



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 12 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 45 of 2017 in the Chief Magistrate's Court, Naivasha, (Z. Abdul - RM)

ZACHARY MACHARIA MAINA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant was charged with defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act, 2006**. The alternative offence with which he is charged is that he committed an indecent act with a child aged fifteen (15) years contrary to **section 11 (1)** the **Sexual Offences Act**. The particulars were that on 11th June, 2016 at [Particulars Withheld] estate in Naivasha within Nakuru county, he intentionally caused his genital organ namely penis, to penetrate the genital organ of SWW, a girl aged 15 years.

2. After a full trial, the accused was convicted and subsequently sentenced to twenty years imprisonment on 30th March 2017. Dissatisfied with the judgment, the appellant has filed this appeal on the following grounds:

- 1. That the learned trial magistrate erred in law and fact by conducting a trial without the following laid down procedures.***
- 2. That the learned trial magistrate erred in law and fact by convicting the appellant in the prosecution case where age is very important ingredients of defilement was not proved in evidence.***
- 3. That the learned trial magistrate erred in law and facts by convicting the appellant on the basis of assumption, presumptions and matters unsettled by facts and conclusion unestablished by evidence.***
- 4. That the learned trial magistrate erred in law by committing procedural blunders, thus prejudicing the appellant, the charge sheet was amended but the appellant was not explained his right under Section 214 of the CPC.***
- 5. That the learned trial magistrate erred in law and facts by failing to give the appellants defense particularly his defense of alibi fair, objective and open minded analysis and casually rejected the appellant's defense.***

3. Arising from the appeal, the issues for determination are as follows:

- a. Whether the charge sheet was procedurally amended***
- b. Whether the age of the complainant was proved***
- c. Whether the evidence of the offence was sufficient and the Accused's defence of alibi was considered***
- d. The evidence was uncorroborated***

4. The prosecution opposed the appeal and gave oral submissions. The appellant filed written submissions. The role of this court on first appeal is to review all the evidence and re-evaluate it itself, and come to its own conclusions See **Pandya v Republic [1957] EA 336**: where

the court stated the duty as follows:

“On first hearing from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate courts own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it....”

5. Reviewing the evidence I find as follows. The gist of the prosecution case was that on 11th June 2016, the appellant asked the complainant to go to his house to learn computer studies. When she got there he was alone. She sat on a chair and appellant sat on the bed; it was a one roomed rented house, and music was playing. A laptop was on a chair next to her. The appellant then increased the volume of the music, which she asked he lower, but he said he needed it loud so no one would hear what he was going to tell her.

6. He then started to teach her how to operate the laptop, and told her he loved her because of how she dressed. She asked him to let her go home. He asked her to stay longer, and pulled her to the bed, removed her clothes and fondled her. Then he removed his trouser and had sex with her.

7. After that he appellant called for a boda boda to pick the complainant. When the rider came, it was one Zechariah Ngugi, PW6, who she asked to drop her on the way home, and she would walk the rest of the way. As they left the appellant’s compound on the boda boda, PW2 and PW4 saw the complainant leave the appellant’s plot with the rider. Both PW2, a class seven pupil who gave evidence after a voire dire examination, and PW4, a form 1 student had been playing near the shops together with others. Both PW2 and PW4 were able to identify the appellant.

8. On getting home, the complainant told her mother all that had happened. Her mother took her to the police station where they reported the incident before then complainant was taken to Naivasha District Hospital for examination and treatment.

9. PW5 was the police officer who arrested the complainant. PW6 was the boda boda rider who carried the complainant. He recalled that he was at work at about 1.00pm when he received a call from the appellant, whom he knew, to pick a passenger. He found a lady with a shuka draped around her head, at the appellant’s compound, and dropped her near the supermarket.

10. PW7, the Clinical Officer, testified that he attended to the complainant on 14th June, 2016, two days after the incident. He then prepared the P3 form and a Post Rape Care form. On examining the

Whether the charge sheet was procedurally amended

11. During the hearing, the prosecution applied to amend the charge sheet to reflect the age of the complainant as 15 years old from 11 years old as her birth certificate had now been received. This application was made in open court, and the appellant stated h that he had “no objection”.

12. However, it is true as submitted by the appellant, that he was not requested to plead afresh to the amended charge, as required under **section 214** of the **Criminal Procedure Code**.

13. I however do not consider the failure to plead afresh a serious or material omission in the particular circumstances of this case, as nothing turns on it

The age of the complainant

14. The age of the complainant cannot be seriously in issue because her birth certificate was produced in evidence as Exhibit 3 by PW 8 Inspector Consolata Wanjiku, the Investigating Officer. It showed that the complainant was born on 2/2/2001, making her 15 years on the date of the alleged offence.

The evidence

15. In evidence in chief, the complainant said that on 11th June, 2016 at 6pm the appellant asked her to go to his house. That was a Saturday. She went there. However in cross examination, she testified:

“You had sexual intercourse with me. You had asked me to come to your house. It was on Sunday.”

It appears that the incident may have occurred on Sunday 12th June, after the complainant received a call on Saturday 11th June to go to the appellant’s house. It is not very clear.

16. PW2 testified that he was playing with G PW4 and C:

“On 12/6/2016 at around 1pm I was near a shop with G and C. We were playing. I know PW1, we used to go to the same school. I saw her coming from a certain plot. A boda boda operator came and took her”

17. Similarly, PW4 testified that:

“On 12/6/2016 at 1.00pm I was at the back of our house with PW2, C, and N, playing. I saw PW1 coming from Mr Maina (accused’s) house. A motor bike came and she boarded. I did not tell anyone. The boda boda rider is known to me. His name is Ngugi”

18. On his part PW6, the boda boda operator, testified that :

“On 11/6/2016 at 1pm I was at work when I received a call from the accused. He asked me to go and ferry a customer from the place near where he was living behind a chemist..... I proceeded and found a lady who had a shuka around her head ...She was from a plot near where the accused was living. I dropped her at Kamunyaka supermarket opposite the police station....”

19. The evidence of these witnesses is clearly contradictory. On which date did the offence occur: 11th or 12th June 2016? The case stands or falls on the answer to this question.

20. In her judgment, the trial Magistrate stated that the particulars of the offence and the substantive charge facing the accused was that :

“...on 11/6/2016 at [particulars withheld] Estate, Naivasha Sub-county intentionally and unlawfully did cause his genital organ to penetrate the genital organ namely vagina, of SWJ a girl aged 15 years old”

21. The trial Magistrate summarised the evidence of the complainant on the incident as follows:

“That on 11/6/2016 at 6 pm PW1 went to accused’s house which is near the school. She had been told to go for computer studies. When she entered the accused locked the door....

...He pulled PW1 to the bed and removed her dress and panty. He put his fingers in her vagina, removed his trousers and had sexual intercourse with her”

The trial magistrate also found that PW2 and PW4 gave the same evidence: that on 12th June, 2016 they saw PW1 on a boda boda coming from a certain plot where the accused lived. This evidence, however, relates to the day following the date of the incident.

22. The trial Magistrate also noted that PW6 went to pick the lady (complainant) ***“on 11/6/2016 at around 1pm”***, thus asserting that the offence occurred on 11th June 2016, and not on 12th June 2016, contrary to the evidence of PW1, PW2 and PW4, and in consonance only with the evidence of PW6, the boda boda rider.

23. In the Post Rape Care Form indicates the circumstances surrounding the incident (survivor account) shows the survivor’s account as:

“Report having visited the perpetrator in his house where they had penetrating sexual intercourse with him for 30 minutes on Sunday 12/06/2016”

Yet in the judgment, the trial magistrate held:

“...I am satisfied that the prosecution has proved its case beyond reasonable doubt against the accused person and he is found guilty of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No 3 of 2006 and he shall be convicted accordingly”

24. Assessing the evidence for myself, I cannot see any indication that is in consonance with the charge that the complainant was defiled on 11th June 2016. PW1 is unclear which date it was on, although it appears more likely that it was on 12th June, 2016. PW2 and PW4 asserted that they definitely saw the complainant leave the appellant’s compound with the boda boda rider on 11th June 2016. And the Boda Boda rider also said it happened on 11th June 2016.

25. The Magistrate did not critically analyse this evidence of the date of the offence. If she had, she would have noted that the complainant said that, that on 11th June 2016 at 6pm that she was told by the appellant to go to his house. If she did go that evening, then it was impossible for the boda boda rider to pick her at 1.00pm on that same date.

26. Similarly, it is surprising that PW2 and PW4 saw the boda boda rider on 12th June 2016, carrying the complainant after the alleged incident, despite the boda boda rider’s assertion that he had allegedly carried the complainant on 11th June, 2016.

27. Consequently, I find there was sufficient doubt on – and insufficient evidence concerning – the date of the occurrence of the offence of defilement as set out in the charge to sustain a conviction.

Disposition

28. Having considered all the appellant’s grounds of appeal, and also having carefully reviewed the evidence on record, I find that the

learned magistrate was in error in convicting the appellant on the available evidence.

29. Accordingly, the appeal succeeds and I set aside the conviction. I order that the appellant is set free forthwith unless otherwise lawfully held.

30. Orders accordingly.

Dated and Delivered at Naivasha this 22nd Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Zachary Macharia Maina Appellant in person.
2. Mr. Koima for the State.
3. Court Clerk – Quinter Ogutu.