



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 38 OF 2015

ISMAEL PAUL TITO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kitui Principal Magistrate's Court

Criminal Case No. 29 of 2010 by Hon. B. M. Kimemia (PM) on 31/10/13).

J U D G M E N T

1. **Ismail Paul Tito**, the appellant, was charged with the offence of **defilement** contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dated between **10th June**, and **2nd July, 2010** at **[Particulars Withheld]** in **Kitui District** of the **Eastern Province**; did an act which caused penetration with **FM** a child aged **11 years**.

2. In the alternative the appellant was charged with **Committing an Indecent Act** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the diverse dates between **10th June**, and **2nd July, 2010** at **[Particulars Withheld]** in **Kitui District** of the **Eastern Province**; committed an act of indecency with **FM** a child aged **11 years** by touching her private parts namely vagina using his hands.

3. In Count 2 he faced a charge of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the diverse dates between **10th June** and **2nd July, 2010** at **[Particulars Withheld]** in **Kitui District** of the **Eastern Province**; willfully and intentionally committed an act of indecency with **KM** a child aged **8 years** by touching her private parts namely vagina using his hands.

4. Facts of the case were that between the month of June and July 2010 both complainants were from the mosque where they had attended madrassa classes. They went to the shop to buy some ice when the Appellant enticed them with money. As a result they followed him to the stadium where he inserted his fingers in the genitalia of the 2nd complainant and penetrated the genitalia of the 1st complainant with his genital organ. He warned them not to divulge the information to anyone. They were afraid therefore did not tell anyone what befell them.

On the 3rd day July, 2010, PW3 Aliya Mwalimu got information that the 1st complainant used to passby the shop of the accused. She interrogated her and caused her to be examined in hospital. The matter was reported to the police who investigated, arrested the appellant and caused him to be charged.

5. When put on his defence, the appellant stated that in June/July 2010 he had a kiosk behind the mosque where he used to sell miraa and sweets. He admitted knowing the complainants as his neighbours who used to passby and buy sweets on their way to madrassa. He denied having gone with them to any place or enticed them as alleged and stated that he disagreed with their parents because of the location of his shop as they wanted him to move elsewhere, having declined to pay them a small stipend because his kiosk was between two (2) plots one of which belonged to the parents of the complainant.

6. The learned trial magistrate considered evidence adduced and convicted the appellant on both the main count and the second count and sentenced him to life imprisonment on the 1st count and twelve (12) years imprisonment on the 2nd count.

7. Aggrieved by the conviction and sentence, he appealed on grounds that:-

- The charge sheet was defective for lack of essential ingredients of the offence and section 214 of the Criminal Procedure

- Code was not complied with.
- The charge was not proved.

8. At the hearing the appellant canvassed the appeal by way of written submissions. It was his contention that the charge as drawn was not specific as to what act was done that caused penetration, which part of the body was penetrated and the object or instrument used, was not disclosed. Therefore this made the charge defective.

9. That the particulars of the offence were at variance with evidence adduced which called upon the trial magistrate to cause the charge to be amended pursuant to section 214 of the Criminal Procedure Code that was not done. In the result he was prejudiced.

10. Further he urged that having pleaded to non-existent charge the subsequent conviction was invalid, bad in law if not null and void.

11. On the ground of the charge having not been proved to the required standard it was urged that the complainants did not know when the offence was committed which raised doubts as to the charge. That the offence having not been clear, the Appellant's rights under Article 50(2) (b) of the Constitution were violated as he did not understand the charges that he faced.

12. In response the State through the learned State Counsel, **Mr. Mamba** opposed the appeal. He reiterated evidence adduced by the witnesses and urged the court to find that the case was proved to the required standards.

13. This being the 1st Appellate court, I am duty bound to re-valuate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (*see Okeno -vs- Republic [973] E.A. 32*).

14. It is stated that the charge was defective for failure to disclose the specific act that was done which caused penetration. The particulars of the offence state thus:

Count 1

“On diverse dates between 10th June and 2nd July, 2010 at [Particulars Withheld] in Kitui District of the Eastern Province, did an act which caused penetration with FM a child aged 11 years”.

15. In the case of *Sigilani vs Republic (2004) eKLR 480* the court stated that:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law.

The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand.

It will also enable an accused person to prepare his defence”

16. **Section 2** of the **Sexual Offences Act** defines penetration as:-

“the partial or complete insertion of the genital organs of a person into the genital organs of another person”

The dictionary on the other hand defines penetration as –

“The action or process of penetrating something”

17. The appellant having been a layman could not have understood the intended meaning of the word penetration as stated in the particulars of the offence. Therefore failure to specify the act as allegedly done rendered the charge fatally defective since the information given was not reasonable so as to enable the appellant to prepare for his defence.

18. The complainants herein were stated to have been children aged eleven (11) years and eight (8) years respectively.

19. It was the evidence of PW3 that a child was sent by **Mstadh** a teacher at the madrassa to call her. She went and learnt that PW1 and PW2 used to pass by the appellants shop. This information is what prompted her to interrogate the complainants and report the matter to the police. **Mstadh** was not a witness therefore the alleged information that PW1 relied on was hearsay hence inadmissible in evidence. But it was her testimony that she got the information on the **3rd July, 2010**.

Both complainants were examined on the **5th July, 2010**. The 1st complainant had a reddish vagina, the hymen was absent and there was foul smell from the genitalia.

The 2nd complainant had no bruises or tears but her hymen was absent. The clinical officer was not able to form an opinion when exactly both complainant's hymen broke.

20. Per the evidence adduced by the complainant a person they identified in court as the appellant herein enticed them with money to follow him to the stadium where he inserted his penis into 1st complainant's private parts while he inserted his finger into the private part of the 2nd complainant. Both complainants could not tell when exactly he did it and they did not report to their guardians.

21. The proviso to **Section 124** of the **Evidence Act** provides thus:-

“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”.

22. In her judgment the learned trial magistrate was of the view that both complainants knew what they were talking about and were telling the truth. It is not in doubt that both minors had no hymen. When their hymen was broken is what the court could not tell. The minors were mum on what transpired until PW3 learnt from another party. According to her the individual was concerned because per the report PW3 got the complainants used to passby the shop of the appellant and he could give them money.

23. Mstadh was not called as a witness. In the case of **Bukenya –Vs. Uganda (1972) EA 549** was relied upon. In the stated case the court held that:

“(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”.

This is a case where evidence adduced was hardly adequate. It left many gaps. These were children who claimed to have been violated at a time they could not remember. A missing hymen may not necessarily be caused by defilement, the stretching of the hymen may be due to some injuries or even an accident. It was imperative to hear from Mstadh the reason why he sought to see PW3 if he did and what they discussed. Failure to call her as a witness leaves the court to draw an inference that the evidence may have been adverse to the prosecution's case.

24. From the foregoing I find that the case was not proved to the required standard on both counts. It was therefore unsafe for the trial court to convict the appellant.

25. In the result the appeal is meritorious and is allowed. The conviction therefore stands quashed and the sentence meted out is set aside. The appellant shall be released forthwith unless otherwise lawfully held.

26. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of November, 2018.

L.N. MUTENDE

JUDGE