REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 56 OF 2017

KATANA MBARI…..APPELLANT

VERSUS

REPUBLIC ……..…RESPONDENT

(Being an appeal against both convictions and sentence in Criminal case No 374 of 2016 at Mariakani law courts, by Hon N. S. Lutta, SPM)

JUDGMENT

1. The appellant, KATANA MBARI was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act in the main court.

he particulars of the charge were that;

> **"On the 5th day of June, 2016 at [particulars withheld] area in Kaloleni sub –location wiithin Kilifi County of the Coast Region, the appellant intentionally caused his penis to penetrate the vagina of W .O a child aged 14 years".**

2. 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 of the offence were that;

> **" On the 5th day of June, 2016 at [particulars withheld] area of Kaloleni sub –County within Kilifi county of the Coast Region the appellant intentionally torched the vagina of W O a child aged 14 years with his penis".**

3. The appellant pleaded NOT GUILTY to the charges and the case proceeded to full trial. After the full hearing, the appellant was convicted of the offence of defilement and sentenced to serve twenty (20) years imprisonment.

4. Aggrieved by the conviction and sentence, the appellant filed an appeal in which he set out five (5) grounds as herein below;

> 1. That the learned trial magistrate erred in law and fact in the convicting me the appellant while not considering that the charge sheet that was relied upon to convict the appellant was fatally defective as it did not support the evidence that was adduced in the present case this contravening section 89, 134, 137 (e) (i) F, 214, 275 (1) and 276 of the CPP.
>
> 2. That the learned trial magistrate erred in law and fact in convicting me the appellant without considering that the evidence of pw1 was not taken to the requirement of section 19 (1) of the Oaths and Declaration Act, Cap15 and section 124 of the Evidence Act. Cap 80 this contravening the voire dire principles as laid down in law.
>
> 3. That the learned trial magistrate erred in law and fact in coveting me the Appellant without considering that the BURDEN OF PROOF in the present case was not established beyond reasonable doubt as the P3 from and the evidence of pw3 (clinical officer) which would have formed an integral part in proving the present case was not credible enough thus contravening section 107 as read with section 109 of the Evidence Act.
>
> 4. That the learned trial magistrate erred in law and fact in convicting me the Appellant without considering that the evidence that was adduced was full of Massive considering that could not warrant the conviction of the appellant thus contravening section 153 as read with section 154 of the Evidence Act.

5. That the learned trial magistrate erred in law and fact in convicting me the appellant without giving me due consideration to the ALIBI DEFENCE adduced that was credible enough to vindicate him thus contravening section 212 as read with section235 of the CPC.

5. His prayer thus, is for the appeal to be allowed, conviction quashed and sentence of 20 years imprisonment set a side.

6. The appellant appeared in person and filed written submissions which he relied on in arguing his appeal. He submitted that;

(a) the charge sheet upon which he was convicted was defective as it did not meet the required standards of law.

(b) a voire dire examination was not conducted for the complaint who was a child of tender age so as to determine whether or not she was speaking the truth. That the trial magistrate just formed his own opinion when dealing with the complainant and let him give sworn evidence.

(c) the prosecution did not prove its case against the appellant beyond reasonable doubt as required by law. He submitted hat the evidence that was adduced by the prosecution witnesses had massive contradictions and invariances that it left a lot to be desired. The trial magistrate failed to give due consideration of the alibi defence that was raised by the appellant.

7. The appeal was opposed by M/s Ocholla, learned state counsel. She submitted that the prosecution proved their case beyond reasonable doubt. She also submitted that it was not mandatory for the charge sheet to disclose whether the child who was defiled was a girl or a boy and that the omission did not cause the appellant any prejudice since the evidence was led in court hence he was aware of who he was alleged to have defiled.

8. She also submitted that the complainant in this case was 14 years old as demonstrated by exhibit P2 and that under section 2 of the children's Act, a child of tender years is defined as a child of 10 years of age. It was therefore not necessary for section 19 of the Oaths and Declaration of statute Act to be complied with.

9. She also submitted that the P3 form which was produced was credible as it showed evidence of defilement.

10. She further submitted that the prosecution's evidence was not riddled with massive contradictions since Pw1's evidence was corroborated by Pw3's testimony together with the P3 form (Exhibit P1)

11. Finally she submitted that the appellant did not tender any alibi defence but only explained circumstances leading to his arrest on 10.6.2016.

She prayed that the appeal be dismissed.

12. To determine this appeal as the first appellate court, my duty is to examine and re-evaluate the evidence that was adduced before the trial court so as to arrive at my own conclusion while bearing in mind that I did not have the advantage of seeing and hearing the witnesses as did the trial magistrate (See OKENO VS REPUBLIC (1972) E A 32)

13. Briefly, the facts of the prosecution's case are that on 5th June, 2016 the complainant , W. O. was sent to the shops by her mother, C N O (herein-after referred to as PW2) to bring a pencil. That on her way back home, she met the accused person who introduced himself to her as Erick that the accused person then told her that he knew her and she told him to wait for her to finish school. He, however asked her to follow him so she could collect a bag and he took her to a make shift structure where he defiled her while threatening her if she made any noise. Pw1 said she stayed with the accused person until 5.00am and when he wanted to escort her home, she told him that she would be punished. He then took her to his auntie's home. Pw1 went onto say that they had gone to fetch water when they met her uncle. That the accused person ran away when her uncle inquired what the problem was. The matter was reported to Mariakani police station and the complainant was taken to hospital for examination and treatment.

14. According to Pw3, MWANGOLO CHIGULU, a registered clinical officer at Mariakani Sub County hospital, the complainant who was aged 14 years old was taken to the hospital on 21.1.2016 with allegations that she had been defiled by a person known to her `on 6.1.2016. He examined and found her hymen torn with whitish discharge from her private parts. He carried out a vaginal swab and it revealed spermatozoa. He also went on to state that on 12.6.2016, the complainant was again examined and found to have been infected with a sexually transmitted infection. He filled the P3 form which he produced as exhibit P1 and other documents as exhibit P3. The age assessment report dated 22.3.2016 confirming the complainant's age to be 14 years was produced as exhibit P2.

15. Pw4, No. 62804 CORPORAL SOSTEN ROTICH is the investigating officer who received the report of the incident and arrested the appellant upon being identified by witnesses.

16. The prosecution closed its case and the appellant , KATANA MBARI was placed on his defence. The appellant opted to give a sworn statement in which he stated that on 10.6.2016, he left home to go and look for water at a place called Mkilo. That on the way back, he decided to have a rest when they were accosted by some people who alleged that they had taken their mobile phones. He was arrested and taken to the police station where he was locked up in the cells on allegations that he had stolen a mobile phone. He was then arraigned in court for an offence he does not know. He denied having committed this offence.

DETERMINATION

17. With regard to the first ground of appeal, the appellant has submitted that the charge sheet was fatally defective in that it did not support the evidence that was adduced in the case as it failed to outline the full information on the nature of the offence he was charged with as per the requirement of section 134 as read together with section 137 (a) (I) and (ii) of the Criminal Procedure Code I find that while the charge and its full particulars failed to indicate whether the child that was allegedly defiled was a girl or boy, this did not go to the root of the case against the appellant. He participated in the trial by listening to all the evidence and cross examined the witnesses, to the extent that he was able to understand what he had been charged with and what he was alleged to have done. Furthermore, he has not shown what prejudice he suffered. I dismiss this ground of the appellant alleging to have been convicted on a defective charge.

18. On the second ground, the appellant claimed that the trial magistrate decided to subject the complainant to sworn evidence without following the correct procedure of voire-dire examinations as provided for under section 19 of the Oaths and Statutory Declaration.

Section 19 (1)

> **" Where , in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, through nor given upon oath, if , in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise and reduced into writing in accordance with section 233 of the Criminal procedure code (Cap 75), shall be deemed to be a deposition within the meaning of that section".**

Section 2 of the children's Act, a child of tender years is defined as;

> **" a child under the age of 10 years"**

The complainant in the instant case was said to have been 14 years at the time of testifying and this was demonstrated by the prosecution by exhibit P2. Under such circumstances it will be seen that the voire dire examination was not necessary in the case of the complainant who did not fall under the category of 'a child of tender years' as per the Children's Act.

19. For ground three (3) of the appeal. The appellant contended that the prosecution did not prove its case beyond reasonable doubt as is required by law. In considering this ground, the particulars of the charge state that on 5th day of June, 2016 at [particulars withheld] area in Kaloneni sub –County, the appellant intentionally caused his penis to penetrate the vagina of W.O a child aged 14 years". The alternative offence is also indicated to have been committed on the same 5th June, 2016. The prosecution called four (4) witnesses to testify in support of the said charge against the appellant .

20. According to Pw1, (the complainant) she was sent to the shop by her mother on 5.6.2016. Her said mother, who testified as Pw2, said that she sent the complainant to the shop to buy a pencil on 6.6.2016. Pw3, the clinical officer who examined the complainant after he alleged incident told court that

> **" On 21.1.2016 a girl aged 14 years came to hospital and alleged she had been defiled by a person known to her on 6.1.2016.**

He went on to state that;

> **" On 12.6.2016,she returned to hospital and said she had been defiled again"**

When cross examined by the accused person, Pw3 said;

> **" there were two incidents when the complainant was defiled. It was on 6.1.2016 and 12.6.2016."**

Pw4, the investigating officer testified that on 5.6.2016 someone took the complainant while on the way to the shop. When cross examined by the accused person, he said the complainant was examined on 2.6.2016 after the matter had already been reported to the police.

21. The four prosecution witnesses testified about the occurrence of the same incident in court. But in examining their respective evidence. I have noted contradictions and invariances in the same. While the particulars of the charge and evidence of Pw1 (complainant) and Pw4 (the investigating officer) indicate that the incident took place on 5.6.2016, Pw2 told court that it was on 6.6.2016 and pw3, the clinical officer who examined the complainant (Pw1) testified that she was defiled on two occasions, being 6.1.2016 and 12.6.2016.

22. It is so clear that the particulars of the charge and the evidence of the witnesses against the appellant is so inconsistent with regard to when he is alleged to have committed the offence . In fact, while the particulars of the charge and evidence of pw1, and 4 show that the complainant was defiled once Pw3 in his evidence clearly stated both in evidence in chief and cross examination that she was defiled on two occasions . And in analyzing the charge sheet, it is clear that on one of those occasions, being 12.6.2016, the appellant was already in custody having been arrested on 10.6.2016 and arraigned in court on 13.6.2016. And unless, it can be shown that he got out of custody to defile the complainant and returned to be arraigned in court. Also, when cross examined, Pw4 told court that the complainant was examined on 6.6.2016,which would only mean that she was examined before she was defiled, on whichever date that has been referred to by the witnesses.

23. In the instant case, it is only the complainant who identified the appellant as the person who defiled her and her evidence would have been corroborated by the evidence of the medical practitioner who examined her. And by the provisions of section 124 of the Evidence Act, a court can convict on the evidence of a single witness if the trial magistrate is satisfied that the complainant is telling the truth. In this case, the trial magistrate did not explain or give reasons why he believed the evidence of the complainant. Furthermore, there were glaring inconsistencies in the evidence of the witnesses and particulars of the charge with regard to the dates when the incident is alleged to have happened. With these inconsistencies, I find that the prosecution has failed to prove beyond reasonable doubt that the appellant defiled the complainant and the same are resolved in favour of the appellant.

24. The last ground raised by the appellant was that his alibi defence was not taken into consideration. I read through the applicant's brief unsworn defence and find that it is only an explanation of the circumstances that led to his arrest on 10.6.2016. There is nowhere the raise an alibi defence.

25. All in all, I find the appellants' appeal meritable in view of the inconsistences that have been identified in the prosecution's evidence and particulars of the charge with regard to the dates when the offence is alleged to have been committed. In my view, had the trial magistrate considered these inconsistenies, he would not have found the appellant guilty and convicted him for the offence of defilement he was charged with. The said inconsistences are hereby resolved in favour of the appellant.

26.As a result, the appellant's appeal is allowed, the conviction quashed and sentence of twenty (20) years imprisonment set aside.

I hence order the appellant to be set free unless lawfully held for any other reason.

Judgment delivered, signed and dated this 11th day of June, 2018.

HON. LADY JUSTICE D .O. CHEPKWONY

In the presence of;

M/s Ocholla, counsel for the state.

Appellant in person

C/clerk- Beja Nduke