



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 7 OF 2019

MARTIN MAKUPE MWABONJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in lower court criminal case No. 288 of 2014

in the Senior Principal Magistrate's Court at Kilifi before Hon. LN. Juma (Mrs.), RM

dated 31st October, 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the state

JUDGMENT

The appellant **Martin Mwakupe Mwabonje**, was tried before Kilifi magistrate's Court and convicted on the main count of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. He was sentenced to twenty (20) years imprisonment.

Being aggrieved with both conviction and sentence an appeal is preferred to this court.

Background

The case for the prosecution was based on the evidence of five witnesses. The summary of it was that on 3rd July 2014 at about 2.00 p.m., the complainant was travelling to school. In the course before arrival at her destination she met with the appellant who dragged her towards a forest area. The complainant stated that immediately her throat was held by the appellant to avoid any screams. What followed was forcible removal of her underwear and penetration of her genitalia by the appellant.

The complainant stated that on parting ways with the appellant she had to inform her mother **MJ (PW2)**. On receipt of the report from the complainant PW2 proceeded to the home of the appellant to protest of the ghastly act done to the complainant.

The next course of action was to proceed to school to inform the teachers about the incident thereafter the police in order to investigate the appellant.

Notably, PW2 and the complainant were referred to Kilifi County Hospital where she was examined and the positive finding were that she had been defiled. The initial treatment notes issued by the medical doctor formed part of the evidence together with the P3 Form in support of the complainant's defilement case.

PW3 Peter Odhiambo the police officer testified as the investigating officer who recorded statements from the witnesses and further issued the P3 Form to the complainant for purposes of medical examination. It was also acknowledged by PW3 that the clothes worn by the

complainant on the material day were recovered and used as exhibit in support of the charge. According to PW3 the appellant was later arrested and charged with the offence. **PW4 Dr. Daisy Juma** of Kilifi Hospital testified on behalf of **Dr. Khadija** who had filed the P3 Form upon examining the complainant. It was her evidence that among the findings made in the report were that the hymen was missing, but the labia majora and minora were normal.

PW5 – Dr. Sheila Mokare a medical doctor attached to Kilifi County Hospital gave evidence on the treatment notes and the PRC Form filled on behalf of the complainant.

According to PW5, upon examining the complainant it was established that the high vaginal swab revealed presence of spermatozoa. Further at that initial contact and examination the complainant had been attended while in blood stained clothes. The treatment book was admitted in evidence as exhibit 1 and PRC Form as exhibit 2.

In his defence after the close of the prosecution case the appellant denied that he committed an act of defilement against the complainant. He did not refer to the offence but raised complaint that he has only been able to cross-examine two witnesses. He asked for justice to be done.

It is against this procedural history, the learned magistrate found the offence of defilement proved beyond reasonable doubt. On appeal the appellant challenged the judgement of the trial court on the following grounds:

- 1. That the learned trial magistrate erred in law and fact by failing to consider that original or certified copies of the age assessment was not produced by the prosecution.***
- 2. The learned trial magistrate erred in law and fact by failing to order for a review of the appellants age assessment.***
- 3. That the learned trial magistrate grossly erred but in law and facts by failing to consider the mandatory minimum sentence legal position.***
- 4. That the learned trial magistrate erred in both law and fact by failing to consider that the appellant was denied the right to freedom under Article 50(2)(a)(b)(4) of the Constitution. The appeal was disposed off by way of written submissions.***

Analysis and Resolution

The Court of Appeal decision in **Okeno v R 1972 EA 32** lays down the principles and the mandate of the first appellate court is to analyze and re-evaluate the evidence adduced before the trial court and independently be able to draw its own conclusions on the matter.

In this case the conviction proceeded on the premise that the following elements of the offence of defilement were proved beyond reasonable doubt:

- 1. The act of penetration of the complainant genitalia with that of the appellant.***
- 2. The age of the complainant was below 18 years.***
- 3. That the appellant was positively identified and placed at the scene of the crime.***

In the submissions by the appellant the age of the complainant was not proved beyond reasonable doubt. At the time of the trial the appellant submitted that only a photocopy was admitted to prove age which fell short of the required standard of proof on documentary evidence.

This court did not have the advantage of the input by the prosecution counsel on her perspective with regard to the appeal. Nevertheless, the circumstance of this case there will be no failure of prejudice or justice on the part of the respondent.

The Analysis and the Law

It is trite that under the Sexual Offences Act with regard to defilement age apparently is one of the critical elements to be proved beyond reasonable doubt by the prosecution because of its application in appropriating the correct sentence for the offence. The prosecution must give proper and sufficient evidence in respect to age of the complainant. Such evidence is then considered along with other available material in support of the charge capable of discharging the burden of proof under Section 107(1) of the Evidence Act.

A trial court cannot simply rely on conflicting evidence as to the age of the complainant. The proposition of this criteria is very case specific and in law to prove age the case of **Hilary Nyongesa v R CR Appeal No. 123 of 2009** the court held:

“Age is such a critical aspect in sexual offences that it has to be conclusively proved and this becomes more important because punishment (sentence under the sexual offences Act is determined by the age of the victim.”

In similar case of **Francis Omuroni v Uganda CRA No. 2 of 2000** the court held:

“In defilement cases, medical evidence is paramount in defining the age of the victim and the doctor is the only person who could professionally determine the age of the victim. In the absence of the other evidence apart from medical evidence age may be proved by both certificate, the victim’s parents or guardian and by observation and common sense.”

In the instant appeal on this ground, the appellant attention was based on the evidence of a police officer (PW3) who presented a photocopy of an immunization card indicating that the complainant was born in the year 2001.

The appellant advanced issues on this ground. That the trial magistrate erred when she relied on a photocopy of the clinic card which was not even certified. The clinic card did not state with certainty when the complainant was born.

Further, the medical evidence on this aspect was not admissible as evidence in view of the breach of the provisions in Section 77 of the Evidence Act.

I have reviewed the evidence by the prosecution in support of this ingredient at the trial court. The following inconsistencies were not sufficiently dealt with by the Learned Magistrate.

First, there was an ineligible photocopy clinic card produced by PW3 as evidence to prove age of the complainant. Secondly, the evidence being that of documentary evidence ought to have satisfied the criteria laid down in Section 64 and 66 of the Evidence Act. Thirdly, there was no basis laid by the prosecution to rely on a photocopy not duly certified as against the content of the original card.

Under Section 68 of the Evidence Act proof of documents by secondary evidence maybe given of the existence, condition or contents in a document in the following cases:

a) when the original is shown to appear to be in possession or power of

(1) the person against whom the document is sought to be proved

(2) a person out of reach of or not subject to the process of the court or

(3) any person legally bound to produce it

(b) When the original has been destroyed or lost or when the party offering evidence of the contents cannot for any other reason not arising from his own default neglect, produce it in a reasonable time when the original is of such nature as not to be easily movable.

Fourth, the P3 Form approximated the age of the complainant to be 12 years but prima facie it was not an age assessment report as stipulated in law.

Fifth, the complainant's mother (PW2), gave the age of her daughter to be 14 years; but failed to produce a birth certificate mentioned in her evidence.

From this background there was lack of lucid and clarity on the part of the prosecution as to exact age of the complainant consistent with the particulars in the charge sheet. The nature of the correlation between the complainant's testimony who told the court that she was 13 years old and that of PW2 her mother's testimony that she was 14 years was never resolved by the learned trial magistrate in the impugned judgement.

On the totality of the evidence the exact age of the complainant remained unknown and not proven beyond reasonable doubt at the conclusion of the trial. The Learned trial Magistrate finding of guilt without proof of this element was not anchored on firm ground. The sentence of the appellant may as well may have been based on the wrong premise of the age of the complainant.

Although the Learned Magistrate convicted the appellant the evaluation of the evidence on age fell short of the standard of proof set out in the case of **Miller v Minister of Pensions and Woolmington v DPP**.

It leaves me with no doubt that the error is not curable under the provisions of section 382 of the Criminal Procedure Code. For the above reasons the conviction of the appellant is hereby set aside.

The ultimate question is whether it is safe to set the appellant at liberty on the basis of this ground. I am mindful of the mistake which occurred during the trial and the gravity of the offence initiated with the objective of securing justice for the victims and the public interest. The statutory principle in the case of **Ahmed Ali Sumar v R 1964 481** persuades me to order for a retrial, where the court held:

“That each case must depend on the particular facts and circumstances and that an order for retrial should only be made where interests of justice require it.”

In the present case it is safe to rule that a retrial be ordered as against the appellant. This end the primary file is returned back to Kilifi Principal Magistrates Court to reschedule a trial on a priority basis before a different trial Magistrate other than **L.N. Juma (Hon.)**. The case management directions be taken with a view to have the trial concluded within 60 (sixty) days with effect from 1st January 2020 excluding weekends and public holidays.

The Deputy Registrar is directed to take action by extracting the order and have it served upon the Senior Principal Magistrate at Kilifi for compliance. For the above reasons, save for the retrial the appeal by the appellant is hereby allowed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11th DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the state
2. The appellant