



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 15 OF 2017

J K B.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence In Criminal Case No. 418 of 2014 of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma, RM)

JUDGEMENT

1. The Appellant, J K B is currently serving 15 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The allegation was that on 4th October, 2014 at [particulars withheld] Location in Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.J.N. a child aged 16 years.
2. The Appellant faced an alternative charge of committing an indecent act contrary to Section 6(b) of the Sexual Offences Act. That charge is no longer relevant to this appeal and I do not find it necessary to reproduce the particulars of the offence.
3. The Appellant being aggrieved by both conviction and sentence has appealed to this court on six grounds faulting the trial court for convicting him without prove of age of the complainant; failing to take into account the fact that he was a child at the time of the alleged offence; relying on hearsay evidence; failing to consider that there was no proper identification; and not considering his defence.
4. Starting with the claim that a birth certificate or an age assessment report was not produced, the Appellant points to the court proceedings and submitted that an attempt by the investigating officer to produce the age assessment report was rebuffed by the trial court. The Appellant cited several decisions in support of his submission that prove of age is necessary in order to sustain a conviction for a charge of defilement. The cases cited are **Alfayo Gombe Okello v Republic [2010] eKLR**, **Kaingu Elias Kasomo v Republic, C.A. No. 504 of 2010 (Malindi)** and **Gilbert Miriti Kanampili v Republic [2013] eKLR**.
5. On the question of his age, the Appellant submitted that the age assessment report dated 6th October, 2014 showing that he was an adult at the time of the alleged offence was fraudulent and irregular. He asserted that there was no way that an age assessment report could have been prepared for him a day before his arrest. According to the Appellant, it is the said age assessment report which made the trial magistrate to give him a custodial sentence.
6. The Appellant submitted that if indeed an age assessment had been carried out on 6th October, 2014, the prosecution would not have found it necessary to apply for his age assessment before sentencing. This second age assessment generated a report dated 10th July, 2017. Pointing to the fact that both reports indicated that he was 18 years old, the Appellant wondered whether he had not aged between 2014 and 2017.
7. According to the Appellant, he was a child at the time of the alleged offence and his imprisonment was unlawful as well as unconstitutional. He urged this court to find that the sentence imposed on him was unlawful.
8. On the ground that his conviction was based on hearsay evidence, the Appellant submitted that the evidence of the investigating officer was read out by PW4 Corporal Clara Bingo and the trial Magistrate erred in convicting him on such evidence which amounted to hearsay evidence. The Appellant submitted that it is only the investigating officer who could have tied the loose ends of the case and failure to call the investigating officer without advancing any reasons for not calling him ought to have been resolved in his favour.
9. Submitting on the issue of identification, the Appellant stated that his encounter with the complainant is said to have taken place at night and it was not clear how the complainant had identified him.

10. Finally the Appellant asserted that his defence was never considered by the trial court as there is no mention of his defence anywhere in the judgement. He contended that his alibi defence was never considered at all.
11. Opposing the appeal, counsel for the Respondent submitted that the evidence adduced confirmed that the Appellant had carnal knowledge of the complainant on the said night. He stated that the complainant was a child on the date the Appellant defiled her. The Respondent's position is that it proved its case against the Appellant beyond reasonable doubt. Relying on the decision of Ngenye, J in **Fred Omar Omondo v Republic, Criminal Appeal No. 59 of 2011**, counsel submitted that the trial court cannot be faulted for relying on the evidence of the complainant as the law allowed convictions based on reliance on the evidence of complainants in sexual offences. The Respondent urged this court to dismiss the appeal.
12. This is a first appeal and the Appellant is entitled to a review of the evidence adduced at the trial in order for this court to reach its independent decision. In doing so this court should be mindful of the fact that unlike the trial court it never observed the demeanour of the witnesses.
13. The complainant testified as PW1 and told the court that on 4th October, 2014 she met the Appellant at the shops. He invited her to a wedding. During the night at about 10.00 p.m. she sneaked out of the house through the window and went to the wedding. On the way she met the Appellant who defiled her and threatened to kill her if she disclosed the act to any soul. The Appellant thereafter escorted her home. She did not go to the wedding. She sneaked back to the house through the window but her mother discovered her antics. She beat her up and that is when she disclosed what the Appellant had done to her. She was escorted to hospital where the doctor examined her and confirmed that she had been defiled.
14. Cross-examined, the complainant stated that she was on her way to the wedding when she met the Appellant who was with his friend. She denied having arranged a date with the Appellant.
15. J G, the father of the complainant testified as PW2. His evidence was that on 5th October, 2014 in the morning he discovered that the complainant had sneaked out of the house the previous night. They also learned that she had been seen at a disco. The complainant was beaten up and she disclosed that the Appellant had defiled her. The Appellant denied knowledge of the defilement. The complainant was taken to hospital and upon examination it was discovered that she had indeed been defiled. The matter was reported to the police and the Appellant was arrested and charged.
16. PW3 Dr. Noorein Abdultwalib Noorein produced a P3 form filled for the complainant by Dr. Hashim Suleiman. His evidence was that the genitalia was normal and there were no tears or bleeding. There was no discharge. The hymen was broken.
17. PW4 Police Corporal Clara Bingo told the court that she took over investigations from P.C. Julius Koitaba. She testified that the complainant informed the investigator that she had met the Appellant during the day and he had invited her to go to a wedding. At about 9.00 p.m. the Appellant, who was in the company of his brother, went to the complainant's home and assisted her to sneak through the window. When they reached a forest, the Appellant had forceful intercourse of her after tearing her skirt and pants. The Appellant broke her virginity and the complainant bled. After the act the Appellant escorted her back home and helped her get back to the house through the window. In the morning her parents discovered that she had sneaked out. They beat her up. She opened up and told them what the Appellant had done to her.
18. The Appellant testified in his defence as DW1 and told the court that on the material night he was going to a wedding with his friend DW2 Alex Amani Kadenge when they met the complainant who was also going to the wedding. They went to the wedding together and parted ways upon arrival. At 4.00 a.m. they left for home. During the day the mother of the complainant summoned him to their home. He went with DW2 and found the complainant tied up and being beaten by his father. Police officers were called and he was arrested.
19. DW2 gave evidence similar to that of the Appellant.
20. What was the age of the Appellant at the time of the alleged offence? The Appellant insisted that his age could not have been assessed on 6th October, 2014 as he was arrested on 7th October, 2014. His view is that the age assessment report dated 6th October, 2014 was fraudulent and irregular.
21. The charge sheet indicates that the Appellant was arrested on 7th October, 2014 and presented to the court on 8th October, 2014. The information on the charge sheet does not tally with the evidence of DW2 and the Appellant who told the court that the Appellant was arrested on 5th October, 2014. Going by the evidence adduced, it is therefore most probable that the Appellant's age was indeed assessed on 6th October, 2014 as he was already in police custody by then. I do not see any reason why the prosecution would manufacture evidence in this matter.
22. What does the age assessment report dated 6th October, 2014 state? The doctor who saw the Appellant stated that **"I have assessed the above named for age and in my opinion he/she is approximately eighteen years old."** This means that the Appellant was either below or above eighteen years of age. The trial magistrate ought to have reconciled this evidence in favour of the Appellant. She ought to have found that the Appellant was a minor at the time of the alleged offence and proceeded to apply the necessary principles during the sentencing.
23. Was there evidence to lead to the conviction of the Appellant in the first place? In order for conviction to arise in a case where a person is accused of defilement, the prosecution ought to prove that there was penetration of a child (a person under the age of 18 years) by the accused.
24. In the case at hand the medical evidence does not establish defilement. The missing hymen cannot in itself be linked to sexual intercourse between the Appellant and the complainant. The testimony of the investigating officer was that the Appellant broke the complainant's

virginity and there was blood. The medical officer talked of a normal vagina. No blood was seen and neither was any discharge noted. The complainant most likely had had a sexual encounter before the material night.

25. Secondly, it is noted that the complainant did not make any voluntary allegation against the Appellant. She had to be beaten to the point of injury (as confirmed by her father and the doctor) before she could name the Appellant as her defiler. It is therefore possible that the complainant only named the Appellant because of the beating she received. On the material placed before the trial court one cannot therefore positively assert that the complainant was defiled by the Appellant.

26. The Appellant also complains about failure to establish the age of the complainant. The complainant never stated her age and neither did her father. No birth certificate or age assessment report was produced in court. Attempt by PW4 to produce the age assessment report was indeed rejected by the trial Magistrate who agreed with the Appellant that the age assessment report ought to have been produced by the doctor. Age is a necessary ingredient in an offence of defilement. For a conviction to ensue the prosecution must establish that the victim was under 18 years of age at the time of penetration. Although the doctor stated that the complainant was 16 years, the source of the information was not disclosed. There is no indication that the doctor who treated the complainant carried out any age assessment of her.

27. The trial magistrate also noted when recording the evidence that the complainant was a minor without indicating the basis for this conclusion. In short the evidence adduced did not establish that the complainant was a child.

28. Looking at the evidence adduced in this case, I find that the necessary ingredients of the charge were never proved. The conviction is shaky and the only outcome is to allow the appeal. The conviction is quashed and the sentence set aside. The Appellant is therefore set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 19th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT