REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 46 OF 2015

(An appeal against conviction in criminal case No 309 of 2014 Republic Vs ABEID ATHUMAN CHIMBUGWA at Kwale before Hon. P. K. Mutai (RM)

ABEID ATHUMAN CHIMBUGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, ABEID ATHUMANI CHIMBUGWA was charged with defilement contrary to section 8 (1) as read with sub-section 4 of the Sexual Offences Act No 3 of 2006.

2. The particulars were that on the 15th day of September, 2013 in Kwale County within Coast Region, the Appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of BOJ, a child aged 16 years.

3. The Appellant also faced the alternative charge of indecent act with a child contrary to section 11 (1) of the sexual offences Act No 3 of 2006.

4. The particulars being that; on the 15th day of September, 2013 in Mbuguni location of Kwale County within Coast Region, the Appellant intentionally committed an indecent to BOJ, a child aged 16 years by touching her private parts.

5. After a full trial, the appellant was convicted for the offence of defilement whereby he was sentenced to serve fifteen (15) years imprisonment. There was no finding made in respect of the alternative charge.

SUMMARY OF EVIDENCE.

6. To determine this appeal, the court will briefly consider the evidence which was tendered by the prosecution and defence before trial court.

7. Pw1, BOJ testified that she recalled the month of September, 2013, she met the appellant along the road and he started seducing her and expressed his love for her. She said that she accepted his proposal as he used to come to her place.

8. Pw1 went on to state that on 15.9.2013 they entered into a relationship and had sex in the bush whereby she did not feel pain. They did this again on 11.11.2013 and in February, 2014.

9. Pw1 said that she missed her periods and told him. He told her that he would take responsibility and they continued to have sex.

10. That her grandmother (Pw2) noticed she was expectant and told the Headmaster, who interrogated her he referred her to Kwale police station where she told the police the person responsible for her pregnancy was.

11. Pw1 was later taken to Kwale District hospital where she was examined and confirmed pregnant. The P3 form she had been issued by the police was filled by the doctor and a DNA examination also conducted.

12. Pw2, MM told the court that on 12.3.2014, she received a call from her father M who informed her that her daughter was expectant. She said that she went and interrogated her daughter who told her that Abedi, the Appellant was arrested.

13. Pw3, Bora Mwaiwe recalled that on 17.3.2014, he was in instructed by the area chief to arrest the appellant, being a member of community policing. He then approached the village chairman who directed him to the home of the appellant. He took him to [Particular Withheld] primary school before proceeding with the appellant to Kwale police station.

14. Pw4, MM 4, the complainant's grandfather testified that in February 2014, he noticed some changes in the complainant's body. He also said he had noticed that she was not longer working and was eating raw mangoes. That he sat her down and on interrogating her, the complainant admitted that she was pregnant and implicated Abedi. He identified the appellant in the dock as the said Abedi and said that he was their neighbour. Pw4 said that investigations began and the appellant was later arrested.

15. Pw5 Cornelius Machage is a clinical officer, who was based at Kwale sub county Hospital. He testified how he examined the complainant after she visited the facility with a history of having been defiled by a person known to her. He told court that a laboratory test was conducted and it showed that the patient was pregnant with no sexually transmitted disease. He assessed the pregnancy to be 24 weeks old. He filled and signed the P3 form on 19.3.2014 which he produced as Exhibit P2.

16. Pw6, Senior Sergeant Joseph Kimani from Kwale police station stated that on 19.3.2014, the complainant visited the said police station in the company of her parents and reported a case of defilement. He said that they also came along with the appellant. Pw1 said that he escorted both the complaint and appellant to Kwale Sub-County hospital for medical examination where a laboratory test confirmed that the complainant was expectant.

17. Further, Pw6 told court that upon delivery, the mouth swabs samples were taken to Government chemist analyst for analysis. However, they were unable to secure evidence of Government analyst after information was recorded that the samples got spoilt.

18. After the prosecution closed their case the appellant was found to have a case to answer and was placed on defence. He then opted to give a sworn defence.

19. In his sworn defence, the appellant recalled that on 23.3.2014, he was from his farm when he saw two people heading towards his home. When they got there, they asked for him and he identified himself. They then informed him that he was needed for interrogations. He was handcuffed and taken to [Particulars Withheld] primary school. That he was left outside as these people talked on phone, then a young girl and woman came.

20. The appellant was asked if he knew the young girl and he said he did not know her. That the head teacher came and asked the girl where she had been for a month.

21. The appellant said that he was asked to board a motorcycle to Kwale police station from whether he was taken to Kwale Hospital and later charged.

22. After hearing all these evidence, the trial magistrate found on page 7 lines 1-4 o his judgment.

> ".....that penetration was by the accused person. In sum trial prosecution has proved all the elements in the required standard and the accused is convicted under section 215 of the Criminal procedure Code".

GROUNDS OF APPEAL.

23. Upon being aggrieved with the conviction and sentence, the appellant appealed in respect of the main charge. He advanced the following grounds (reproduced verbatim)

> (a) That the trial magistrate erred in law and fact by convicting and sentencing me to serve 15 years in prison without considering that the age of the complainant was not proved beyond reasonable doubt hence the conviction was unsafe.
>
> (b) That , the learned trial magistrate erred in law and fact by arriving to his conclusion without considering the fact that the DNA attest was not conducted so section 36 (1) of the Sexual Offences Act No 3 of 2006 was not adhered to hence, the sentence was unsafe.
>
> (c) That, the learned trial magistrate erred in the rule of law by arriving to his conclusion without considering the fact that the prosecution did not prove its case beyond reasonable doubt hence sentence was unsafe.
>
> (d) That, the learned trial magistrate erred in failing o consider his reasonable defence statement which had created doubt in the prosecution's case.

SUBMISSIONS BY THE APPELLANT.

24. The appellant in his written submissions consolidated all his grounds of appeal and argued them together stating that the learned trial magistrate's final analysis of convicting and sentencing him to 15 years imprisonment was not done within the parameters of the law owing to the fact that the issue of defilement was not proved as required.

25. In his said submissions, the appellant pointed out that the complainant (Pw1) in her testimony did not mention her age but stated that she was taken to hospital and her age was assessed to be 16 years.

26. He also submitted that Pw2, mother to the complainant, MMM at page 6 lines 8-9 of the proceedings stated:

> "I know BO. She is my child. O stays at [Particulars Withheld] with grandparents. She is 16 years old. Pregnancy was around 24 weeks. She was advised to start antenatal clinic immediately".

And Pw5, Mr Machagi Cornelius, the clinical officer, who is allege to have assessed the complainants age at page 10 lines 1-3 of the proceedings said;

> ***"I signed the P3 form on 19th March, 2014, I wish to produce the same as exhibit 2. I also assessed the age of the minor. She was 16 years old".***

27. He cited the authorities of KAINGU ELIAS KASUMU CR APP. NO. 504 of 2010, at Malindi and CHIROTO NYAMANI MUMBA, APPEAL NO. 373 of 2010, also of MALINDI, where the age of the victim as a necessary ingredient to be proved in a case of defilement was considered.

28. The applicant submitted that although it was not in doubt that the complaint was pregnant, there was no evidence connecting the appellant to the same.

29. The appellant finally submitted that since there was failure by the prosecution to establish that

complainant's age and the paternity of the child in question rendered their evidence unproved.

RESPONDENT'S SUBMISSIONS.

30. The respondent submitted orally through M/s Ocholla, the learned state counsel who opposed the appeal.

31. According to M/s Ocholla, the complainant's age was found to be 16 years vide the age assessment report dated 19.2.2012 produced by Pw5 as exhibit P1.

32. She submitted that there was no need for the prosecution to conduct a DNA test pursuant to section 36 (1) of the Sexual Offences Act, as this is not couched in mandatory terms.

33. As for the 3rd ground of appeal where the appellant stated that the case was not proved beyond reasonable doubt, M/s Ocholla, counsel for the state, submitted that the complaints age was proved by the production of the age assessment report (Exhibit P1) and penetration provide by the production of the P3 form (Exhibit P2) which indicated that the hymen was absent and complainant was pregnant. It was also confirmed from the evidence of Pw1 and the appellant that they were neighbours hence the appellant was known to the complainant

34. M/s Ocholla submitted that the trial magistrate considered the appellant's defence at page 20 line 19 of the judgment. She also submitted that the sentence meted against the appellant was lawful as he was sentenced under section 8(4) of the Sexual Offences Act having been alleged to have defiled a girl aged between 16 to 18 years.

FINDINGS.

35. As the first appellant court, it is expected that I subject the entire evidence adduced before the lower court to fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and give due allowance.

36. I am guided by the court of appeal case (see OKENO RS REPUBLIC 1972 EA 32) which set out the principles that apply on a first appeal.

37. These were ably also out in the case of ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VRS REPUBLIC, CRIMINAL APPEAL NO. 272 of 2005 as follows;

> "In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully exercise and analyze afresh evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so that first Appellant court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO VS REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated.
>
> ***"The first Appellate court must itself weigh conflicting evidence and draw its own conclusion (Shanti al M Ruwala vs R (1975) E A 57). It is not the function of a first Appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then, can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".***

38. I have carefully considered the grounds of appeal, submissions made by the appellant and state counsel, and reviewed the evidence of the lower court, relevant law and authorities. I think the issues for determination are;

(a) Firstly, whether the prosecution proved its case beyond reasonable doubt;

(b) Secondly, whether the trial magistrate failed to consider the appellant's defence statement.

(c) Thirdly, whether the sentence imposed against the appellant was safe and legal in view of the prosecution's evidence.

39. With regard to the first issue, the appellant was charged with defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No 3 of 2006.

To establish a case of defilement, the prosecution must prove;

(i) The act of penetration;

(ii) The age of the victim

(iii) The identity of the culprit

40. In the instant case, the act of penetration was proved by the P3 form which was produced by Pw5, Machagi Cornelius, a clinical officer, who conducted a medical examination on the complainant (Pw1) and conducted a laboratory test which reveated she was 24 weeks pregnant. He also found that her hymen was absent. Pw1 and confirmed in their evidence that Pw1 was pregnant. This evidence was not contested by the defence/appellant.

41. As for the victim's age, Pw1 said she was 16 years old when she was shown the age assessment report. Pw2, her mother said that the complainant was 16 years old. Pw5, the clinical officer stated that he examined the complainant and assessed her age as 16 years.

42. I am in agreement with the appellant in his submissions that pw2 did not produce any documentary evidence as envisaged under section 4 of the Sexual Offences Rules of the court, 2014 which provides that;

"while determining the age of a person, the court may taken into account evidence of that person that may be confirmed in a birth certificate any school documents or in a baptismal card or similar document"

43. An age assessment report was also referred to and alleged to have been produced by Pw5 as exhibit p1. However, I also agree with the appellant that the same is nowhere in the court records.

44. The court of appeal like in the case of KAINGU ELIAS KASUMO CR APPEAL NO. 304 of 2010 at MALINDI, had this to say in the case of ALFAYO GOMBE OKELLO VRS REPUBIC , (2010) e KLR, "in its wisdom, parliament chose to categorize the gravity of that offence on the bases of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt, That must be so because dire consequences flow from proof of the offence under section 8 (1)".

45. As for the issue of pregnancy it was the evidence of Pw1, Pw2 and Pw5 vide P3 form (exhibit P1) that the complainant (Pw1) had engaged in sexual activity and was pregnant. However, the question for determination is whether the complainant) Pw1) was involved in sexual activity with the appellant.

46. Apart from the evidence of Pw1, the complainant, there is no other evidence pointing to the appellant as the person who defiled and made her pregnant.

47. While section 124 of the Evidence Act provides that the testimony of a complainant is sufficient to sustain a conviction in a charge of defilement and that corroboration is not necessary where the court is satisfied that the complainant was telling the truth, in the case where pregnancy is alleged , there is need

for corroboration to prove paternity of the child. A DNA test then becomes necessary.

48. Section 36 of the Sexual Offences Act provides as follows;

> ***"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test , in order to gather evidence and to ascertain whether or not the accused person committed the offence".***

49. In this particular case, it was the evidence of pw6 that the mouth swabs were taken but they got spoilt. Therefore like in the case of ARNOLD KILILO, CRIMINAL APPEAL NO 57 of 2011 Justice G. L. Nzioka, had this to say in her judgment (which I am persuaded by)

> ***"Having been found to be pregnant, the investigating officer should have been vigilant to seek to establish the paternity of the child beyond any reasonable doubt through a DNA or any other clinical findings. I find that the investigating officer was causal in investigation. He relied on the pregnancy as the main evidence, but that person could not incriminate the appellant ..... it is probable anyone else would have been responsible for the pregnancy and the evidence of the victim required corroboration. The appellant's conviction was thus unsafe"***

51. It was therefore erroneous for the trial court in this case to rely only on evidence of Pw1.

52. As for the trial magistrate failing to consider the appellant's defence, I find that he dismissed it as a mere denial. In view of the evidence which was adduced by the prosecution it was not plausible.

53. Since the analysis of the evidence that was adduced before the trial court has shown that it was riddled with doubts whose benefit should have been awarded to the appellant, I find that the appeal has merit and allow it.

54. I therefore quash the conviction and set aside the sentence that was imposed against the appellant.

The appellant is hereby released forthwith unless otherwise lawfully held.

Judgment delivered, signed and dated this 13th February 2017.

D.O.CHEPKWONY

JUDGE

In the presence of :

M/s Ocholla for the state

Appellant in person

C/clerk-Kiarie