



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 41 OF 2016

From the Judgement of Kithimani Resident Magistrate's Court (Hon. G.O Shikwe, RM), in Criminal Case No. 33 of 2014 REPUBLIC v KAVOO KIMONYI

(CORAM: KEMEI J)

KAVOO KIMONYI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. G.O. Shikwe, Senior Resident Magistrate in Criminal Case No. 33 of 2014 on 21st June 2016. The Appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act.

Appellant's submissions

2. It is the appellant's case that the prosecution did not prove the case beyond reasonable doubt. The age and penetration was not established to the required standard. It is also his case that the trial court went into error in believing the contradictory evidence of the witnesses, therefore the appellant is entitled to an acquittal.

3. According to the appellant, there was no eye-witness account of what happened, the only direct evidence is that of PW1, who stated that she was bleeding and the doctor testified that the reason for this was that she was on her periods, and yet she denies that she was on her periods. That this was a frame up brought about by the NGO fronted by the PW2 who was giving hearsay evidence. That there was real possibility that the victim was not telling the truth. That the appeal be allowed and the conviction quashed and the sentence of the trial court be set aside.

Submissions by the state

4. The state submitted that age was established by the child health card that is on record. On the issue of penetration, this was established by the clinical officer who in confirming the absence of hymen, it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. With regard to the contradictions in evidence, he submitted that the same could be cured by Section 382 of the Criminal Procedure Code. The NGO activities are carried out in the best interests of the child. Therefore it states that the appeal lacks merit and should be dismissed.

DETERMINATION

5. This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

6. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds:

1. That the trial Magistrate erred in law and grossly misdirected himself by convicting the Appellant for the offence of defilement in the absence of clear establishment as to the elements of the offence and commission thereof by the appellant;

2. That the trial magistrate erred in convicting the Appellant on evidence that was clearly inconsistent untruthful and contradictory; and

3. That the sentence is manifestly excessive in the circumstances.

Elements to be proved

7. In cases of defilement, the prosecution must prove:

1. The age of the child.
2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and
3. That the perpetrator is the Appellant.

8. I have given due consideration to this appeal and the rival submissions. It is undisputed that the complainant was a person below 18 years. What is in contention is the issue of identification of the appellant as the perpetrator. In the circumstances I find that the issues for determination by this court are:

- i. Whether or not the prosecution proved its case beyond reasonable doubt and
- ii. Whether or not the appellant was identified as the perpetrator.

Analysis of evidence on penetration

Penetration was presented vide evidence of the P3 form and the account of the victim

(a) Of P3 Form and testimony of the doctor

9. P3 form was filled by Edwin Mutembei on 27. 10. 2014. It is dated 28.10.2014. He testified on the physical examination carried out on 27.10.2014. PW4 (Edwin Mutembei) testified on the contents of the document. The Appellant did not object to its production. He stated that on examination she had normal external genitalia, hymen was absent with dry whitish discharge. No conclusion was made. During cross-examination he stated that absence of hymen is not injury, as the girl could be sexually active. He added that the red blood cells indicate that she had bled; she was already having her periods at the time of examination though she said she had not yet started and no one told him that she was bleeding.

10. The P3 form indicates that, *“There are no injuries noted.* The Complainant went to the hospital four days after the incident had happened which is 96 hours after. It was noted, however, in the P3 Form that there was dry white discharge and red blood cells as well as many epithelial cells. With regard to the submission by the Appellant that the victim had been defiled by the maternal grandfather much earlier, I fall back to the evidence. According to the evidence of PW4 he stated that the absence of hymen is not injury, the girl could be sexually active. Hence to convict the appellant, there ought to have been no doubt in the mind of the court that he was responsible as well as rule out other causes or explanations to the condition of the body of the complainant.

11. According to Lana Burgess in her article *“Epithelial Cells in Urine, what does it mean?”* [\[1\]](#) a raised amount of epithelial cells in the urine are often the sign of a minor infection, such as a UTI or yeast infection.”

12. **Maraga and Rawal, JJA**, as they then were), in **P. K.W VS REPUBLIC [2012] eKLR** on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more.

“15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child’s hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?”

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanilla [1999] AB QB 769.”

The doctor was examining a victim of defilement. Therefore, the findings in the P3 Form that there was white discharge and red blood cells from the torn hymen may support penetration. The court ought to take into account this evidence in totality and not in isolation of other factors surrounding the case.

b. Account of the victim

13. The victim testified that on 19.10.14 she was alone grazing goats and the appellant came with two pawpaws, he was known to her, he took her to a nearby thicket and penetrated her. On 23.10.14 she was at home, the appellant came and asked for her aunt Kalunde and he held her hand and led her to the same thicket and penetrated her. Once done, she went home and told her aunt who took her to Kangonde Dispensary; she went to school and was taken to Kikumini Police Post where she was issued a P3 form. She was never taken for age assessment at Matuu Hospital. She has been defiled by her maternal grandfather while she was in class 4. She and the appellant are neighbors and they share a boundary. They have a dispute over the land. The Appellant was a person known to the complainant thus she recognized him.

14. The trial court found that a prima facie case was established and put the appellant on his defense.

15. The accused appellant denied defiling the victim, he further stated that the victim was his neighbor and they had a boundary dispute with the victim's family wherein they hoped that if he is incarcerated, they would take possession of his land. The dispute was confirmed by DW2 a neighbor to the victim's family, who gave an instance of trespass that occurred on 30/9/2012 where he was assaulted by the victim's uncle and produced a P3 form. DW3 also testified that she is a neighbor to the victim's family one of her goats went missing and when she went to another of the complainant's uncles to inquire, she was assaulted, she produced the P3 form to that effect. DW 4, another neighbor stated in her evidence that the victim's family accused her of taking their land and gave an account where one of the victim's uncle assaulted her, she produced a P3 form.

16. From the account of the appellant and of his witnesses, there seems to have been bad blood between the neighbors and the trial court found that there was no link between the land dispute and the charges that the appellant was facing. However the trial court ought to have been more careful to rule out the possibility of a vendetta against the appellant, by establishing whether or not there was indeed such dispute.

Of alleged contradictory evidence

17. The second ground is that the trial magistrate erred in convicting the Appellant on evidence that was clearly inconsistent, untruthful and contradictory. I emphasize that in order to convict the appellant, there ought to have been no doubt in the mind of the court that the appellant committed the offence based on the evidence before the court. If the effect of the contradictions was to go to the root of the case as to create reasonable doubt, then a finding of guilt on the part of the appellant is erroneous. The appellant has vilified the contradictions in evidence of the prosecution witnesses a fact that the trial magistrate has confirmed and yet he proceeded to convict the appellant. According to the appellant, the contradictions ought to have cast doubt on the proof of the prosecution's case.

18. The first contradiction is on the **place of commission of the offence**, was it at home? Was it in the thicket? According to the testimony of PW1, on 19.10.14 she was defiled at a nearby thicket while tending goats, however in her written statement, she was defiled at home. The accounts of PW2 and PW6 state that the victim was defiled while at home on 19.10.14 and yet her oral evidence states she was defiled while tending goats on the said date. This is confirmed by PW6, the police officer who relying on the records, the victim was defiled at home on 19.10.14. The victim during the examination in chief stated that she was at home on 23.10.14 when the appellant came to look for her aunt (PW5) and she informed him that she had gone to the market. She thus created the impression that she was home alone. However, the same PW5 in her evidence states that on the said 23.10.14 she was at home. If indeed the appellant came to see her, wouldn't she have said in her testimony that she saw the appellant on the said date so as to corroborate the victim's evidence? If any movement happened in the house on the said date, couldn't she have seen or heard and testified of the same? There is no evidence to the effect that she saw the appellant at her house on 23.10.14, the place where the victim alleges to have met with the appellant to be taken to a thicket for commission of the offence. There is also no evidence to the effect that the victim possibly was missing for a period of time from the house. This casts doubt as to whether indeed the appellant was at the scene of crime on 23.10.14, or whether any incident occurred on the said date.

19. The second contradiction is on the question as to **who was given the first account of the incident**, was it the teacher? Was it the Aunt (PW5)? Was the aunt aware of a sexual offence having been committed? Was she told anything or she simply saw the victim bleeding and took her to hospital and later learnt that there was a sexual offence? On the 28th, was the complainant examined because it was discovered she was bleeding as a result of periods (a fact that she did not disclose to her doctor) or because the Officer from the NGO created an impression that there was a sexual offence and wanted everyone to believe him. According to the testimony of the PW 1 during evidence in chief, she first told her aunt PW 3 of the defilement that occurred on the 23.10.14, on cross-examination and re-examination she says she first told her teacher Ann before anyone else. On chief examination of PW3 she learnt of the incident through her sister in law on 25.10.14, on cross-examination, she says she learnt of the incident on 27.10.14 through a Corporal John. PW5 says that on 23.10.14 when she was at home, the victim told her that she was defiled, and she then told the victim's mother. In cross-examination, PW5 says she called the mother on the following day after taking her to the hospital for she was bleeding.

20. From the foregoing, this did not have the benefit of seeing the witnesses testify, however from the proceedings and the court record, there are contradictions which was also noted by the trial magistrate who nevertheless proceeded to find the appellant guilty. The state has submitted that the contradictions may be cured by the provisions of Section 382 of the Criminal Procedure Code. However I find the contradictions were prevalent and could not be cured by Section 382 of the Criminal Procedure Code.

21. If the victim is not clear in her mind as to the place of commission of the offence, if it is not clear who was around the house when the incident occurred or who got the first account of what happened then it casts doubt as to whether it happened or whether the appellant has been recognized and identified as the person who committed it. In that case I would fault the prosecution for failing to adduce any evidence to place the appellant at the thicket or at the house on the 19.10.14. and at the house on 23.10.14 at time material to this case. In that regard, I find the contradictions go to the root of the case for they cast doubt as to whether the appellant committed the offence that he is charged of. The said contradictions cannot be cured hence a finding of guilt was erroneous. I place reliance in the case of **Felix Luwambe Gonzi vs Republic [2006] eKLR** wherein the appellate court held that it was difficult to know the true position of the matter as the witnesses therein had given contradictory evidence

22. From the evidence, two of the three critical ingredients for the offence of defilement that is: age and penetration have been met. I think that had the learned magistrate not attached undue and undeserved weight to the state of **PW1's** hymen, he would have been less confident about the strength of the prosecution case against the appellant. I find that there is insufficient evidence on record to sustain a conviction

against the appellant who due to the evidence on record has not been placed at the scene of the crime on the impugned dates as well as the insufficiency of the medical evidence thereof. The conviction of the appellant was therefore unsafe

Of sentence

23. The third ground of appeal is that the sentence is manifestly excessive in the circumstances of this case. According to Section 8 (3) of the Sexual Offences:

“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.”

24. However because of my above analysis, I shall not make a finding on the issue of the sentence.

25. In the result, I find that the prosecution did not prove its case beyond all reasonable doubt. The appeal has merit and is allowed. The appellant’s conviction is quashed and the sentence meted out against him is set aside. He is to be set at liberty unless otherwise lawfully held.

Signed, Dated and delivered at Machakos this 12th day of November, 2018.

D.K. KEMEI

JUDGE

[1] <https://www.medicalnewstoday.com/articles/321295.php>