



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 29 OF 2017

(From original conviction and sentence in Machakos Resident Magistrate's Court Criminal Case No. 5 of 2015, C K Kisiangani, RM on 23rd March, 2017)

KAVEKE MUTHAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **Kaveke Muthama**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No5 of 2015 the offence of defilement contrary to section 8(3) of the **Sexual Offences Act No. 3 of 2006**. The particulars were that the appellant on the 5th day of November, 2014 at [particulars withheld] Village, Mathinthini sublocation, Makutano Location in Mwala Sub County within Machakos Count, he intentionally and unlawfully caused his penis to penetrate the vagina of E N M, a child aged 14 years. He was charged with the alternative charge of indecent act with a child contrary to section 11(1) of the **Sexual Offences Act No. 3 of 2006** the particulars being that on the 5th day of November, 2014 at [particulars withheld] Village, Mathinthini sublocation, Makutano Location in Mwala Sub County within Machakos Count, he intentionally and unlawfully touched the vagina of E N M with his penis, a child aged 14 years.

2. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the **Sexual Offences Act, No. 3 of 2006** and sentenced to serve 20 years in prison. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

1. That, the Learned Honourable Magistrate erred in law and fact in convicting the appellant despite the fact the medical evidence did not support the commission of the offence.

2. That, the Learned Honourable Magistrate erred in both law and fact in not considering the defence adduced by the appellant.

3. That, the Learned Honourable Magistrate erred in law in not scuffing the onus of proof on the appellant.

3. Accordingly to the appellant, from the evidence of PW4, there was no evidence to confirm the complainant was defiled, and secondly, the evidence of DW1, the accused as well as DW2 was never considered.

4. It was contended that the judgement shifted the burden of proof against the accused which was in the appellant's view wrong.

5. It was therefore submitted that the appellant was wrongly convicted and ought to be given the benefit of doubt.

6. In support of his submissions the appellant relied on **Pius Arap Maini vs. Republic 2013] eKLR**.

7. The appeal was however opposed by the Respondent. According to the Respondent, the issues for determination in a sexual offence relating to a minor are whether the prosecution has proved penetration, whether the penetration was caused by the appellant and, whether the age of the minor was established. It was the Respondent's case that the charge against the appellant was proved beyond reasonable doubt based on the evidence of six prosecution witnesses and the P3 form which confirmed that PW1 had been defiled.

8. It was submitted that though, as a result of the lapse of time, there was no medical evidence to prove defilement, the statement of PW4 cannot be construed to mean that there was no medical evidence to prove penetration in light of the evidence of mild lower abdominal pains and the broken hymen. According to the Respondent, from the evidence of PW1, there was penetration of her genital organs by the genital organs of the appellant for about 30 minutes hence proving penetration.

9. It was submitted that the evidence of PW1 was corroborated by the evidence of P3 forms which indicated that the hymen was broken though not fresh due to lapse of time. It was therefore submitted that the element of penetration was proved beyond any reasonable doubt and was sufficiently proved by the medical report adduced.
10. It was submitted that though the appellant testified that he riding a *boda boda* on the material day from 5.00am till 8.00pm, his evidence was not corroborated by any of his family members. It was submitted that the evidence if PW2's while dealing with the past relationship between the appellant and PW2 did not deal with the subject matter herein hence the evidence of DW2 did not corroborate the appellant's with respect to the charge of defilement.
11. It was submitted that contrary to the holding in **Karanja vs. Republic [1983] KLR** that the defence of alibi be put forward at the early stage, at no time during the case did the appellant raise the defence of *alibi*.
12. The Respondent further denied that the Court shifted the burden of proof from the prosecution to the appellant but to the contrary the trial court evaluated the prosecution evidence vis-à-vis the defence and was alive to the fact that the burden lay on the prosecution.
13. It was therefore submitted that the three issues to be determined in an offence of defilement were proved especially based on the evidence of PW1 who testified on how the Appellant took her to his bed and defiled her for about 30 minutes which evidence was corroborated by the P3 form. The offence, it was submitted took place in broad daylight and that PW1 knew the appellant prior to the commission of the offence and that PW1 at the time of reporting mentioned the appellant by name hence there was no possibility of mistaken identity. It was submitted that the age assessment showed that PW1 was 14 years and that whereas there was contradiction in the evidence of PW1 and PW2 as to when PW1 informed PW2 about the defilement, the same did not warrant interference with the decision of the trial Court. As the same did not go to the root cause of the offence.
14. It was the Respondent's case that the trial Court duly analysed the evidence and was satisfied as to the commission of the offence by the appellant hence his conviction based on well-reasoned and supported by evidence
15. The Court was therefore urged to uphold the conviction and confirm the sentence.
16. According to PW1, the appellant was known to her being their neighbour. On the material day while she was plucking mangoes, the accused called her but she refused the first time. However she acceded to do so the second time at the appellant's home. The appellant then led her to his house, took her to his bedroom, removed both his and her clothes, inserted his private parts into her private parts. However PW1 did not scream. After the ordeal, which led to her bleeding, PW1 left, but with pain in her waist. According to her the process took about 30 minutes after which she went home and took a bath. The same night she reported the incident to her mother.
17. On 30th November, 2014, PW1 was taken to a hospital in Mwala after being taken to Mwala Police Station where she was issued with a P2 form. Her age was also assessed.
18. In cross-examination, PW1 testified that she informed her mother about the incident at 8.00pm since no-one was at home apart from her brother and sisters. She insisted that the time the appellant called her to his home, though the appellant was unmarried with children, no one was at the appellant's home. Though she bled, PW1 did not show the mother the ant but took bath immediately.
19. According to PW2, the mother of PW1, on 27th November, 2014 she was at home when she was PW1 limping and upon asking her what had happened, she kept quiet. However, the following day after being beaten, PW1 ran to her grandmother's place and spent the night there. It is there that she disclosed to PW2 that she had been defiled by the appellant on 25th November, 2014 at 3pm. On 1st December, 2014, PW2 reported the matter to the sub chief who told her to take the child to the hospital. She went to the AP post where she obtained a note and went with it to the hospital, 5 days after the incidence. According to PW2, PW1 did not inform her of what had happened until after she had been beaten.
20. In cross-examination, PW2 stated that she knew of the defilement on 27th November, 2014. According to her evidence PW1 informed her of the incident in 28th November, 2014 at which time she was limping. According to PW2, the appellant is her neighbour. By the time she went home, she found when PW1 had already washed her clothes. She testified that at the hospital, PW1 was examined and given medicine. In cross-examination, PW2 testified that there was no grudge between her and the appellant and that PW1 was not aware of their relationship.
21. PW3 was PW1's grandmother. On 29th November, 2017 at 5.00pm PW1 went to her house and spent the night there. Her mother however went the following day. When asked by the mother what had happened to her, PW1 disclosed in the presence of both PW2 and PW3 that she had been defiled by the appellant after which both PW1 and PW2 went home.
22. In cross-examination, PW3 confirmed that PW1 was limping when she went to her house. However, on the day PW1 disclosed what had happened to her, it was PW3's evidence that she was not beaten.
23. PW4 was the Senior Clinical Officer, Mwala Hospital. According to her on examination of PW1, she found her sober but shy. She however had mild lower abdominal pains, while the lower and upper limbs were normal. On further examination, PW4 found that though PW1's home was broken, the same was not fresh and there was no evidence of laceration while labia minora and majora were normal. It was his evidence that apart from the allegations, there was no medical evidence to prove the same since the patient had stayed for over one week. He however signed the P3 form.
24. PW5's evidence was limited to the assessment of the age of PW1 which was placed at 14 years. PW6 was the investigating officer.

25. At the close of the prosecution evidence, the appellant testified as DW1. According to him, on 25th November, 2014 she was in his business of *boda boda* operations from 5.00 am till 8pm. It was his evidence that he was staying with his wife and children aged 8 to 16 years. It was his evidence that on that day there was a teachers' strike and his family was at home. According to him the distance from his home to PW1's home is 50 metres and there are other homes in between. It was his evidence that he did not hold PW1's hand otherwise he would have been noticed by other people whose homes he would have passed.

26. It was his evidence that PW1's mother was his girlfriend and they were to get married in 1998. Because of that PW1's father believes that he is having an affair with PW1's mother. It was his evidence that upon hearing the allegation that he had defiled PW1, he went to PW1's home and asked the parents but they denied the same. It was his evidence that he was arrested about one month after the incident during which time he was working normally. It was his evidence that PW1 was married and that she gave birth while the case was ongoing. He denied that he committed the said offence.

27. In cross-examination, the appellant said that he refused to marry PW1's mother who went to work in Nairobi and upon coming back found that the appellant was already married. According to him, PW1 delivered a baby boy at Machakos Hospital on 24th December, 2015.

28. The appellant called DW2, who confirmed that between the appellant's home and PW1's there are other homes and that their farms do not border each other. According to him, the appellant and PW2 were friends since 1998. However when PW2 went to Nairobi, the appellant married PW2's cousin.

29. In his judgement, the learned trial magistrate found that PW1 was 14 years old, that she was penetrated and that the appellant was well known to PW1. The trial magistrate proceeded to find that based on the evidence on record, the prosecution's evidence was overwhelming and discounted the appellant's alibi on the ground that the same was not put forward at the early stage in the case.

30. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”

31. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. 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; 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.

32. Section 8 of the *Sexual Offences Act* provides as follows:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(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.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

33. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

34. In this case, it is clear that no issue arises from the age of PW1. Neither is there a question as to whether there was a penetration since this is confirmed by the fact that PW1's hymen was broken.

35. The only question is whether it was in fact the appellant who defiled PW1 and the date of the said defilement.

36. From the evidence of PW1, the defilement took place on 25th November, 2014. It was her evidence that she reported the incident to the mother the same night and it was as a result of the said information that the mother beat her up. However, the mother told her that she would take her to the Hospital on 30th. In the meantime PW1 went to her grandmother's home on 28th by which time, according to her mother she knew that she had been defiled. It was however her evidence that her grandmother was not there though she informed her that she had been defiled by the appellant.

37. According to PW2, she only became suspicious when she saw PW1 limping on 27th November, 2014 and even after beating her, she did not disclose what had taken place till 28th November, 2014. However, even after disclosing the same on 28th November, 2014, no action was taken until 1st December, 2014 when the matter was reported to the Assistant Chief. PW2 however admitted that the appellant went to her home on 1st December, 2014 but she did not ask the appellant anything.

38. Whereas PW2 testified that PW1 was limping when they went to see the doctor, PW4 did not notice any abnormality in the manner in which PW1 was walking when she went for examination. In cross-examination, PW2 did not deny the existence of prior relationship between her and the appellant. She only said that “the child did not know about our relationship.”

39. On the part of the grandmother, PW1 went to visit her on 29th November, 2014 and PW2 went the following day and it was on the following day that PW1 disclosed that she had been defiled by the appellant.

40. It is clear that from the prosecution evidence there were inconsistencies as to when PW1 reported the incident. While she maintained that she reported the incident the same day and it was as a result thereof that she was beaten, her mother PW2 insisted that she was not aware of the incident until 3 days later. Apart from the same, there is no evidence that the defilement took place on the day alleged since the medical evidence was not helpful at all. While I agree that the defence of alibi ought to be raised at the earliest opportunity, it is not the law that the mere fact that it is raised at a later stage of the proceedings, it is not to be considered. In this case the said defence coupled with the inconsistencies in the prosecution evidence as well as the fact that the medical evidence was not helpful as to when the offence could have been committed, in my view makes the conviction unsafe.

41. In Omar Nache Uche vs. Republic [2015] eKLR the Court observed as follows:

“If the complainant contradicted her uncle and mother on the events of 24th January 2013 how sure are we that whatever she testified as having transpired on 19th January 2013 is true. Can we rely on her to tell the truth?” The court of Appeal in the case of *Ndungu Kimanyi VR [1979] KLR 283* held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

42. While the past relationship between PW2 and the appellant may not necessarily warrant the defilement of PW1, it goes to show that the linking of the appellant to the offence in question could have been maliciously instigated particularly considering PW2's failure to take up the issue with the appellant on the day the appellant visited her home when she already had the information that the appellant had defiled her daughter.

43. It is therefore my view that considering the totality of the evidence adduced by the prosecution, the conviction of the appellant cannot stand. There were just too many inconsistencies in the prosecution evidence and inconclusive evidence to leave the conviction undisturbed.

44. I accordingly, find that the appellant's conviction was unsafe and for that reason I allow the appeal set aside the conviction and quash the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

45. Right of appeal 14 days.

46. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 12th day of June 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Musila for the Appellant.

Ms Mogoi for the Respondent.