



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 136 OF 2018

ALEX WATILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court

at Eldoret (Hon. S. Telewa, RM) delivered on 19 December 2018 in Eldoret

Chief Magistrate's Criminal Case No. 2927 of 2012)

JUDGMENT

[1] This appeal arises from the Judgment of the Resident Magistrate in **Eldoret Chief Magistrate's Criminal Case No. 2927 of 2012: Republic vs. Alex Watila**. The Appellant was the accused in that case. He was charged with two substantive counts of defilement and two corresponding alternative counts of indecent act with a child. In the first substantive count, the Appellant was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the **14 June 2012** at Kingongo Village in Eldoret West District within Rift Valley Province, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of T.V.A a child aged 13 years.

[2] In the alternative, the Appellant was charged with the offence of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. It was alleged that on the **14 June 2012** at Kingongo Village in Eldoret West District within Rift Valley Province, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of T.V.A a child aged 13 years.

[3] In the second substantive count, the Appellant was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars alleged that on the **19 June 2012** at Kingongo Village in Eldoret West District within Rift Valley Province, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of T.V.A a child aged 13 years.

[4] In the alternative to the second count, the charge itself was not stated, but particulars were supplied, alleging that on the **19 June 2012** at Kingongo Village in Eldoret West District within Rift Valley Province, the Appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of T.V.A a child aged 13 years.

[5] The record of the proceedings of the lower court shows that the Appellant denied the charges and, that at his trial, the Prosecution called 3 witnesses in proof of its allegations; and that the Appellant was also given an opportunity to adduce evidence in his own behalf. The Learned Trial Magistrate, in a Judgment delivered on **19 December 2018**, came to the conclusion that:

“Though her evidence has not been corroborated. I am guided by the provision in the sexual offences Act. I am convinced in mind that the accused person is the one who defiled the minor, he used to take to her money sent through him by her father, in the process he got an opportunity to defile the minor. The accused in his defence explained to this court that he had been threatened by the complainant's aunt one Lilian, but there was evidence to that effect, there is no evidence that he reported to the police that he had been threatened. I am convinced that the accused person committed the said offence.”

[6] Consequently, she sentenced the Appellant to 20 years' imprisonment on **20 December 2018**. Being aggrieved by his conviction and sentence, the Appellant lodged this appeal in respect thereof on **21 December 2018** on the following grounds:

- [a] The Learned Magistrate erred in fact and in law in convicting the Appellant on the evidence before her;
- [b] The Learned Magistrate erred in relying on the Prosecution's evidence which was weak and incapable of sustaining a conviction;
- [c] That the Learned Magistrate erred in law and fact in convicting the Appellant on a charge of defilement yet the Prosecution's evidence and in particular the medical evidence tendered by **PW2**, the doctor, was scanty, unsatisfactory, speculative and contradictory in material particulars and when the medical evidence tendered could not certainly conclude whether the complainant was actually defiled and if so when the alleged defilement took place and when the medical evidence tendered did not link the Appellant to the alleged offence or at all;
- [d] The Learned Magistrate erred in law and in fact in failing to give her reasons on why she believed the Complainant was truthful and relying solely on her testimony contrary to the provisions of **Section 124** of the **Evidence Act**;
- [e] The Learned Magistrate erred by failing to give the Appellant the benefit of the doubt considering the flaws in the investigations and the generality of the circumstances of the case;
- [f] The Magistrate misconducted herself by failing to abide by case law and failing to record reasons for her finding;
- [g] The Learned Magistrate failed to realize the glaring contradictions and unfilled gaps in the evidence of the Prosecution;
- [h] The judgment of the Learned Magistrate is against the weight of evidence;
- [i] The Learned Magistrate erred in sentencing the Appellant for an offence that was not proved; and
- [j] That the Learned Magistrate erred in law in failing to give due and/or adequate consideration to the Appellant's defence.

[7] It was in the light of the foregoing grounds that the Appellant prayed that his appeal be allowed, and the conviction and sentence passed against him set aside. The appeal was urged on his behalf by **Ms. Khayo, Advocate**, vide the written submissions dated **10 June 2019** and filed herein on **12 June 2019**. Counsel reiterated the Appellant's contention that the Prosecution evidence was marred with a lot of contradictions as to the date of the offence and pointed out that the minor gave conflicting dates, namely **14 June 2012, 19 June 2012** and **20 June 2012** as the dates on which the defilement took place; yet she was also emphatic that the incident occurred only once. Counsel urged the Court to note that the Prosecution failed to have this discrepancy cleared in re-examination or thereafter. She pointed out that **Dr. Timet (PW2)** also confirmed that the minor was not aware of the date of the alleged defilement. Thus, the doctor was unable to tell exactly when the defilement took place and was not sure as to whether or not the alleged defilement took place.

[8] Counsel further submitted that there were significant contradictions in terms of the history presented to the doctor by the minor. She drew the attention of the Court to the P3 Form which was produced before the lower court as the **Prosecution's Exhibit No. 1** wherein the minor is reported to have told the doctor that, on a date she could not recall, the perpetrator went to their home and dragged her by force and took her to a maize plantation and defiled her; and that he had defiled her several times before. According to Counsel, these are fundamental inconsistencies which the Learned Trial Magistrate ought to have considered and taken a position on, as they have the effect of denting the Prosecution's case.

[9] In addition to the foregoing, Counsel for the Appellant took issue with the fact that the trial court believed the uncorroborated evidence of the minor without stating on record her reasons for so doing. She further submitted that the medical report (**the Prosecution's Exhibit No. 1**) could not provide the necessary corroboration as it was deficient in terms of the date and time of the offence; and that, although the minor was found with healed hymenal tears, the doctor did not indicate the age of the injury and the probable type of weapon that caused the injury. In her submission, there was no corroboration of the minor's assertion that the offence was committed by the Appellant.

[10] Learned Counsel for the State, **Ms. Mumu**, resisted the appeal contending that the Prosecution proved its case before the lower court beyond reasonable doubt. She, thus, urged the Court to find that credible evidence was thus placed before the lower court to prove the minor's age and the fact of defilement. She drew attention to the minor's Certificate of Birth, produced before the lower court as the **Prosecution's Exhibit No. 2**, indicating that the minor was born on **13 August 1998**. It was further her submission that the Prosecution had demonstrated that, as a neighbour, the Appellant was well known to the minor; and therefore, that the lower court committed no error in accepting and relying on the minor's evidence which connected the Appellant with the crime. There was also the **Kshs. 50/=** note which was exhibited before the lower court; and the explanation proffered by the Complainant was that it was given to her by the Appellant after the defilement to mollify her and prevent her from reporting the incident to anyone. Thus, the stance of the State was that the Prosecution had proved its case beyond reasonable doubt and that the Appellant's defence was considered by the trial court and found to be a mere denial which did not shake the Prosecution case. She concluded her submissions by stating that, since the sentence was legal, the appeal is completely lacking in merit and ought therefore to be dismissed.

[11] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am cognisant of the requirement that, in a first appeal such as this, the Court is under obligation to re-evaluate the evidence adduced before the lower court and come to its own conclusions thereon, but noting to give allowance to the fact that it did not see or hear the witnesses. (See **Okeno vs. Republic [1972] EA 32**). I have therefore perused the entire record of the lower court in **Eldoret Chief Magistrate's Criminal Case No.2927 of 2012** and note that the Prosecution called three witnesses, namely, the minor, the doctor and the Investigating Officer.

[12] The minor testified as **PW1** before the lower court; and her evidence is that her parents were then living in Mombasa; having left her and her brother, Bill, under the care of the Appellant, who was their neighbor. She told the lower court that she was at home on the **14 June 2012** when the Appellant went there to find out whether they had food for the day; and that on learning that they had ran out of funds, the Appellant left, promising to contact her father and inform him of the situation. She further stated that she was then standing at the door to the

bedroom; and that the Appellant tried to grab her but she raised alarm and he left.

[13] It was further her testimony that the Appellant returned the same day and called her to his house; and that on going there at about 5.00 p.m., he locked the house; and that he proceeded to defile her. She added that the Appellant then cautioned her not to tell anybody. Then, on **15 June 2012**, she woke up in the morning and went to school with a view of reported the incident to her teacher; but did not find her. She then went to the home of her aunt, **R M**, and reported what the Appellant had done to her; and it was her aunt who took steps to report the matter to the Children's Office.

[14] **PW1** further testified that the Appellant visited their home on **2 July 2012** and gave her **Kshs. 50/=** and told her not to tell anybody about it. She again brought it to the attention of her aunt and the money was handed over to **Baharini Police Post** where the incident had been reported. She confirmed that she was issued with a P3 Form and that she thereafter went to **Moi Teaching and Referral Hospital** for examination and treatment. The lower court record shows that the minor identified both the P3 Form she was issued with and the note that the Appellant gave her.

[15] The second Prosecution witness before the lower court was **Dr. Timet** of **Moi Teaching and Referral Hospital**, who testified as **PW2** on behalf of **Dr. Kibet**. **PW2** explained that **Dr. Kibet** had left for the United States of America for further studies. Thus, **PW2** produced the P3 Form and confirmed that **Dr. Kibet** examined the minor herein on **3 July 2012**; and that she had no body injuries apart from hymenal tears in her genitalia. In cross-examination, **PW2** conceded that she could not tell exactly when the penetration that caused the tears happened; and added that **Dr. Kibet** relied on the history given to her by the minor as to what may have caused the tears.

[16] The Investigating Officer, **PC Moses Lirembe (PW3)** as the last witness, testified that he was transferred to **Baharini Police Station** on **27 July 2015**; and that the Appellant's file was one of the files that were handed over to him for purposes of facilitating prosecution, as the matter was already pending before court. He added that his duty was mainly to trace and bond witnesses; and that, in spite of his best efforts, the witnesses could not be found. He was thereafter transferred to **Eldoret Police Station** and had to hand over the file to the Officer in Charge, Baharini Police Station. He produced the minor's Certificate of Birth before the lower court as the **Prosecution's Exhibit No. 2**; and with that the Prosecution closed its case.

[17] On his part the Appellant made a sworn statement on **16 July 2018** and conceded that the Complainant's father is his neighbor; and that he was at the material time working in Mombasa. He told the lower court that because the Complainant had a bad relationship with her step-mother, she was left by her father to stay at their rural home with her brother; but that the father would send money for their upkeep through him. He explained that he tried in vain to broker reconciliation between the Complainant and her step-mother; and that there was a time the mother of the Complainant, who is the first wife, warned him of dire consequences for his efforts. He further stated that three days before his arrest, he was again threatened on the telephone by the Complainant's aunt, whose name he gave as **R**. Thus, the Appellant denied the allegations against him and concluded by stating that all he did was to held his neighbour's children.

[18] The Appellant called his neighbor, **Chemwinos (DW2)** as his witness. **DW2** also testified that the Complainant's father is both a neighbour and family friend; and that he lived in Mombasa with his second wife, leaving the Complainant and her sibling to fend for themselves at his rural home. He further confirmed that the Complainant's father used to send money for the children's upkeep through the Appellant; and that since the Complainant had a poor relationship with her step-mother, her father had asked for the Appellant's intervention in terms of counselling the girl, but that she did not heed the counsel.

[19] The foregoing being the evidence presented before the lower court, the question to pose is whether it can be said that the Prosecution proved their case beyond reasonable doubt. The relevant provision of the law for purposes of the two Main Counts of defilement, of which the Appellant was convicted is **Section 8 of the Sexual Offences Act**. It stipulates that:

- (1) **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;**
- (2) **A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
- (3) **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.**
- (4) **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[20] In the premises, it was incumbent on the Prosecution to prove the following ingredients of the offence set out in the two Main Counts beyond reasonable doubt:

- [a] the age of the minor
- [b] Penetration of the minor's genital organ;
- [c] Whether the penetration was committed by the Appellant.

[a] On the Age of the Complainant:

[21] For purposes of the **Sexual Offences Act**, a minor is defined in **Section 2** thereof as read with **Section 2** of the **Children Act, No. 8 of 2001** to be any human being below the age of 18 years. Before the lower court, evidence was called from the Complainant to the effect that

she was 13 years at the time of the incident. In addition to her evidence, her Certificate of Birth was produced by **PW3** and marked the **Prosecution's Exhibit 2**. According to that document, **PW1** was born on **13 August 1998**. It therefore confirms that the minor was yet to attain 14 years; and was therefore, for all practical purposes a child. Indeed, **Rule 4** of the **Sexual Offences Rules of Court Rules** recognizes 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."

[b] On Penetration:

[22] On penetration, the Learned Trial Magistrate believed the testimony of **PW1**, that she had been subjected to sexual intercourse. She also relied on the medical evidence adduced by **PW2**, who noted that the minor had healed hymenal tears at position 3 and 8 o'clock, suggestive of vaginal penetration. Although the evidence of **PW1** was discounted by Counsel for the Appellant in that the Learned Trial Magistrate did not give her reasons for acting on it without corroboration; and therefore contravened **Section 124** of the **Evidence Act**, the requisite corroboration was furnished thereto by the medical evidence of **PW2**, which demonstrated beyond reasonable doubt that penetration, in the case of **PW1**, had indeed taken place; and that this was the only logical explanation for her healed hymenal tears. In his defence, the Appellant denied that he defiled the girl and that he was simply being framed for an offence he did not commit. Hence, the Prosecution contention that **PW1** was defiled was not displaced by the defence.

[23] I note that there appears to be a misdirection at page 42 of the Record of Appeal, in that at lines 13 and 14 thereof, the Learned Trial Magistrate purported to rely on the evidence of the doctor on the basis that she was 100% sure that the minor had been defiled. First and foremost, **Dr. Timet (PW2)** did not examine or fill the **Prosecution's Exhibit 1**. She made it clear that she attended court to testify on behalf of **Dr. Kibet**; and therefore, could not have been categorical as to whether or not defilement occurred. Secondly, the evidence of **PW2** in cross-examination was that:

"...The evidence suggests defilement. I am not 100% sure that defilement occurred. We based on what the minor said..."

[24] Nevertheless, upon a re-evaluation of the Prosecution evidence, as taken and weighed side by side with the Appellant's defence, I am satisfied that penetration was proved beyond reasonable doubt; and that the trial court cannot be faulted for coming to that conclusion.

[c] On Whether the offensive act of penetration was committed by the Appellant:

[25] The bone of contention in this appeal is the question whether the evidence presented before the lower court was sufficient to prove beyond reasonable doubt that the minor was defiled by the Appellant as alleged. There is credence in the argument that the Appellant is a person well known to the Complainant, granted that the Appellant is not only one of their neighbours but a person under whose charge the Complainant's father had committed her and her brother. The Appellant admitted as much, as did **DW2**. However, there are notable discrepancies in the evidence presented by the Prosecution before the lower court which required consideration and resolution. First and foremost is the confusion as to the date of the offence. **PW1** mentioned the date of **14 June 2012** as the date in question; yet she initially stated that:

"...the accused told me he will call my father, then I was in the door to the bedroom. He tried to grab me but I raised alarm. He told me that I should not make noise against when somebody is greeting me. He left the house. The following day I did not go to school..."

[26] This was in relation to the time period between 3.00 p.m. and 4.00 p.m. Then later in her evidence she said the Appellant called her to his house towards 5.00 p.m. and locked the door and proceeded to defile her before sending her away; and that it was not until **19 June 2012** that she reported the matter to her aunt. Thus, in her evidence in chief, she only mentioned one incident of defilement. In cross-examination, however, the minor had the following to say:

"...The accused defiled me twice that is on 19.6.2012 and 20.6.2012. He did not do anything on 14.6.2012, there is nothing. The accused ...defiled me once..."

[27] It is noteworthy too that when the Complainant presented herself to **PW2** for examination, the history provided by her was totally different. In the P3 Form marked the **Prosecution's Exhibit No. 1**, the doctor stated the general medical history thus:

"...on a date she cannot recall, the alleged perpetrator came to her home, dragged her out, took her to a maize plantation, removed her panty and defiled her. She reports that she has defiled her several times before..."

[28] I would agree with the submissions by the Appellant's Counsel that these were fundamental discrepancies that required specific mention by the trial magistrate; as well as a justification as to why she believed the minor; granted the line of defence taken by the Appellant before her. In **Ndungu Kimanyi vs. Republic, Criminal Appeal No. 22 of 1979** it was aptly stated by the Court of Appeal that:

"...The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence..."

[29] Lastly, in a case such as this where the Appellant was faced with multiple counts in the same Charge Sheet, it was imperative for the Learned Trial Magistrate to specify which charges the Appellant had been convicted of. **Section 169(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, is explicit enough on this. It provides that:

“In the case of a conviction, the Judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

[30] Hence, in **James Nyanamba vs. Republic [1983] eKLR**, the Court of Appeal held that:

“The trial magistrate after outlining the evidence of the prosecution witnesses stated that he believed their evidence but gave no reason for believing it apart from saying that they had no reason for lying. The judgment failed to comply with the provisions of section 169(1) of the Criminal Procedure Code which requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision...Again the magistrate transgressed subsection (2) of Section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted.”

[31] In the light of the foregoing discrepancies, it cannot be said that the Appellant’s conviction and the ensuing sentence were based on sound evidence. Accordingly, I would allow the appeal, quash the conviction recorded on **19 December 2018** and set aside the sentence of 20 years imprisonment meted out against the Appellant on **20 December 2018**. It is accordingly ordered that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2019

OLGA SEWE

JUDGE