



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 14 OF 2017

JOHN MUTISYA MBEETU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 40 of 2012 of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma, RM)

JUDGEMENT

1. John Mutisya Mbeetu, the Appellant is serving twenty years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence disclosed that on 6th January, 2012 in Kilifi County the Appellant intentionally and unlawfully penetrated the vagina of M.K.H. a girl aged 12 years using his penis.

2. The Appellant being aggrieved by both conviction and sentence has appealed to this court through the grounds of appeal dated 21st July, 2017 as follows:

“1. The learned magistrate erred in law and in fact by convicting the appellant when the age of the complainant had not been proved.

2. The learned magistrate erred in law and in fact by convicting the appellant based on contradictory evidence of the prosecution witnesses.

3. The appellant's right to a fair trial under Article 50(2) of the Constitution was violated by the trial court when it ordered the case to proceed without the appellant being given prosecution's witness statements.

4. The learned magistrate erred in law and in fact by convicting the appellant on charges that were not proved beyond reasonable doubt.”

3. Mr. Nyongesa for the Appellant commenced his submissions by stating that the age of the complainant was not proved. He submitted that the complainant testified that he did not know her age and that her sister PW2 L.K.N told her that she was 14 years. According to counsel, PW2 never corroborated this testimony and neither did PW3 K.K the mother of the complainant disclose the age of the complainant.

4. Counsel for the Appellant asserted that although the trial magistrate relied on the post rape care (PRC) form and the P3 form to find that the complainant was 12 years old, the age in the forms is estimated. Further, that the doctors who filled the said forms never carried out any specific scientific age assessment of the complainant and the complainant's age was therefore not proved.

5. The Appellant's counsel stressed that in a charge of defilement the prove of age of the victim beyond reasonable doubt is necessary. In support of this assertion he placed reliance on the decisions in **Alfayo Gombe Okello v Republic [2010] eKLR** and **M.N. V Republic [2016] eKLR**.

6. On the Appellant's contention that the prosecution evidence was contradictory and the case was thus not proved beyond reasonable doubt, counsel submitted that the complainant's evidence that she was defiled on 9th March, 2013 contradicted the charge sheet which disclosed the date of the alleged offence as 6th January, 2012. According to counsel, the only explanation that can be attributed to the complainant's contradictory evidence on the date of the alleged defilement is that the offence never occurred at all.

7. Further, it was submitted for the Appellant that there were contradictions as to the time of the alleged offence with the complainant talking of 12.00 noon and the PRC form indicating that the incident took place at 9.15 p.m. Further, that PW3 talked of the offence occurring at 9.00 p.m. although she also talked of having first seen the complainant at 1.00 p.m.

8. Still on the issue of contradictory testimony, counsel for the Appellant submitted that although the complainant and PW3 testified that the first hospital of call was Dida Vitengeni, PW2 never mentioned that hospital and the PRC indicated that the complainant had not been seen at any other medical facility prior to being taken to Kilifi District Hospital. Counsel asserted that no treatment notes from Dida Vitengeni Hospital were produced as exhibit.

9. Counsel closed his submission on this issue by stating that although the complainant testified of being impregnated by the Appellant and the P3 form shows that when the complainant was being examined on 23rd January, 2014 she had a child aged 1 year and 3 months, PW2 and PW3 did not corroborate this evidence. Further, that there was no DNA test carried out to prove that the child indeed belonged to the complainant.

10. On the claim that the Appellant's right to a fair trial was violated, counsel submitted that the Appellant was forced to proceed without witness statements and relevant documents thus violating his right to a fair trial as guaranteed by Article 50(2) of the Constitution. Counsel urged this court to find that the Appellant was prejudiced in the preparation of his defence as was found by this Court (Nyakundi, J) in **Kaingo Lesakei v Republic [2017] eKLR**.

11. The Respondent's submissions dated 13th March, 2018 were directed at the grounds of appeal filed by the Appellant himself. The grounds of appeal were amended after he instructed counsel. Though the Respondent was given a chance to file supplementary submissions, this opportunity was not utilized after counsel for the Respondent indicated that no supplementary submissions would be filed.

12. It was submitted for the Respondent that the medical evidence adduced by PW4 Dr. Hadija Abdunassir corroborated the testimony of the complainant that she had been defiled.

13. As for the failure to conduct a DNA test, counsel for the State asserted that Section 36 of the Sexual Offences Act, 2006 did not make such a test mandatory. Reliance was placed on the decision in **Jackson Mwanzia Musembi v Republic, Machakos HCCRA No. 99 of 2011** in support of this assertion.

14. Further, that the pregnancy of the complainant was in itself evidence of defilement as was held in **Nyamani Nyawa v Republic, Criminal Appeal No. 172 of 2011**.

15. The key question herein is whether the prosecution proved the three ingredients of defilement namely age of the victim, penetration and identity of perpetrator beyond reasonable doubt. There is also need to consider if the Appellant's constitutional right to a fair trial was violated.

16. On the age of the victim the trial magistrate in her judgement dated 7th July, 2017, after quoting the Court of Appeal decision in **Moses Nato Raphael v Republic [2015] eKLR** held that:

“As such being guided by the above authority I note that there was no dispute that the complainant herein was below 18 years old as at the time of commission of the offence. Further this being a children's Court I was able to observe the complainant in this case and I could not place her age to be above 18 years old. This Court is also guided by the P3 and PRC form which are medical records duly produced before this Court that indicated the complainant was 12 years old at the time of the offence. I am therefore satisfied that the age of the complainant has been proved to be below 18 years old i.e. 12 years old as at the time of commission of the offence.”

17. In her testimony, the complainant stated that:

“I left school sometime back after the incident herein occurred. I am fourteen years old. My elder sister told me that I am fourteen years old. She is called L.”

18. The complainant was not sure of her age. When L (PW2) herself testified she never mentioned the age of the complainant and neither did she state her own age so that the same could be used to estimate the age of the complainant. PW3 the mother of the complainant never mentioned the age of the complainant.

19. In **Dennis Abuya v Republic [2010] eKLR; Criminal Appeal No. 164 of 2009**, the issue of the age of the appellant in that case was handled by the Court of Appeal thus:

“There is a P3 Form in the record before us and it shows that on 26th June, 2007, the appellant's “Estimated age” was eighteen years. By “estimated age” we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at the date he was said to have committed the offence.

Neither the trial magistrate nor the learned Judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years at the relevant time; but it may equally be that he was below eighteen years at the time.”

20. Applying the logic in the cited case to this matter, I find that a P3 form is not good evidence for purposes of establishing the age of a person. It only gives the estimated age of the person named in the P3 form.

21. In the case of **Moses Nato Raphael** which was cited by the trial magistrate in support of her finding that the complainant was a child, the Court of Appeal held that:

“On the challenge posed by the uncertainty in the complainant’s age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanja v R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child’s age cannot therefore assist the appellant to avoid criminal culpability.”

22. In the trial that resulted in the cited appeal, the complainant had testified that she was ten years old and her mother had stated that the complainant was six years old.

23. In **M.N. v Republic [2016] eKLR**, this Court (Ngaah Jairus, J) was confronted with a situation where the complainant gave her age as 12 years and the mother said she was 14 years. After analyzing Court of Appeal decisions the learned Judge held that:

“In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal is of the view that the word of mouth alone irrespective of whose mouth the word is coming from is insufficient and proof of age in a trial of an offence under section 8 of the Act demands some sort of documentary proof.”

24. He continued to state that:

“The point here is that the age indicated in a P3 form as “the estimated” age of either the victim or the culprit of a sexual offence is not a conclusive proof of that particular person’s age; there is need for evidence ascertaining *conclusively* a person’s age whenever the question of his or her age arises.”

25. This position was adopted by Chitembwe, J in **Omus Kiringi Chivatsi v Republic [2017] eKLR; Malindi H.C. Criminal Appeal No. 32 of 2016** when he stated that:

“My view is that the age indicated on the P3 form is what the complainant informs the police to be the complainant’s age. That information has to be supported by the production of supporting documents or information. Such documents include birth certificate, immunization or baptismal card, school records such as school identity card indicating date of birth as per the school records or school leaving certificate, passport, age assessment or any relevant information such as the numbers of children the victim’s family has and the complainant’s position of birth in the family. This information enables the court to verify the victim’s age. Where the victim appears to the court that she/he is a child, the court can make such observations and the apparent age can be considered.”

26. That the age of the victim should be proved in a case of defilement was stressed by the Court of Appeal in **Kaingu Elias Kasomo v Republic, Criminal Appeal (Malindi) No. 504 of 2010** when it stated that:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement.”

27. The question would then be whether the word of the complainant and the contents of the P3 form and the PRC form are sufficient to establish that the complainant was a child at the time of the alleged defilement. The answer lies in the decision of the Court of Appeal in **Evans Wamalwa Simiyu v Republic [2016] eKLR; Criminal Appeal No. 118 of 2013**.

28. In the said case, the appellant had argued that the prosecution had failed to produce the victim’s age assessment report as well as a birth certificate thereby failing to discharge the burden of proof beyond reasonable doubt. Dismissing the appellant’s submission, the Court of Appeal held that:

“ [17] In this regard the evidence before the trial court was that of the complainant who stated during her *voir dire* examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant’s age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant’s age, the fact that the trial court found it necessary to carry out a ‘*voir dire*’ examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed section 2 of the Children Act define “age” as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.”

29. The facts in **Evans Wamalwa Simiyu** (supra) are similar to the facts in the appeal before this court. The victim in the appeal before me

had indicated that she had been told by her sister that she was 14 years old. The prosecution could have done better by producing the birth certificate of the child or any other document to prove the age of the victim.

30. Nevertheless, I note that the P3 form gave the estimated age of the child as 12 years. This is the age given to the medical officer by the child, her parent or guardian. The trial magistrate found the victim was a child of tender years and conducted a *voir dire* examination in order to establish whether she had the capacity to testify and whether she understood the importance of telling the truth. The trial magistrate also stated in her judgement that being a magistrate gazetted to handle matters touching on children, she had formed the opinion that the victim was a child. If the complainant had not been subjected to a *voir dire* examination, one could have said that the estimated age in the P3 form was not good enough to support the complainant's evidence on age. In the circumstances of this case, the evidence adduced established beyond reasonable doubt that the victim was a child. The Appellant's claim that the age of the victim was not proved is therefore without basis and this particular ground of appeal fails.

31. Was the complainant penetrated by the Appellant? In brief, the prosecution's case was that the complainant was walking home from the market when she was confronted by the Appellant in a forest. The Appellant pushed her to the ground and had carnal knowledge of her. She bled as a result of the violation.

32. After the incident the complainant walked home and fainted upon arrival. Her sister, PW2 resuscitated her before informing their mother. The incident was reported to the chief and the complainant taken for treatment at Dida Vitengeni Hospital from where she was referred to Kilifi County Hospital for further treatment. A PRC form was filled immediately and a P3 form was filled two years later.

33. Dr. Hadija Abdunassir produced a P3 form prepared by Dr. Kalu on 23rd January, 2014 and a PRC form filled by Dr. Busra on 6th January, 2012. The medical evidence supported the complainant's evidence that she was defiled.

34. In his defence the Appellant told the court that he indeed saw the complainant in the company of a boy on the material day. The girl later went to where he was selling water and requested him to give her water to drink. At that time the girl was alone. He gave her water and she left. He stated that about a week before he had quarreled with the girl's parents after they refused to pay for water he had supplied them. His evidence was that the complainant had since been married in Tana River.

35. When one looks at the testimony of the Appellant *vis-à-vis* that of the complainant, it becomes apparent why the trial magistrate chose to believe the complainant. She detailed how the Appellant who was armed with a panga persistently called her before grabbing her by force and taking her to the forest. He then removed her clothes and put her down before defiling her. Thereafter he cleaned her using water and cotton.

36. It was the evidence of the complainant that she became pregnant as a result of the defilement and later gave birth to a child call B. Her evidence that she had a child was confirmed by the medical officer who filled the P3 form for her in January, 2014. It is indicated that at that time the complainant had a child who was one year and three months old.

37. A perusal of the evidence adduced shows that the trial magistrate reached the correct decision. The Appellant penetrated the complainant who was approximately twelve years old at the time of the incident. The claim by the Appellant that he had differences with the parents of the complainant was an afterthought. He did not take up the issue during cross-examination of the prosecution witnesses.

38. The remaining ground of appeal is the alleged violation of the Appellant's right to a fair trial due to the failure by the prosecution to supply him with statements of witnesses and other documentary evidence. Unfortunately, by failing to file supplementary submissions the Respondent did not respond to this important issue.

39. The court record clearly shows that on 6th February, 2014 the Appellant applied for adjournment on two grounds namely that he was bereaved and that he had not been supplied with statements of prosecution witnesses. The application was opposed by the prosecution. The application for adjournment was dismissed by the trial court.

40. In rejecting the application for adjournment the magistrate did not address the Appellant's claim that he had not been supplied with witness statements. Previously on 16th December, 2013 the Appellant had raised the issue of not being supplied with the statements of the prosecution witnesses. It was the responsibility of the trial court to ensure that the Appellant had been supplied with the material to be used in the trial. In a criminal trial, the duty of protecting the trial rights of an accused person squarely falls on the court.

41. One of ingredients of the right to a fair hearing as protected by Article 50(2) of the Constitution is the entitlement of an accused person **"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."** Failure to comply with the requirement vitiates the trial – see **Kaingo Lesakei** (supra); **Joseph Ndungu Kagiri v Republic [2016] eKLR** (Mativo, J) and **Erick Ochieng v Republic [2015] eKLR** (Ruth Sitati, J).

42. Consequently, I allow the appeal, quash the conviction and set aside the sentence. Considering that a conviction is likely to result if a retrial is held, and noting that the error was caused by the trial court, I remand the matter to the SPM's Court at Kilifi for a fresh trial before any competent magistrate apart from L.N. Juma, Resident Magistrate. The Deputy Registrar of this court to ensure that this court's order is complied with forthwith.

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

W. KORIR,

JUDGE OF THE HIGH COURT