



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HIGH COURT CRIMINAL APPEAL NO. 17 OF 2017

SAMUEL MWANGIRI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the Judgment of Hon. Wandia, Resident Magistrate delivered on 19th July, 2017 in Malindi Chief Magistrate's Court Criminal Case No. 59 of 2014).

JUDGMENT

1. The appellant, Samuel Mwangiri, was arraigned in court on 11th September, 2014 and charged with the offence of defilement of a girl contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 6th June, 2014 and 9th September, 2014, in Magarini District within Kilifi County, intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of JKM [name withheld] alias J [name withheld] a girl aged 15 years.
2. He was also faced with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on diverse dates between 6th June, 2014 and 9th September, 2014 in Magarini District within Kilifi County committed an indecent act by touching the female genital organ namely vagina of JKM a girl aged 15 years using his hands and penis.
3. After hearing the evidence tendered before her, the Hon. Magistrate found the appellant guilty of the offence of defilement and convicted him. She sentenced him to serve 20 years imprisonment.
4. The appellant being dissatisfied with the said conviction and sentence filed a petition of appeal on 17th August, 2017 raising the following grounds of appeal. That:-
 - (i) The Learned Magistrate erred in law and in fact by convicting him on charges that were not proved beyond reasonable doubt;
 - (ii) The Learned Magistrate erred in law and in fact by disregarding his defence;
 - (iii) The Learned Magistrate erred in law and in fact by relying on contradictory evidence of the prosecution witnesses to convict him;
 - (iv) The Learned Magistrate erred in law and in fact by relying on the uncorroborated evidence of the complainant to convict him;
 - (v) The Learned Magistrate erred in law and in fact by relying on questionable medical evidence to convict him; and
 - (vi) The alleged love letters, P. exhibit 4A, were not examined and produced by an expert nor was the appellant asked to provide samples of his handwriting for comparison with the letters.
5. Mr. Gekanana, Learned Counsel, held brief for Ms. Omollo for the appellant. He relied entirely on the written submissions filed on 18th March, 2018. These were to the effect that the birth certificate produced in court indicated that PW1 was born on 11th March, 1999 which shows that she was 15 years old at the time of defilement. The appellant relied on the case of **Martin Charo vs Republic** [2016] eKLR where the court held that the offence of defilement should not be limited to age and penetration, because if those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends.

6. It was submitted that PW1 despite her age behaved like a grown up woman when she consented to the letters written to her by the appellant and only reported the matter to the Head Teacher which also raises a lot of questions as to why she did not report the matter to her parents.

7. The appellant's Counsel argued that the relationship had stayed for so long that age became a non-issue and PW1 enjoyed her relationship with the appellant. The said Counsel wondered why PW1 was arrested and detained in Malindi Police Station on 9th September, 2014 if she really had a complaint.

8. It was contended that although the incident happened during the day, no witness was called to corroborate the fact that PW1 used to accompany the appellant to the staff quarters as no teacher or fellow students saw her with him in the said quarters. Counsel stated that the conduct of PW1 creates doubt as she did not inform anyone that she had been defiled by the appellant but only informed her Head Teacher, PW3, of the same. It was further stated that the said Teacher said he was informed of the incident by two parents but they were not called to testify. It was also argued that two teachers, namely M B and C, were not called to give an account of what they saw. It was submitted that the appellant did not penetrate the genital organ of PW1.

9. In concluding his submissions, Counsel for the appellant argued that in PW1's testimony, she stated that she used to go to the appellant's house to have sex and then go home. She would also go to the staffroom to meet the appellant but no witness was called to testify on when she was called therein or who informed her that there was no Teacher so that she could go to the staffroom. It was contended that when a child under the age of 18 years who is protected by the law opts to go to men's houses for sex, the court should not conclude that such a person was defiled.

10. It was further submitted that there was no other evidence suggesting either complete or partial penetration of PW1's genital organ and that PW4 did not give the basis upon which he came up with the conclusion that there was penetration.

11. The Office of the Director of Public Prosecutions through Ms. Lydia Kagori, Prosecution Counsel, filed its written submissions on 28th March, 2018. The said submissions indicate that PW1 was 15 years when the offence took place on 5th September, 2014 as she testified that she was born on 11th March, 1999. A birth certificate to support that fact was produced as exhibit 3. This court was informed that as at the time of testifying in court, PW1 stated that she was 17 years old. It was therefore submitted that PW1's age was properly proved.

12. On the issue of penetration, it was submitted that PW1 testified that she had sexual intercourse on 6th June, 2014 in the appellant's house and that she felt pain and bled. She also had sex with him on 20th August, 2014. Counsel stated that PW4, a Senior Clinician who filled the P3 form found that PW1's hymen was broken which proved penetration had taken place.

13. It was submitted that the appellant was PW1's Math's Teacher at [particulars withheld] and he was well known to her. It was argued that the allegations by the appellant that no one saw them in the staff quarters was rebutted by PW3, the Head Teacher who said that he was told by parents who found PW1 in the staff quarters with the appellant. It was stated that the Head Teacher then sent 2 Teachers to investigate.

14. Counsel for the respondent submitted that PW1's evidence was corroborated by that of PW4 and the fact that she and the appellant were arrested together at Mombasa stage when they should have been at School corroborates everything else. It was argued that the evidence tendered before the lower court was watertight and the appellant's conviction was safe. Counsel relied on the case of **Kiilu and Another vs Republic** [2015] eKLR, **Joseph Maina Mwangi vs Republic** [2000] eKLR and **Jackson Mwanzia Musembi vs Republic**, HC Criminal Appeal No. 42 of 2016, to assert that a court can ignore minor contradictions and discrepancies if they do not affect the conviction and sentence or cause prejudice to an accused person.

15. Counsel took the position that PW1's treatment notes were properly produced as exhibit 1 by PW4, who authored the documents and that the P3 form showed that PW1 had a broken hymen.

16. On the issue of the love letters that were recovered from the appellant, it was submitted that the same were not necessary in proving the offence. It was further submitted that the Magistrate did not consider the said letters and they were not the basis for the conviction.

17. In addition to the foregoing written submissions, Ms. Keng'ara, Prosecution Counsel, who attended court to represent the Office of the Director of Public Prosecutions at the hearing of this appeal submitted that the Judgment cited by the appellant's Counsel was of persuasive value to this court and was bad law and should not be replicated as it cited cases from Australia and Belgium where the age of consent for marriage is 16 years. She stated that the Children Act defines a child as a person below the age of 18 years and therefore the victim in this case had no capacity to give sexual consent.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

18. The duty of the first appellate court is to analyze and re-consider the evidence adduced before the lower court and come to its own conclusion. In the case of **Simiyu and Another vs Republic (2005) 1KLR at Page 192** the Court of Appeal stated thus:-

“It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.”

19. The evidence of PW1, JKM [name withheld], was that she was a pupil at [particulars withheld] Primary School in class 7 in the year 2014. She was by then 15 years old. She testified before the lower court that in May 2014, the appellant who was her Teacher asked her to be his friend. They had sex on 6th June, 2014 after he called her to his house. She stated that she felt pain and bled. They had sex again on 20th August, 2014 after he called her in school and asked her to follow him home. She stated that on 4th September, 2014, she told their

Headmaster, Mr. C K, who told her to go to school with her parents on 9th September, 2014 but she did not go with them.

20. She further testified that on the said date she went to Malindi on instructions of the appellant but she was caught by her Father who had gone to the said town. They were taken to Malindi Police Station and put in cells. She indicated that the appellant wrote her another letter telling her not to say what she had said the day before. She gave the letter to Madam F. She was taken to hospital on 10th September, 2014 where she was treated. She identified her treatment notes, P3 form, and birth certificate which were marked as MFI-1, MFI-2 and MFI-3, respectively.

21. It was her evidence that PW1 told her that he would marry her and he would communicate to her through letters which he would put in her Math's book. She indicated that she would also reply to the said letters. She identified the letters he wrote to her as MFI-4A and the ones she wrote to him as MFI-4B.

22. PW2, JK [name withheld], indicated that he as PW1's father. He recounted how on 8th September, 2014 his wife was called by PW1's Head Teacher, C K who asked her if they had been informed by their child (PW1) that they were needed in School on 9th September, 2014. He said they had no such news. On the said date he and his wife went to School where the Head Teacher informed them that PW1 was having an affair with the appellant and that the two had been writing letters to each other. They were shown the letters. PW2 stated that PW1 disappeared from school. A friend of theirs called and told them that he had seen PW1 with a man at Marafa. He called his friends in Malindi and asked them to be on the look out for her and instructed them that if she was in the presence of a man, they should detain them. At around 3:30 p.m., he was called by another friend who told him that he had seen PW1 with a man. PW2 requested his friend to detain them and he went to Malindi where he found them and took them to Malindi Police Station. PW1 was taken to hospital the following day. PW2 indicated that PW1 was born on 11th March, 1999. He identified MFI-3 as her birth certificate. He further stated that he knew the appellant when he was employed at the School.

23. PW3, CK [name withheld] the then Head Teacher of [particulars withheld] Primary School testified that PW1 was a student in class 7 in the said School. He stated that on 1st September, 2014 while at School, two parents told him that the appellant was found in his staff quarters with PW1 and that he had a relationship with her. He told the parents that he would investigate and requested two teachers who lived near the appellant to assist. The said Teachers took to him letters that they found in the appellant's house. PW3 identified MFI-4A and MFI-4B as the letters.

24. It was his evidence that he called PW1 to his office and asked her about her and her Math's Teacher. She told him that they were friends and had had sex. PW3 then told PW1 and the appellant that he would call PW1's parents to visit the school on 9th September, 2014 to discuss the issue. PW3 testified that the parents went to the School but PW1 and the appellant did not. PW3 stated that PW1's mother was called and told that her child had been seen in Malindi.

25. Ibrahim Abdullahi a Senior Clinician working at Malindi Sub-County Hospital testified as PW4. He stated that on 10th September, 2014 he treated PW1 and filled her P3 form. She alleged to have been defiled severally and that they had used condoms. On vaginal examination, he found that her hymen was broken. Laboratory test done for pregnancy and HIV were negative. PW4 concluded that there was vaginal penetration of a 15 year old. He produced her treatment notes as P. exh 1, P3 form as P. exh 2 and birth certificate as P. exh 3.

26. The Investigating Officer was No. 84868, Corporal Fatuma Ali, who testified as PW5. She stated that when at Malindi Police Station on 9th September, 2014 at around 6:30 p.m., she received a report that a girl who was a 15 year old minor, PW1, had been defiled by the appellant. PW5 recorded their statements. PW1 was taken to hospital the following morning and a P3 form was filled. PW5 charged the appellant after PW1 told her that she used to have sex with the appellant but she did not report because he was her Teacher. PW5 informed the Trial Court that she also found out that PW1 and the appellant would write letters to each other and he would put the letters in her mathematics book. PW5's investigations also revealed that the appellant ran off with PW1 from School but her parents followed them to Malindi where they were caught. PW5 produced the letters written by the appellant as P. exhibits 4A and B. She also produced the letters written by PW1 as P. exhibits 5 and 6.

27. In his sworn defence, the appellant denied having had sex with PW1 or having gone with her to his staff quarters which were 100 meters from the School. He denied that they ever wrote love letters to each other. He also denied having written any letter in which he admitted having had sex with PW1. He denied having been arrested with PW1 and stated that they were arrested at different places.

28. The Hon. Magistrate considered the evidence that was tendered before her and in noting that there were no eye witnesses to the commission of the offence, she duly warned herself of the dangers of basing a conviction on the evidence of a single witness. She believed that PW1 was a truthful witness and her evidence was corroborated by medical evidence.

DETERMINATION

29. The issues for determination are:-

- (i) If the age of the complainant was established;
- (ii) If the appellant was properly identified;
- (iii) If there was penetration of the complainant's genital organ;
- (iv) If failure by the prosecution to call some witnesses was fatal to its case; and
- (v) If there was contradiction of the prosecution evidence.

30. On the age of PW1, she testified that she was 15 years old when the offence was committed. Her father, PW2 attested to the said fact. A copy of PW1's birth certificate was produced by PW4 as P. exhibit 3. It shows that PW1 was born on 11th March, 1999. The Prosecution therefore proved that she was 15 years old, thus a minor, as at the time the offence was committed on 6th June, 2014 and 20th August, 2014.

31. PW1 gave a vivid account of the sexual relationship she had with her Math's Teacher, the appellant, after he asked her to be his friend. She narrated that their sexual liaisons would take place at staff quarters of the Primary School where the appellant was working. On cross-examination, she said that no one saw her visiting the appellant in the said quarters. It is my finding that PW1 could not have been mistaken about the identity of the appellant as the one who defiled her.

32. The appellant raised the issue of being convicted on the uncorroborated evidence of PW1. The facts of the case were clear as to the fact that the sexual relationship between the two was under wraps until it was brought to the attention of the Head Teacher, PW3. The Hon. Magistrate found PW1 to be a truthful witness and warned herself of the dangers of convicting on the evidence of a single witness. It is this court's finding that the Hon. Magistrate properly directed herself on the said issue. The provisions of **Section 124 of the Evidence Act** provide as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

33. Going by the evidence on record, the conduct of the appellant and PW1 on 9th September, 2014 was one of guilt. Prior to the said date, the Head Teacher informed them that he had summoned PW1's parents to visit the School on the 9th September, 2014. The evidence adduced shows that neither the appellant nor PW1 attended School on 9th September, 2014 but the pair was spotted at Marafa and Malindi by PW2's friends who alerted him and his wife. PW1 and the appellant were arrested and taken to Malindi Police Station.

34. On the issue of age, the appellant's Counsel submitted that the PW1 despite her age behaved like a grown up. This court was urged to rely on the case of **Martin Charo vs Republic** (supra). This court notes that the said decision was rendered by a court of concurrent jurisdiction. This court's point of departure from the said decision is that the act of PW1 who was a minor, of visiting the appellant, who was an adult, in his staff quarters and having sexual intercourse with him, did not sanctify the sexual act to make it lawful. The evidence of PW1 was to the effect that it was the appellant who would tell her to go to his staff quarters. He did the bidding and she obliged. The Court notes that the appellant had been placed in a position of authority over PW1, as her Math's Teacher, but he abused his position by taking sexual advantage of her.

35. The sexual intercourse that the appellant had with PW1 amounted to defilement as a child under the age of 18 years is incapable of giving consent to engage in a sexual relationship. Even if a minor behaves like an adult, the law still recognizes him/her as a child. This case is no exception. As the Hon. Magistrate correctly held, the appellant had been entrusted with the safety of PW1 but took advantage of his role and became a predator.

36. The medical evidence produced by PW4 proved that PW1 had been defiled, penetration was thus proved. Contrary to the appellant's 5th ground of appeal, there was nothing questionable about the medical evidence that was relied on by the Prosecution.

37. In his submissions, the appellant challenged the fact that two teachers namely, M B and C were not called as Prosecution witnesses as well as the two parents who informed the Head Teacher about the sexual relationship between PW1 and the appellant. The evidence adduced by PW3 was that he requested the two teachers to investigate about the relationship between PW1 and the appellant. They searched his bag and found love letters which they handed over to PW3. This court notes that the Hon. Magistrate did not rely on the said letters as the basis of convicting the appellant and therefore no prejudice was occasioned to him by failure on the part of the Prosecution to call the two Teachers.

38. PW3 stated in his evidence that two parents informed him of the sexual relationship between PW1 and the appellant. It was as a result of the said information that PW3 set in motion the investigations that established that the two had a sexual relationship. The said parents from the evidence adduced did not play a major role in gathering evidence other than informing PW3 of the facts that had come to their attention. The court notes that the Prosecution called witnesses that it considered material in proving the case. It is not the number of witnesses called that determine if a case has been proved beyond reasonable doubt, but the quality of the evidence adduced is what is most important. The position would have been different if a material witness was not called to testify and no good cause was shown for failure to attend court. It is my finding that the two parents mentioned by PW3 were not material witnesses for the Prosecution.

39. In **Edward Shivanji Makanga vs Republic** [2015] eKLR, the court held as follows:-

“Failure to call a witness will only be fatal if the evidence presented by the prosecution is sufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available”.

40. With regard to the appellant's allegation in ground No. 3 of his appeal that there were contradictions in the Prosecution case, having analyzed the evidence on record, I did not see any contradictions that would render the evidence by the prosecution witnesses untenable. The submissions filed by the appellant's Counsel failed to elaborate on the said ground of appeal. In the case of **Twehangane Alfred vs Uganda**, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 the Court stated as follows:-

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

41. The Hon. Magistrate considered the defence raised by the appellant and found it to be a mere denial. I am of the same position as the Trial Magistrate and it is my finding that the defence raised by the appellant did not cast any doubt on evidence tendered by prosecution witnesses.

42. The result of this appeal is that the evidence tendered by the prosecution was watertight against the appellant. The conviction is sound and the sentence meted against him is lawful. The appeal is hereby dismissed in its entirety. The appellant has 14 days right of appeal, from the date of this Judgment.

DATED and SIGNED at MALINDI on this 3rd day of July, 2018.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at MALINDI on this 27th day of July, 2018.

W. KORIR

JUDGE

In the presence of:-

Appellant in person

Mr. Monda for the respondent

Ms Mwanaidi - Court Assistant