



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 68 OF 2018

SALIM KATANA SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGEMENT

The Appellant, **Salim Katana Salim**, was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. On the 31st of August 2018, he was however sentenced to 15 years imprisonment. Alternatively, the Appellant was charged with committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

Having been aggrieved by the Learned trial magistrate's decision, the Appellant filed an amended memorandum of appeal against both conviction and sentence based on the following grounds:

- (a) That the 15 years sentenced imposed on him by the trial court was harsh and excessive.***
- (b) The age of the complainant was not proved beyond reasonable doubt.***
- (c) That his reasonable alibi defence was not considered by the Learned trial magistrate.***

I now resort to the Court of Appeal remarks in **Okeno v Republic (1972) EA 32, 26**:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

On the 4th of April 2010, the Appellant filed submissions in support of the above-outlined grounds of Appeal. Conversely, the state through its Learned Counsel **Miss Barbara Sombo**, controverted the instant appeal and urged this court to dismissed it in its entirety for want of merit

The evidence on record suggest that the Appellant defiled or alternatively indecently touched the sexual organs of **H.J** a sixteen years old minor on the 26th day of October, 2016 at [Particulars Withheld] village within Kilifi County. It was the prosecution case that the complainant was kidnapped by the Appellant whom she knew as a madrassa teacher. According the complainant, the Appellant instructed her to get on his bike which she did and threatened to pronounce a curse if refuses to accept his demands. That's when the appellant told her to accompany him to his home because his family of two children and wife were not present on the material day.

Further that he gave a separate room to the complainant which she was spent the night to allow the appellant his access which he did by having carnal knowledge severally in the night. The following morning he escorted the complainant to Kakanjuni and threatened to curse her

with mental illness if she makes any attempt to report the incidence to anybody. However, the complainant told the court that she was not deterred with such threats or curses as she proceeded to inform her father of the incident.

I have noted that the Appellant made submission which do not really support the grounds of Appeal that he raised in his memorandum of Appeal. In his submissions, he argues that his right to a fair trial was violated since the charges which faced him were not explained by an interpreter during the plea taking process. He argues that it was incumbent the court to provide an interpreter to serve such purpose.

On the second, ground he argues that the ingredients of the offence of defilement envisaged in terms of section 8(1) were not proved beyond reasonable doubt. Further that there were clear contradictions in the prosecution witnesses' testimonies which ought to have changed the outcome of the Honorable trial court. He also claims that his defence was not considered by the trial court in the final judgement.

Conversely, the Learned Counsel for the State argues that the appeal ought to fail for lack of merit. On whether his right to fair trial was violated, the state contended that the record of proceedings indicate that he understood the language in which the charges were explained to him. Further that, the appellant participated in cross examination of all witnesses and even defended himself in Kiswahili during the trial proceedings.

On age and penetration, the State contends that the same was established to be sixteen and proof of penetration was conclusively proved by medical evidence adduced during the trial. Hence the ingredients were proved beyond reasonable doubt. Lastly, that identification of the appellant was by way of recognition that there can be no doubt whatsoever that the Appellant was positively identified as the defiler of the complainant.

Issues for Determination

I have considered the abovementioned submissions from the appellant and prosecution counsel the record of proceedings and the exhibits brought before the trial court in support of this case, the key issues for determination are that:

- (a) Whether the prosecution proved the offence of defilement beyond reasonable doubt.*
- (b) Whether his rights to a fair trial were not accorded to him by the trial court.*
- (c) Whether the Appellant's alibi defence was not taken into account.*

Findings, Analysis and Determination

Section 8(1) & (2) of the Sexual Offences Act No. 3 of 2006 provides as follows:

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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.”

In light of the foregoing remarks in **Okeno v Republic (Supra)**, this Court in determining the instant appeal is to satisfy itself that the ingredients of the offence of defilement, or the alternative charge of committing an indecent act with a child, were proved to the threshold required in terms of law.

(1) Whether the State proved its case beyond reasonable doubt.

The three key ingredients of the offence of defilement are: proof of the minority age of offence of defilement; proof of penetration; and proof that the Appellant was the author of the victim's misfortune. The onus of proving these ingredients beyond any reasonable doubts resides with the prosecution. Therefore, I shall handle the abovementioned ingredients singly/individually.

(2). Whether the age of the minor was proved.

It is trite law that the age of a person is best proved by way of adducing documentary evidence. This may include birth certificates, school documents, Child Health Card and any other relevant documentary evidence. Oral evidence adduced by the complainant's parents or guardians may also be admissible if there is no other evidence suggesting that the same is not authentic. Age prima facie, or conclusive evidence of age, may also be taken into account with utmost caution so as avoid occasioning prejudice or an injustice to the Appellant or the victim.

The age of the Complainant as per the charge sheet was indicated as 16 years old. The prosecution produced before the trial court, evidence in form of Child Health Card which is marked as Plaintiff Exhibit- 3 which indicates that the complainant was born on 9/9/2000. As such, the complainant sixteen years old at the time the offence was committed. Child Health Card being of the document which contains prima facie evidence of age, I therefore find that the age was proved beyond reasonable doubt.

(3). Whether penetration was proved.

The definition of penetration is enshrined in terms of Section 2 of the Sexual Offence Act which stipulates it to mean:

“the partial or complete insertion of the genital organ of a person into the genital organ of another person”

The foregoing position was buttressed in the case of **Mark Oiruru Mose vs R (2013) eKLR**, where the Court of Appeal enunciated that:

“So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”

In the same respect the Court of Appeal in **Erick Onyango Ondeng v. R (2014) eKLR** also spoke on the aspect of penetration as an intrinsic ingredient of defilement. The Court stated as follows:

“In Sexual Offences, the slightest penetration of a female sex organ by a male organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured”

In the instant case, the penetration claims that the Appellant sexually manipulated her by threatening with curse. The PRC filled by **Dr. Sidi Samuel** and presented before **Dr. Noorein** a medical officer at Kilifi County Hospital. He also presented a P3 form filled by **Dr. Daisy Juma**. The P3 form indicates that upon examination of the genitalia, the complainant's hymen was not intact, she had whitish discharge on vulva, treatment given was for STI and degree of injury was harm. The age of injury was considered to have happened in months and the probable weapon type was blunt. Undoubtedly, there was penetration on the complaint.

(4). Whether the Appellant was positively identified as the perpetrator.

In this matter, the issue of identification stems from the fact that the Appellant denied having committed the offence and gave an alibi defense. The only direct evidence as regards the identification of the perpetrator is that of the complainant. The complainant claims that she knew the Appellant as her madrassa teacher before the offence was committed. She also claims to have been kidnapped during broad day light and took her to several places before taking her to his home. She further claims that the sexual intercourse was not consensual as the Appellant removed her clothes and have sexual intercourse on two occasions. She spent a night with the Appellant and left for home in the morning.

In doing so, the complainant claims that he threatened her with a curse of madness if she disclosed the information. I have considered the Appellant's defence which he merely sought to exclude himself from the crime scene. In the premises, I am not convinced that the Appellant's defence holds any weight to dislodge the prosecution case.

(2) Whether the Appellant was not accorded his rights pertaining to fair trial.

On this limb, the Appellant argues that his right to fair trial was violated. In that regard, the Appellant alleges that the charges he faced were not explained by an interpreter during the plea taking process. According to him, this violated Article 25(c) and 50(2) of the Constitution of Kenya 2010. He referred the Court to lines 8 to 19 of the record of proceeding to support his argument. I have noted that the said proceedings show that charges were read and explained to the accused in Kiswahili, a language he understands. He denied the charges by answering *“it is not true”*.

In my view, what is important is that the Appellant charges were explained to him in the language he understands. That means the Appellant was fully aware of the charges he was facing, had adequate information to answer to the allegations. The ground on right to a fair trial therefore fails.

In the premises, I am of the considered view that the instant appeal has not merit and is hereby dismissed. I therefore uphold the conviction and sentence as confirmed by the learned trial magistrate delivered on 31st August 2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER, 2019.

.....

R. NYAKUNDI

JUDGE