corroborated by the evidence of Pw3. That the aspect of penetration was proven by the evidence of Pw5 who examined the victim and the evidence of Pw3 that she saw blood on the diapers that the victim used. Counsel further argued that there was no need for forensic evidence because rape could be proved by oral evidence and circumstantial evidence as per the case of **Kasim Ali v R (2006) eKLR**. Counsel submitted that the circumstantial evidence points towards the guilt of the appellant and he was rightfully convicted.

4. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. Pw1 was MMM who testified that on 6/2/17 she was working at Machakos and staying at Kariobangi Estate and was in a relationship with the appellant (her boyfriend). She stated that around 8.00p.m she was with her child SM when the appellant came to visit and the gate was opened by AM. She testified that she went to work and left the child sleeping at home under the care of the house help by the name of Victoria Nduku. She told the court that she left the appellant in the house as the child who was three months old slept. She stated that her child had been born on 31/10/16 and she identified a Birth Certificate (MFI 1) that indicated the child's name as SM and her father as JMK. She told the court that the appellant called her afterwards talking in a shaken voice and who sought to inquire as to why the child was bleeding as there was blood in her faeces. She rushed to the house and found the house girl crying while the appellant was holding the child and she could see spots of blood. She stated that the appellant refused to hand over the child but she managed to get hold of her and noticed that the child had no diapers. She checked the child and on lifting the legs of the child, she saw blood from the vaginal area where there was a tear. She went on to add that the appellant sought to explain to her on what had happened but she ignored him and boarded a motorcycle with child as well as the house help and went to Shalom Hospital where the doctors examined the child and confirmed that she had been defiled. The child was treated and that the examination revealed that she had a tear on her private parts while an X-ray showed fractures on both thigh bones and sprain on left hand. It was her testimony that she stayed at Shalom Hospital for three weeks and was then referred to a specialist one Dr. Nguku who transferred the victim to Bishop Kioko Hospital. She produced the treatment card from Shalom Hospital (MFI 2), the treatment record from Bishop Kioko Hospital dated 17/2/17 (MFI 3), and the P3 form (MFI 4) dated 7/2/17 and filled on 28/3/17 at Machakos Level Five Hospital by Dr. Mutunga. She also produced the Post rape care form filled on 10/2/17 at Machakos Level 5 Hospital (MFI5). She testified that the appellant was her boyfriend with whom they had parted ways though they used to communicate occasionally. On cross-examination, she testified that it was not true that the child had a problem on the nose on 6th February, 2017 but however maintained that the house girl had dropped the child and that the child was not injured anywhere on 5/2/17.

5. PW2 was Annastacia Mutheu Mutunga who testified that on 6/2/17 at about 10 p.m. she opened the gate for a young man who entered the next house and she did not see him well. She testified that she saw PW1 leave for work at around 8.00a.m and her house help was washing clothes outside. She later heard a child crying and she came out and found PW1 holding the child and crying together with the house help and they refused to answer as to why the child was crying. PW1 indicated that they were going to hospital and she was able to see the man who had visited Pw1 the previous day. She later heard the man had defiled the child. On cross-examination, she testified that she had never seen the appellant before and did not know his relationship with PW1.

6. PW3 was VNM who testified that on 7/2/17, she was employed by Pw1 as a house help as a day scholar who would report at 7.00 am and leave at 5.00 pm. She told the court that she reported to work at 7.00am and found Pw1. It was her testimony that on Sunday she found Pw1 with a man whom she was told was the child's father and that his name was W. She went on to add that the appellant was not there on Monday the 6th February 2017. She told the court that Pw1 left for work at 8.00am and was informed that the appellant was left with the child. Further that when she went to the house, the appellant was sitting on the bed and had drawn the curtain and she left and returned to the house and heard the child crying while on the bed. The appellant asked her to find out what the problem was and she picked the child who started screaming and she noticed the diaper was loose and they contained faeces with blood. She went on to add that the appellant later called Pw1 who came and snatched the child from the appellant and checked the victim whom she found had a cut and was bleeding. The child was rushed to Shalom Hospital and the doctor confirmed that the child had been defiled and they returned to the house and found the appellant without a shirt and who was promptly arrested and taken to Machakos Police Station. She identified the birth certificate showing date of birth as 21.10.16(MFI-1), the treatment notes from Shalom Hospital and Bishop Kioko Hospital (MFI-2 and 3). She told the court that she was present when the P3 form was filled at Machakos Level Five Hospital and that she only met the appellant on 5th February 2017 and did not know him. On cross-examination, she denied that Pw1 had asked her to frame the appellant and that Pw1 did not tell her that the child was unwell when she left. She testified that she reported on the appellant to the police after leaving hospital. On re-examination, she testified that she did not see the child before Pw1 left for work and did not know what happened in the house the previous night.

7. Pw 4 was SMM who testified that on 7.2.17 at 10.00 am she got a call from a doctor at Shalom Hospital who informed her that her niece was ill and she rushed to the hospital where Pw1 informed her that Nthiwa had defiled her child. It was her testimony that she proceeded to the house with her husband, driver and Pw3 and found the appellant talking to Pw 2 and he had no shirt. She told the court that she had the appellant apprehended and took him to the police station. She knew the appellant but did not know if he had a relationship with Pw1. She told the court that after reporting to the police, they returned with a police officer to the scene where the bloodstained diapers and curtains were photographed. She stated that the minor was treated at Shalom Hospital and also treated at Bishop Kioko for the fracture. On cross-examination, she testified that she had seen the child the previous day around 4.00pm and was fine and she used to live with Pw1 after leaving her husband and she left Pw4's place after getting a job.

8. Pw 5 was Doctor John Mutunga of Machakos Level Five Hospital. He testified of the examination carried out on Splendor Mumbi aged three and half months who was alleged to have been defiled by someone known to her mother on 7.2.17. He observed that she had injuries of fracture of left radius ulna, both femurs and that her external genitalia was swollen, hymen was broken/torn and vaginal area had a tear, she had blood stains on her private parts and there were no spermatozoa. He told the court that an X-ray was conducted on the victim and

that the tear was repaired in theatre. He signed the P3 form on 28.3.17 which was duly stamped. He also had a post rape care form filled in respect of the minor and stated that he learnt that the child had been left with a house help who saw her bleeding. The said doctor stated that he learnt that the assailant had been a boyfriend to the mother of the victim. He told the court that the content of the post rape care form is consistent with P3 form (exhibit 5). He also received treatment notes from Shalom Hospital where the victim had been admitted and taken to theatre. The victim was also seen at Bishop Kioko Hospital as per discharge summary which he relied on while filling the P3 form. He told the court that the victim was booked vide OB NO.696214/17 at Machakos Level Five Hospital. He produced treatment records from Shalom and Bishop Kioko Hospital (Exhibit 2 and 3). He told the court that it took about one month from the date of the incident to filling P3 form but however according to the medical history, the injuries on the victim were consistent with the allegation of defilement and which were inflicted on 7.2.17.

9. Pw 6 was No.95632 Pc Eldah Onsono based at Machakos Police Station Child Abuse Section. She testified that on 7.2.17, she was in the office with colleagues when a group of four people came to the office around 9.00am and who informed her that they had brought a suspect who was subsequently locked in the cells. She proceeded to Shalom Hospital with a colleague called Purity Wangui where the victim is said to have been taken for treatment and while there she found Pw1 with the child undergoing treatment. She returned to the police station and recorded statements of Victoria the house help who had the child in the house together with the appellant who was claimed to have been in bed with the child and that the appellant had been a lover to the child's mother. She learnt further that the house help had been doing her chores outside the house as the appellant was in the house with the child when she heard the child crying and when she returned she found the appellant holding the child and that she immediately checked the pampers and found them bloodstained. Pw1 showed her a copy of birth certificate of the child born on 21.10.16. She established from the witnesses that the appellant was the person identified as lover to Pw1. She told the court that a post rape care form and P3 form were issued and filled at the hospital. She also got treatment records from Shalom and Bishop Kioko hospitals then preferred charges against the appellant. On cross-examination, she testified that she received complaint on 7.2.17 at about 7.00am while in the office and she also visited the scene of incident in search of evidence of the commission of the offence and it was up to the court to make a determination based on evidence presented. She told the court that according to Pw1, the child was left with him in bed and a housemaid who was in the house claimed that he child had been injured and was bleeding from her private parts. She told the court that there were blood-stained pampers with faeces. On re-examination, she testified that from investigations the child was defiled.

10. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. Section 211 of the Criminal Procedure Code was explained to the appellant and he opted to give sworn evidence. Dw1 was Wycliffe Nthiwa a hotel attendant who testified that on 9/2/17 he visited his former girlfriend Mildred Mutheu at Machakos Town and he arrived at 9.00am and found her with her child Splendor Mumbi. He testified that Pw1 had been married and separated with her husband a police officer as she alleged that he was not romantic. He told the court that she threw him out of the house and he returned to Kitengela and on the 6th February 2017 he received an apology message from Pw1 and when he received messages that she was ill, he decided to visit her at around 8.00pm and arrived at Machakos at 10.00pm. He told the court that Pw2 opened the gate at Pw1's house and found that Pw1 was well and who informed him that she had used sickness to get him to visit her. He stated that he noticed that the baby had a scar on her nose which was bleeding and Pw1 told him that the house girl had caused the child to fall. He told the court that at night the child was crying as though in pain and he later slept. He went on to add that on 7/2/17 Pw1 woke up early and prepared for work and they agreed that she takes permission to take the child to hospital. That at about 7.00am the house help arrived and was shown her daily chores by Pw1 and she started washing clothes outside the house about 2.5 metres. He stated that Pw1 left for work and left him with the baby in bed while the house help was washing clothes and as he was taking breakfast while seated on a chair he heard the baby make a loud sound and it appeared she was straining as if in pain and she then broke into painful cry. He called the maid to check the baby and the maid came and undressed the baby who was in diapers and overall only to find blood stained faeces, and on confirming she called Pw1 who came immediately and when she saw the blood stained faeces, she screamed while claiming that her child had been raped. Pw1 took the baby and rushed to a neighbour's door where he followed and about 10 tenants who ordered them to seek medication claiming it could be poisoning or diarrhoea but not rape. Pw 1 and Pw 2 went to hospital and he was left to keep an eye on the house. Pw1 later called him asking for Kshs.1800/- to pay hospital bills and he went to an M-pesa shop but before reaching there he saw Pw 3 and Pw 4 (sister to Pw 1) and Richard Musyoki and another man whom he later learned was Pw 4's husband who told him that he was needed at the hospital. He proceeded to the hospital but on the way they changed direction and took him to Machakos Police Station where he was locked from 7th to 13th February, 2017. He told the court that on 13th February, he was arraigned in court and charged. On cross-examination, he stated that he was at Pw1's place on 5th and 6th February and on 7th February he was left with the small child. On 6th the child was only nose bleeding and he did not confirm other injuries. He stated that on 5th February he left around midnight because Pw1 became violent and told him to leave. He stated that he did not have any employment card and had no witness from Galaxy Hotel. He stated that his phone was taken and he had not availed the text messages from Pw 1. He maintained that he could not tell how the injuries on the anus arose and that he was in good terms with Pw1.

11. Dw. 2 was Stephen Mwendo from Machakos. He testified that on the 7/2/17 while at Kariobangi area he left for work and returned around 10.00am and found a large group of people claiming that a child had been defiled. On cross-examination, he stated that he was not present when the incident happened. On re-examination, he testified that he was told by the ladies who checked the minor that there were blood stains in the faeces of the child. The trial court found that penetration had been proven by the Pw5 and that there was overwhelming evidence that the appellant committed the offence and that his submission on the absence of spermatozoa could not negate penetration and because the child was left alone with the appellant, and no other explanation being offered, the appellant definitely committed the offence. He relied on the case of **R v Nyamwai Muanga Kanyae & Another (2005) eKLR** where the court found that the appellant did not explain what happened to the child and as such convicted him of defilement and sentenced him to life imprisonment.

12. Having looked at the Appellant's and Respondent's Written Submissions as well as the grounds of appeal, the following are the issues for determination:-

a. Whether or not the Charge Sheet was defective; and whether the same occasioned injustice to the appellant

b. Whether or not the Prosecution had proved its case beyond reasonable doubt.

c. What orders the court may issue

13. The Appellant contended that the charge sheet was defective and that the date indicated in the charge sheet and the evidence led before the court differ. The state submitted that the appellant was not prejudiced and or the same occasioned no miscarriage of justice. Counsel argued that the appellant was present in court and he was aware of the charges he was facing. However according to the record the appellant did not raise an objection regarding the charges that he faced and duly proceeded with the trial from start to finish.

14. Section 134 of the Criminal Procedure Code provides 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.”

15. From the above section, I am satisfied that the charge sheet was defective though the appellant was aware of the nature of the charge facing him and I find that there was no injustice occasioned to the appellant because the defect does not go to the root of the case and it can be remedied under Section 382 of the Criminal Procedure Code. Further the appellant in his evidence confirmed having been present at the scene and also confirmed the date of the incident as 7th February 2017 and hence the date indicated on the particulars of the charge must have been typographical error which did not prejudice him at all.

16. On the issue of proof of the prosecution case, the Appellant submitted that no one witnessed the appellant commit the offence. The prosecution submitted that the age of the victim was proven by the birth certificate; that the appellant was at the scene of crime because he spent at Pw1's home and Pw1 left for work and left the appellant behind with the victim and this was corroborated by the evidence of Pw3. That the aspect of penetration was proven by the evidence of Pw5 who examined the victim and the evidence of Pw3 that she saw there was blood on the diapers that the victim used. Counsel further argued that there was no need for forensic evidence because rape could be proved by oral evidence and circumstantial evidence as per the case of **Kasim Ali v R (2006) eKLR**. Counsel submitted that the circumstantial evidence points towards the guilt of the appellant and he was rightfully convicted. A perusal of the List of Exhibits in the Trial Court showed a birth certificate as evidence of age, a P3 form as evidence of penetration as well as a PRC form that curiously is not stamped. There are no treatment notes though Pw5 referred to them; what is on record are letters from respective hospitals. There is also a laboratory report that indicated that the appellant was Hepatitis B positive and that the P3 form indicated that the victim had fractures. There is no eye witness account of the incident.

17. The appellant has not disputed that he was at the scene on the material day and the age of the victim has easily been proven. However the appellant denied commission of the offence and he has imputed that he was framed because he noticed that the victim had a scar on her face and she was crying in pain even during the night when the alleged offence took place. The trial court relied on the P3 and PRC forms to prove that there was penetration.

18. The prosecution has the burden of proving the case against the appellant beyond reasonable doubt. The burden does not shift to the appellant who is only convicted on the strength of the prosecution case and not because of weaknesses in his defence. (See *Ssekitolesko v. Uganda [1967] EA 531*). By his plea of not guilty, the appellant joined issue on each and every essential ingredient of the offence with which he was charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

19. The evidence as narrated by Pw1, Pw2, Pw3 and Pw4 is largely hearsay and violates the provisions of Section 63 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. In *Junga v R [1952] AC 480* (PC) it was held that the trial magistrate had before him hearsay evidence of a very damaging kind. Without the hearsay evidence the court below could not have found the necessary intent to commit a felony and that being the case the Court of Appeal allowed the appeal against conviction. I find that the evidence relied on by the trial court is not evidence capable of sustaining a conviction and such evidence can only corroborate other credible evidence. There is no other direct and cogent evidence pointing irresistibly to the appellant as the defiler.

20. There is circumstantial evidence that the appellant was left alone with the victim and this was used to pin him. However the appellant cast doubt upon the prosecution case by testifying that the child had a scar and was writhing in pain on the material night. There is no medical evidence to explain the scar. There is evidence from the P3 form that the victim had a fracture and I discern that the fracture was occasioned before the appellant was lured to the crime scene. It is quite unfortunate that he was not able to smell a rat that he was being led into a trap. After having been thrown out of the home on 5th and called back on the night of the offence, there seems to be a sinister motive behind the same. Indeed the mother of the complainant confirmed that she phoned the appellant and requested him to come over as she was unwell only to inform him that she had lied about the illness as she had used it as a bait to invite him over for a sleep over at her place.

21. In the instant case, there is no direct or cogent circumstantial evidence pointing irresistibly to or showing that it is the appellant who caused the victim the injuries in her genitalia. I am faced rather with weak evidence of reports made to Pw1, Pw3 and Pw4 which evidence is sought to be corroborated by the P3 form and Prc form of the victim, and such evidence cannot stand on its own to sustain a conviction. In the absence of substantive evidence, reliance on evidence of the quality I have evaluated above in order to establish one of the substantive elements of the offence such as this, would in my view be an affront on the integrity of administration of criminal justice. It is unsafe to convict on the basis of such evidence. The evidence available is incapable of proving the ingredient of penetration allegedly occasioned by the appellant beyond reasonable doubt. There were other injuries such as fractures on the victim which were not related to the alleged defilement. The mother of the victim confirmed that the house girl had earlier left the baby to fall down and got injured. Again the prosecution did not see it fit to produce the blood stained diapers and bed sheets as exhibits and also failed to conduct a DNA analysis of some of the exhibits recovered and tally with those recovered from the appellant so as to link him to the crime as there was no direct evidence received from the victim.

22. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable

doubt, I find that the evidence on record is not satisfactory to convince this court that the offence was committed. It is possible that the injuries were caused by something else other than penile penetration. The diapers used to strap the victim could as well have contributed to the injuries. The trial court's conviction of the appellant was therefore unsafe in the circumstances. It transpired that the appellant and mother to the victim had earlier quarreled as they had some disagreement and thus the appellant's claim of being set up is not far- fetched.

23. On the issue of the orders that the court may grant, the respondent has supported the finding of the trial court. However having found that the prosecution has not proved the case against the appellant beyond reasonable doubt, this court disagrees with the conviction and sentence that was meted upon the Appellant by the Trial Court. I find the appeal has merit and is allowed. The conviction by the trial court is quashed and the sentence set aside. The appellant should be set free forthwith unless he is being held for other lawful reasons.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2019.

D. K. Kemei

Judge