REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 21 OF 2016

KENNEDY WAMBUA MUTUA...........................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. I.M. Kahuya, PM), in Criminal Case No. 443 of 2015 vide judgement delivered on 4.2.2016)

BETWEEN

REPUBLIC..PROSECUTOR

VERSUS

KENNEDY WAMBUA MUTUA..............................ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. I.M. Kahuya., Principal Magistrate in Criminal Case No. 443 of 2015 vide judgement delivered on 4.2.2016. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. When the matter came up before the trial court, the prosecution presented 6 witnesses so as to establish the guilt of the appellant. Pw1 was BW and a Voire–dire examination was conducted on the girl who gave a sworn statement. She testified that she was 15 years old studying dressmaking and she produced her birth certificate. It was her testimony that on 10.3.2015 she was from her aunt's house heading to her aunts shop at Kathemboni Market when the appellant who was walking along the road signaled her to follow him because he wanted to send her and when she obliged, he led her to his house and pulled her inside and cupped her mouth then he pulled her skirt and tights, pushed her on the mattress, lowered his trousers and raped her. When he was done, she looked out of the window and saw her aunt F whereupon the appellant panicked and escaped through the window. She told the court that Kioko (Catherine's husband) arrested him and later the chief of the area was contacted and he had the appellant arrested and taken to Machakos Police station and later she went to the hospital for examination where she was given a P3 form. On cross-examination, she testified that she thought the appellant wanted to send her and thus she trusted him and followed him. She told the court that the appellant penetrated her and she was in his house for three hours was able to see him clearly.

3. PW2 was Catherine Kioko who testified that on 10.3.2015 Pw1 came to the plot she was staying and she entered Mama Syombua's house and stayed for long and she got suspicious and decided to peep. She told the court that she saw Pw1and the appellant seated by the table in readiness to eat Ugali and she realized the door was locked from inside. She then alerted the complainant's aunt who raised an alarm and when the door was opened, Pw1 and the appellant were arrested. On cross examination, and reexamination she denied being in an affair with the appellant.

4. PW3 was FM who testified that on the material day when she returned home from work, she did not find Pw1 whom she had left to remain at home. After a frantic search, it was realized that she was in the company of a tuktuk rider in a certain house and she peeped inside the house and saw the appellant lying on a mattress and Pw1 was standing and she decided to lock the door to that house from outside and she went to call the chief who was not available. She told the court that the appellant escaped from the window and members of the public arrested him and when the sub chief arrived she opened the door and the whole party went to Machakos Police Station and later to Machakos level 5 hospital where the P3 form was filled and she produced the same in court. On cross examination, she testified that Pw1 told her that the appellant waylaid her to his house before defiling her.

5. PW4 was Dr... John Mutunga, a clinical officer based at Machakos Level 5 Hospital. He testified that he filled the P3 form in respect of

the complainant and noted that her hymen was broken and at the time of examination on 12.3.2015 she had a history of defilement that took place on 10.3.2015. He filled in the PRC form and relied on the same contents in filling the P3 form. On cross-examination, he told the court that no spermatozoa was found on Pw1 and he could not tell when the hymen was broken.

6. Pw5, Dominic Matheka told the court he was a sub chief of Katoloni and on 10.3.2015 at 3.30pm he received a call informing him that a minor was found in a manner likely to suggest that she was defiled and he confirmed that the scene was at his rental houses where the appellant was his tenant. He rushed to the scene and found the door to the house locked and when he peeped through the window he saw the appellant and the victim standing and later he called for reinforcement to have the appellant and Pw1 arrested and took them to Machakos Police station.

7. PW6 was No. 89006 Corporal Waweru, the investigating officer, attached at Machakos Police station. It was his testimony that on 10.3.2015 a report was made in the OB and that Pw1 came in the company of the appellant, Pw3 and Pw5 and reported that the appellant and Pw1 were found locked in a house and that Pw1 was defiled by the appellant. He recorded a statement from Pw1 who told him that the appellant persuaded him to go to his house and Pw2 and Pw3 saw them and alerted the authorities and he took Pw1 to Hospital and a P3 form was filled. It is his testimony that Pw1 was aged 15 years as per her birth certificate and upon compiling the evidence he charged the appellant with the offences before court. On cross-examination, he testified that he did not visit the crime scene. The prosecution closed its case.

8. The trial court found that the prosecution had established a prima facie case and the appellant was put on his defence. He opted to give a sworn statement. It was his testimony that on the material day there was an altercation with Pw2 who demanded for her debt to be paid and later at 10.00 am he saw a stranger with a plate of Ugali and she entered his house and started eating the ugali. He told the court that while he was talking to Pw1 someone pushed the door from outside and this prompted him to escape through the window. He told the court that later he was arrested by members of the public and taken to Machakos police station where he and Pw1 were beaten to confess the crime that he said he did not commit. He told the court on cross-examination that Pw1 was threatened to give false evidence.

9. The appellant was found guilty and convicted of the offence of defilement and was sentenced to twenty (20) years imprisonment.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error by failing to find that an essential witness was not procured and that the complainant was coerced to testify. Further he submitted that the age of Pw1 as well as penile penetration was not proven. He submitted that no voir dire was conducted on Pw1 and therefore her evidence ought to be disregarded. He concluded that his appeal be allowed, the conviction quashed and the sentence set aside.

11. The state submitted that the elements of defilement were proven. Age was proven via the birth certificate and so was penetration proven and the identity of the appellant for he was arrested at the scene of the offence. On the issue of contradictions, it was submitted that the same is not material as the same is curable under Section 382 of the Criminal Procedure Code. On the issue of the voir dire, no submission was made.

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

13. The court has carefully considered the petition of appeal and the amended petition that was filed without requisite leave as well as the submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***
>
> ***2. That the trial magistrate erred in failing to conduct a proper voir dire;***

14. The issues for determination are whether the elements of the offence of defilement were proven to the required standard and whether the failure to conduct a voir dire vitiated the entire trial. In cases of defilement the following are to be proven:

> ***1. The age of the child.***
>
> ***2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***
>
> ***3. That the perpetrator is the Appellant.***

15. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she testified that she was aged 15 years and there is on record a birth certificate that was produced by Pw6 to which the appellant did not object to its production and hence I am satisfied that age was proven to the required standard. In the case of in **Musyoki Mwakavi v Republic [2014] eKLR** the court held that:_

> ***"…the age of the complainant may also be proved by birth certificate.…".***

16. On the issue of penetration, this was established by the evidence on record as indicated on the P3 form, the PRC form and the account of the victim.

17. P3 form was filled by Pw4. He testified on the physical examination carried out on the victim and testified on the contents of the document, he also testified that he relied on the PRC form and the Appellant did not object to its production. He concluded that the victim was defiled and signed the P3 form. The P3 form indicates that, *"the hymen broken.* To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v REPUBLIC [2012] eKLR** took this view.

18. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

19. The victim testified that on 10.3.2015 she was from her aunt's house heading to her aunt's shop at Kathemboni Market when the appellant who was walking along the road signaled her to follow him as he wanted to send her and when she obliged, he led her to his house and pulled her inside and cupped her mouth then he pulled her skirt and tights, pushed her on the mattress, lowered his trousers and raped her. When he was done, she looked out of the window and saw her aunt F whereupon the appellant panicked and escaped through the window. She told the court that Kioko (Catherine's husband) arrested him and later the chief of the area was contacted and he had the appellant arrested and taken to Machakos Police station and later she went to the hospital for examination where she was given a P3 form. On cross-examination, she testified that she thought the appellant wanted to send her thus she trusted him and followed him. She told the court that the appellant penetrated her and that she was in his house for three hours and thus saw him clearly. The Appellant was not a person known to the complainant however she told the court that she was with him for three hours and thus she recognized him. The evidence of Pw1, Pw2, Pw3 and Pw5 placed the appellant at the scene of the crime and so did his own testimony.

20. The appellant denied commission of the offence. His defence evidence did not shake that of the prosecution which was overwhelming against him.

21. From the foregoing, I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant.

22. In this regard penetration was proven in terms of Section 2 of the Sexual Offences Act vide the P3 form and the account of the victim and the doctor. The appellant was properly identified and thus the elements of the offence were established. The appellant has raised the issue that the voir dire was not properly conducted. When a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93** the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).*** But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

23. It is important to test the intelligence of a child and from the evidence on record, Pw1 was aged 15 years and had a sense of understanding and indeed was able to identify the person who hurt her. However the record does not reveal the questions that were asked and answers recorded and therefore I find that a voir dire was not conducted. I am of the view that if there is independent corroborative evidence and or circumstantial evidence to support the charge, the proceedings of the trial court ought not to be vitiated for failure to conduct a voir dire. In any event the complainant was aged 15 years old and knew her duty before the court. She had no difficulty in presenting her evidence as well as on cross-examination. She was not such a small girl for the court to doubt and hence the fact that the trial court had no difficulty in receiving her evidence. Further the appellant engaged her robustly in cross-examination and even went ahead to corroborate the complainant's testimony. There was no prejudice suffered by the appellant as a result of absence of a voir dire examination.

24. It is the position of the law that for a court to base a conviction on circumstantial evidence it must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. For evidence to be capable of being corroboration it must:

(a) be relevant and admissible, **R v Scarrot, [1978]QB 1016**;

(b) be credible, **DPP v Kilbourne [1973)AC 729**;

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] I KB 99**,

(d) implicate the accused. **Abanga alias Onyango v Republic Cr. Appeal 32 of 1990(UR)**

25. From the evidence on record, the prosecution case suggests that the appellant had an opportunity to defile the victim because he was found together with her and the evidence of Pw2 and Pw3 speak to that fact. It is undisputed that the appellant was at the scene on the material day. The complainant stated that the appellant took his sweet time in defiling her as they remained in his house for about three hours. On the element of penetration, the report of Pw4 as well as the testimony of the complainant confirm the aspect of penile penetration. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The appellant in his defence testimony somehow corroborated the complainant's version of events as he admitted having been found with the complainant in his house.

26. Consequently I find that the availed circumstantial evidence establishes the offence against the appellant beyond reasonable doubt and the same is sufficient to sustain a conviction against the appellant. He was found at the scene of crime and that there were no other factors or circumstances weakening the circumstantial evidence against him.

27. Section 8 (3)of the Sexual Offences provides that :

"(3) A person who commits an offence of defilement with a child aged between 12 and 15 years shall be liable on conviction to a term of imprisonment of not less than 20 years."

28. From the evidence on record, and the analysis of the appellant, the victim was 15 years at the time of commission of the offence and therefore the mandatory sentence was within the law.

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

It is so ordered.

Dated and delivered at Machakos this 3rd day of October, 2019.

D. K. Kemei

Judge