



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO.83 OF 2017**

**ALBANUS KIOKO KINYAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against the Judgement by Hon. A. Gilbert Shikwe (Resident Magistrate*

*in Kithimani Principal Magistrate's Court in S.O. Case No. 21 of 2015*

*delivered on 21<sup>st</sup> April, 2016)*

**JUDGEMENT**

1. The Appellant herein **ALBANUS KIOKO KINYAI** had been charged before Kithimani Law Courts with a main charge of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 21<sup>st</sup> day of February, 2015 Yatta Sub-County within Machakos County intentionally caused his penis to penetrate the vagina of SMM a child aged 15 years. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on the 21<sup>st</sup> day of February, 2015 Yatta Sub-County within Machakos County, intentionally touched the vagina of SMM, a child aged 15 years with his penis.

2. The Appellant was convicted on the main count and sentenced to serve 20 years imprisonment. The Appellant is now aggrieved and has raised the following grounds of appeal:-

***(a) That the learned trial magistrate erred in both law and facts when he convicted the Appellant on evidence which was full of contradictions and inconsistencies.***

***(b) That the learned trial magistrate erred in both law and fact by infringing on the Appellant's fundamental rights requiring a fair trial.***

***(c) That the learned magistrate erred both in law and fact when he convicted the Appellant without ensuring that caution was administered before such conviction.***

***(d) That the learned magistrate erred in both law and fact when he denied the Appellant an opportunity to mitigate.***

3. This being a first appeal, the duty of this court is well settled namely to analyze and re-evaluate the evidence afresh and to come to its own conclusion and to bear in mind that it had no opportunity to see or hear the witnesses testifying.

4. The Complainant (PW.1) started off by stating that she was a pupil at [Particulars Withheld] Primary School in class eight and that she was aged 15 years, having been born on the 31/10/1998 as per the birth certificate shown to her. She testified that her encounter with the Appellant started on the 21/02/2015 when she met him on the way and who held her hand. She was later sent by her mother to go fetch some banana leaves from her grandmother's place when she met the Appellant again and who dragged her to his house but she managed to wrench free and went home. She stated that while cooking supper in the family kitchen, the Appellant turned up and took her to his house where he defiled her and the following day he took her to a nearby house. She was later traced by her parents who took her to Yatta Police Station and Matuu Hospital. On cross – examination, she stated that the Appellant had covered her mouth and thus she could not scream for help.

5. JMK (PW.2) was the father to the complainant. He stated that he had stepped out of his house to go visit his mother and had instructed

the complainant to prepare supper and on returning back he found the complainant missing. He embarked on a frantic search for her and he later received a tip off that the girl had been cited in one of the houses within the neighbourhood. He proceeded there and met the Appellant who led him to where the girl was. It was at that time that the Appellant informed him he wanted to marry the girl and immediately broke into a run and escaped.

6. MNM (PW.3) stated that the complainant was her daughter. She further testified that she and her husband had gone to visit the complainant's grandmother and on returning back found that the girl was missing. They began searching for her and it was the Appellant who led them to where the girl was traced.

7. Benjamin Maingi (PW.4) was a Senior Clinical Officer at Matuu Level Four Hospital. He carried out an examination on the complainant and noted that the hymen was torn but not fresh and there was white vaginal discharge but no spermatozoa. As far as he was concerned he maintained that clinically there was no evidence of defilement.

8. Betty Kigen (PW.5) was the investigating officer in the matter. She stated that a report had been made to the police. She received the complainant and referred her to hospital. She further stated that the Appellant who had escaped was later arrested and charged. On cross – examination, she stated that the Appellant had been found while in company of the missing girl.

9. The Appellant was put on his defence and he tendered an unsworn statement. He stated that he reported from his usual casual job in the evening when some people who were not known to him ordered him to show them the whereabouts of their daughter. He maintained that he did not know the girl or her whereabouts. He further added that he was attacked by thieves on 4/4/2015 and who stole his money and that he did not know why he was beaten.

10. Parties agreed to canvass the appeal by way of written submissions. It was submitted by the Appellant that evidence of a broken hymen is not conclusive proof of penetration and hence the prosecution had not proved its case beyond reasonable doubt. The Appellant sought reliance in several cases namely:

- (i) **Karisa Gona Katana =Vs= Republic [2015] eKLR**
- (ii) **Hillary Nyongesa =Vs= Republic [2010] eKLR**
- (iii) **Martin Charo =Vs= Republic [2016] eKLR**
- (iv) **Kaingu alias Kasomo =Vs= Republic - C.O.A No. 504 of 2010.**

On the other hand Mr. Machogu learned counsel for the Respondent submitted that the case had been proved against the Appellant beyond reasonable doubt since all the ingredients of the offence namely age of the victim, penetration and identification of the Appellant as the penetrator were clearly established. As regards the age, counsel submitted that the complainant's age at the time of the offence was 16 years and not 15 years as stated on the particulars of the charge and in the evidence. Counsel added that the error in specifying the correct age is curable under Section 382 of the Criminal procedure Code as the same did not occasion any injustice or prejudice to the Appellant in any way as he clearly understood the charge and made a defence. Counsel further submitted that the aspect of penetration and identification of the Appellant as the perpetrator were proved beyond reasonable doubt. Finally counsel submitted that in view of the age of the victim being 16 years, the sentence of 20 years should be substituted with a sentence of 15 years as provided for under Section 8(4) of the Sexual Offences Act. The cases of mark **Oiruri Mose =Vs= Republic [2013] eKLR** and **Kassim Ali =Vs= Republic [2006] eKLR** were cited.

11. I have considered the evidence presented before the trial court and the rival submissions by the parties herein. The main issue for determination is whether the case had been proved against the Appellant beyond the required standard of proof. The key ingredients of the offence to be proved by the Respondent are age of the complainant, proof of penetration and positive identification of the assailant.

12. On the aspect of the age of the victim, she testified that she was aged 15 years old. She identified a birth certificate which indicated her date of birth as 31/10/1998. The particulars of the charge put her age as 15 years old and that the incident is said to have occurred on the 21/2/2015. The father to the complainant produced the birth certificate as exhibit No.1. It would appear that at the time of the alleged offence the complainant was aged 16 years 8 months and ten days since her 17<sup>th</sup> birthday would have been the 31/10/2015. Hence the complainant was aged about 16 years and eight months at the time of the alleged defilement. This then would appear to differ with what is indicated on the charge sheet. Indeed the issue of age is quite crucial in sexual offences as the same would establish that the victim was a minor at the time of the alleged incident and also to guide the court during sentencing upon conviction. This was the position of the Court of Appeal in the case of **Hillary Nyongesa =Vs= Republic [2010] eKLR** when it held as follows:

***“Age is such a critical aspect in sexual offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim”.***

The above position was also restated by the Court of Appeal at Malindi in the case of **Kaingu alias Kasomo =Vs= Republic [2010] eKLR** when it held as follows:-

***“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible offence for the sentence to be applicable.***

As the correct age of the complainant does not tally with that indicated on the particulars of the charge sheet, the issue of concern is whether

the particular charge is defective. Section 134 of the Criminal Procedure Code spells out what constitutes a good charge 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.”***

Even though the correct age of the complainant was not indicated on the particulars of the charge sheet, I find that did not in any way make it defective as the Appellant understood the charge he was facing and offered an explanation during plea taking and also tendered a defence after he was put on his defence.

He also cross – examined the witnesses at length and it was thus obvious that he had understood the charges he faced. The difference in the age of the victim on the particulars of the charge sheet and the actual age did not prejudice the Appellant as it is only relevant during sentencing after conviction. In any event the Appellant handled the matter and tackled the witnesses comprehensively and is deemed to have known the kind of charges he faced. I find the error in specifying the correct age on the particulars of the charge curable under Section 382 of the Criminal Procedure Code as the irregularity did not occasion a failure of justice. I am satisfied that the prosecution established this ingredient of the offence as the age of the victim clearly left no doubt that she was a minor within the meaning of the Children’s Act No.11 of 2001 for she was below 18 years at the time of the incident.

13. As regards the issue of the identity of the perpetrator, the complainant gave a chronology of how she had met the Appellant several times earlier in the day and who had attempted to seduce her. The complainant stated that the Appellant, during the first encounter, held her hand and dragged her to his house but she managed to break free and went home. She maintained that the appellant later came at night to her home and took her to his house where he defiled her. The complainant knew the Appellant prior to the incident and she also had an encounter with her and hence there was no issue of mistaken identify. The complainant’s father stated that he went in search of her at the home of the Appellant and met him and who led him to where the girl was rescued. Further it was the testimony of the father of the complainant that the Appellant not only led him to where the girl was but also requested him for his daughter’s hand in marriage. The Appellant’s defence consisted of mere denials such as that he did not know the complainant. I find the Appellant’s defence of not knowing the complainant not convincing. I am satisfied that the Appellant was properly identified as the perpetrator.

14. As regards the issue of penetration, Section 2 of the Sexual Offences Act defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another. The complainant testified that earlier in the day, she had met the Appellant twice and who attempted to have sexual intercourse with her but she had rebuffed his advances. However, the Appellant is reported to have visited her at her home at night and took her to his house where he defiled her. She maintained that they had sex that night and the following day the Appellant took her to a near by house from where she was rescued by her father. The trial magistrate in his judgement relied on the provisions of Section 124 of the Evidence Act to convict the Appellant when he ruled as follows:-

***“..... in spite of the findings by the clinical officer, I am satisfied that PW.1 is speaking the truth that the accused defiled her. There is suspicion in my mind that the persistence by the accused in wooing her caused her relent and accept his advances with the result that the sex may have been consensual. However, the accused as the adult should have been aware that the minor is incapable of giving consent legally speaking. .... I am satisfied that there is strong circumstantial evidence that the accused did indeed defile the minor. There is no intervening circumstances to break the inference of guilt in my view.”***

The trial Magistrate’s findings appear to differ with those of the clinical officer. The said clinical Officer Benjamin Maingi (PW.4) examined the complainant on 24/2/2015 about three days after the alleged incident and noted that the hymen was torn and not fresh. There was white vaginal discharge but pregnancy and sexually transmitted infections tests turned negative. According to the doctor he formed the opinion that clinically there was no evidence of defilement. The P.3 form produced indicated that there was no spermatozoa and there was no signs of a struggle with no evidence of defilement clinically. The doctor’s verdict appears to be different from what the complainant stated in her evidence that the Appellant had sex with her in the night. On the other hand the Appellant vehemently denies the assertion. Clearly it is the story of the complainant against that of the appellant since the evidence of the doctor has ruled out any signs of defilement. Indeed in order to secure a conviction for the offence of defilement under Section 8(1) of the Sexual Offences Act the prosecution must establish that the person has committed an act which causes penetration with a child. The trial magistrate appears to have believed the evidence of the complainant that she was defiled by the appellant and that the court felt satisfied that the victim was telling the truth. The learned Magistrate relied on the case of **Mohamed =Vs= Republic [2006] 2KLR 138** wherein the court of Appeal held as follows:-

***“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of sexual offence is a child of tender years if it is satisfied that the child is truthful.”***

The above decision seems to be in tandem with the provisions of Section 124 of the Evidence Act as follows:-

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (CAP 15), where the Evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for the offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

Even though the complainant maintained that she had been defiled by the Appellant, I find the whole evidence presented seems to cast some doubt as to whether the alleged defilement took place. The complainant stated that when she met the Appellant a second time during the day she did not report to her parents of what the Appellant tried to do to her. This is what she stated on page 11 of the proceedings:-

**“..... later at 4 p.m. my mother sent me to get banana leaves at my grandmother. On the way I met the accused who dragged me to his house. I tried to scream but this did not get help. I managed to run away and went back home. I did not tell anybody.... The accused came again and took me to his house where he defiled me.....”**

It is perplexing as to why the complainant failed to report the incident to her parents. There is no evidence that she had been forcefully seized and taken away from her home. Why did she keep quiet about all these things yet she had not even been threatened by the Appellant? This then casts doubt on her testimony that she had been defiled. This left no doubt that the complainant was not truthful and ought not to have been believed by the trial court in absence of corroborative evidence. It is highly likely that the complainant acted under undue pressure from her parents to implicate the Appellant with the crime. In any event the evidence of the doctor put paid to her claim that she had been defiled when the doctor clearly established that indeed there was no defilement. The doctor confirmed that the hymen was torn but which was not fresh. This was only three days after the alleged incident and which is a clear indication that the hymen must have been torn or ruptured a while back. The learned Trial Magistrate noted that the complainant could have been sexually active prior to the incident. That being the position, it is doubtful whether the Appellant was responsible for the torn hymen. A torn hymen is not conclusive proof of penetration by sexual intercourse since other factors might be responsible such as vigorous physical activity like horseback, riding, bicycle riding, gymnastics, football or even tree climbing.

One other doubt raised in this case is the learned trial magistrate’s finding and observations in page 2 of the judgment paragraph 3 where he held as follows:-

***“PW.3 Benjamin Maingi is the Clinical Officer who examined PW.1. Her hymen was missing but this was not fresh. The vagina had a whitish discharge but no spermatozoa. Lab tests revealed no spermatozoa but he stated that PW.1 told him that the man used a condom. He concluded that clinically there was no evidence that the patient had been defiled.”***

A perusal of the evidence of the doctor (PW.4) and the complainant (PW.1) reveals that no such evidence as the alleged use of a condom by the perpetrator was tendered. This was the trial Magistrate’s own understanding of the evidence of the two key witnesses. No wonder the trial magistrate proceeded in the end to find that there was strong circumstantial evidence that the Appellant defiled the minor. This is where the learned magistrate went into error by relying on suspicion to convict the appellant. I find the issue of penetration was not properly established by the prosecution to the required standard. The conviction of the Appellant was therefore unsafe. Even though the other two ingredients namely age of the victim and identity of the perpetrator were established, the failure to prove the aspect of penetration weakened the prosecution’s case against the Appellant. The prosecution was under a duty to prove the guilt of the Appellant beyond any reasonable doubt. There was doubt created when the doctor confirmed that there was no defilement. This doubt ought to have been resolved in favour of the Appellant.

15. In the result it is my finding that the appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at **Machakos** this **1<sup>st</sup>** day of **October, 2019**.

**D.K. Kemei**

**Judge**