



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 21 OF 2016

BENSON TSOILAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 753 of 2011 of the Senior Principal Magistrate's Court at Kilifi – D.W. Nyambu, SPM)

JUDGEMENT

The appellant was charged with offence of abuse of position of authority contrary to section 24 (2) (a) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 15.7.2011at [Particulars Withheld] Chief's Camp in Kilifi County within Coast Province, being a law enforcement officer took advantage of his position and had sexual intercourse with Z G K. who was in need of administrative assistance.

The appellant was also charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 15.7.2011 at [Particulars Withheld] Chief's Camp, [Particulars Withheld] Location in Kilifi County within Coast Province intentionally and unlawfully did an act with his genital organ namely penis which caused penetration into the genital organ namely vagina of Z G K. a child aged 15 years.

The trial court convicted the appellant on both counts and sentenced him to server 5 years imprisonment for the first count and 15 years imprisonment for the second count. The grounds of appeal are that the prosecution did not prove the case beyond reasonable doubt. That the defence evidence was disregarded. That the prosecution evidence was contradictory and uncorroborated. That the medical evidence was questionable.

Mr. Nyongesa, counsel for the appellant, argued all the grounds of appeal together. Counsel submitted that the case was not proved beyond reasonable doubt. There were material inconsistencies such as the medical evidence. Two different P3 forms were filled. One was dated 19.7.2011 while the other one was dated 9.7.2011. The two P3 forms contain material differences which raises doubt. Both P3 forms emanated from the same police station. The doctor who testified did not fill the P3 forms. Further, the complainant testified that she had only one child while her father told the court that she had two children. This raises the credibility of the complainant. The appellant called witnesses but their evidence was disregarded. There was no finding on the defence evidence. The evidence was not sufficient to warrant the conviction. One witness by the name F was mentioned but she was not called to testify yet she recorded a statement.

The State opposed the appeal. Mr. Fedha submitted that the P3 form was properly produced without any objection. The element of defilement was proved. The witnesses were reliable. The defence evidence was also considered. The complainant was a minor.

This is a first appeal and this court is required to evaluate the evidence adduced before the trial court and make its own conclusion. PW1 was the complainant. She told the court that she was fifteen years old and a class five pupil. In March 2011, she met a friend called Mwera Kenga. They became friends and he impregnated her. They used to have sex and she used to visit him many times. In May 2011, she realized that she was pregnant. Her school uniform could not fit her. She told her father who chased her away from home. She went to live with a friend called F who was also a student.

It is her further evidence that on 15.7.2011 she decided to seek the help of the Chief so that he could intervene and enable her go back to her parents' home. She went to the chief's office and there were many other people waiting to be served. The assistant chief was also present. The appellant is the area chief and whenever it was her turn to be served he would tell her to wait. She was attended at 3.00 pm. The chief took her to a maize store and told her to sit on a chair. He told her that he was aware of her problems. He touched her breasts and then defiled her. After he finished he gave her a letter to take to the assistant chief. She went and told her friend F and then decided to report to the village chairman. They reached the village chairman's home at about 11.00 pm and were advised to sleep and go back the following day. The following day they went back to the village chairman who took them to Kilifi police station. She was issued with a P3 form and the appellant was later arrested and charged with the offence. She delivered a baby girl in 2012. By the time she was testifying on 17.10.2013 her child was 1 ½ years old.

PW2 is a village elder in [Particulars Withheld] Location. On 16.7.2011 at about 6.30 am he was at the village chairman's house (PW3) when the complainant went there. She told them that she had been defiled by the chief the previous day. PW2 and PW3 were handling another case where another woman had been threatened by someone and they were to go with her to Kilifi police station. PW2 and PW3 went with PW1 to Kilifi police station and handed the matter to the police. PW3 called the complainant's father (PW4). PW3 testified that he is the area village chairman. PW1 went to her home at about 11.00 pm on 15.7.2011 complaining that she had been defiled by the chief. He advised her to go to sleep and go back the following day. On 16.7.2011 he was with PW2 when PW1 went to his home. She told them about the defilement and they went with her to Kilifi police station. Although PW1 had told him that she had come from her home, he discovered that she was living with her friend by the name F.

PW4 G K K is the father to PW1. He testified that on 16.6.2011 he went to see the head teacher of [Particulars Withheld] primary school as he had heard that PW1 was not going to school for about two weeks. He had been informed that PW1 used to be seen in a neighbouring village living with a man. He found out that the man was Muvera Kenga Kashindo. He found him living with his daughter. PW1 narrated her relationship with Muvera. She said that Muvera had told her to mention one Amani as her boyfriend. PW1 was taken to hospital and found to be pregnant. The matter was reported at the Children's Office. PW1 and Muvera were to be arrested. Muvera was a herdsman. PW1 escaped from home. In July 2011 he got a call from PW3 that his daughter had been defiled by the chief and they were going to Kilifi police station. He is a businessman based in Malindi and decided to go to see his daughter in Kilifi. He found them at the police station. They were deferred for medical examination and the Kilifi district hospital. It is his evidence that PW1 was born in 1996.

PW5 Cpl. DORICAS KAGWIRIA was stationed at the Kilifi police station. On 16.7.2011 at about 11.50 am the case was reported at the station. PW1 narrated to her what had happened. She investigated the case and had the appellant charged with the offence. She saw the letter the appellant had written to an assistant chief to assist PW1. She visited the store where the alleged defilement took place and found that there were no maize and the room had been cleared. She visited the scene on 21.7.2011 and reached there at about 5.00 pm. There were no workers at the chief's office. PW6 DR. HASHIM SULEIMAN was a medical officer based at Kilifi District hospital. He produced the P3 form filled by Dr. Adnan on 19.7.2011 at the hospital. PW1's age was estimated to be 16 years. Her genitalia was normal and there was no discharge.

In his sworn defence the appellant denied committing the offence. It is his evidence that he has been a chief for twenty three years. On 15.7.2011 he went to the office at 8.00 am. His assistant chief (DW2) arrived. They went for tea at a nearby hotel and went back to the office at 9.30 am. They worked in his office as there was a meeting for a Women's Group that was going on at the assistant chief's office. That day they were working on births and death notifications. PW1 went to his office at about 2.00 pm complaining that her father had chased her away and she ran to the forest. He already had a report with him. On 28.6.2011 he had received a letter from the District Children Officer with instructions that he take PW1 and her boyfriend to the police station. He wrote a letter to the assistant chief asking him to arrest PW1 and her boyfriend. The two were arrested and taken to Kilifi police station on 29.6.2011. On 30.6.2011 the boyfriend, Muvera was released. On 15.7.2011 he wrote another letter and gave it to PW1 to take it to the area assistant chief. PW1 left his office at 2.30 pm. He worked with the assistant chief upto 4.00 pm when he left. The next day he attended a burial and got information that he had defiled PW1. On 21.7.2011 police went to his house with PW1 whereby they were searching for a yellow Kaunda suit and shoes which PW1 alleged he was wearing on the date of the incident. The police searched his house and no such clothes were found. He was arrested and charged in court on the 22.7.2015. Before becoming the area chief he used to be the area councilor. He was aware that the complainant's father (PW4) vied for the position of a councilor in 2007 but lost. He refused to assist PW4 with his politics as his slogan was that he would do away with the provincial administration.

DW2 JAMES BAYA YAA is the area assistant chief. On 15.7.2011 he went to the chief's camp at about 8.00 am. The chief was already there. They worked together in the chief's office. He left at around 4.00 pm. They were working on birth and death notifications. His office was being used by women groups. There is a lady who operates a hotel nearby and she normally keep her items in his office. By the time he left the women were still at his office and the keys were left with the woman who operates the hotel. He was present on 21.7.2011 when the police searched the appellant's house for some clothes but nothing was found.

DW3 JOYCE KATEMBE KARISA is the owner of the hotel which is opposite the chief's camp. On 15.7.2011 he opened his hotel at 7.00 am. The chief went to his office at 8.00 am. There was a meeting for women group for merry go round. PW1 whom she knew went to the chief's office at about 2.30 pm in the company of a man. DW3 left the premises at 4.30 pm and she was the last one to leave. The women ended their meeting at about 4.15 pm. She saw PW1 leaving holding some documents. DW4 BEATRICE MANYESO KENGA was at the chief's office on 15.7.2011 attending a meeting for the women group. They met at the assistant chief's office. The meeting started at 11.00 am and ended at 4.15 pm. By that time the chief had already left and there was no one at the office.

The main issue for consideration is whether PW1 was defiled by the appellant. This will answer the question as to whether the prosecution proved its case beyond reasonable doubt. Counsel for the appellant maintains that the case was not proved beyond reasonable doubt. It is clear from the evidence that no one saw the appellant defiling the complainant. It is the evidence of the complainant that should be considered in detail. It is evident from the evidence on record that PW1 was below the age of eighteen years. Her birth certificate was produced and she was born on 3.8.1996. It is also established that by the time the alleged defilement incident occurred PW1 was already pregnant. It is her evidence that she became friend with one Muvera Kenga Kashindo. She started the friendship in March 2011 and realized that she was pregnant in May 2011. The evidence on record shows that at one time she went to live with Muvera at his place.

According to PW1, the appellant took her to a maize store which is located within the appellant's office. The appellant started by touching her breasts and then defiled her. She went home and informed F. They then went to inform the village chairman. That evidence is strongly opposed by the appellant. According to the appellant he attended to the complainant on that day and she left at about 2.30 pm. According to PW1 there were many people at the chief's office. Counsel for the appellant submitted that the medical evidence is not convincing as there were two P3 forms. I have seen the two P3 forms. The first P3 form is dated 16.6.2011. It was referring PW1 to hospital on 19.7.2011. Unfortunately, at the bottom the doctor signed it 9.7.2011. That P3 form bares the official stamp of Kilifi District hospital. It was produced by the appellant. The other P3 form was produced by the prosecution. It gives the same

information on its first page just like the other P3 form. It is stamped with the official stamp of Kilifi District hospital and has the date of 19.7.2011. The P3 form produced by the appellant also has the date of 19.7.2011 at the back where Dr. Adnan signed. That P3 form is a photocopy of the one produced by the prosecution. It only appears that the P3 form was photocopied when the date in the middle had been written as 9.7.2011. when the mistake was realized the date was correctly indicated to be 19.7.2011. I find this to be a normal error as all the contents in the two P3 forms are the same.

The complainant was already pregnant by the time she was examined by the doctor. The medical evidence is not very helpful as the complainant had already started having sex from March 2011 until when she became pregnant. It appears that she continued the relationship with Muvera as she told the court that she met him in 2012 and that she was at home. The record of the trial court showed that the case was initially heard by a different magistrate and when PW1 testified she gave detailed evidence on her relationship with Muvera. She told the court that she had sex for the first time with Muvera in January 2011 and became pregnant in April 2011. She also had sex with him in March 2012. It is also on record that PW4 is the father of PW1 told the court that PW1 has two children instead of one. By the time PW4 was testifying on 18.10.2013 PW1 had had her second child who was about four months old. It is the evidence of the father that he asked PW1 who was the father of the second child but she kept on lying to him.

It is clear that no one saw the appellant defiling PW1. Section 124 of the Evidence Act allows the court to convict an accused in a sexual offence if the court believes the evidence of the complainant. The evidence on record shows that it was the first time PW1 had gone to seek assistance at the appellant's office. She concedes that there were many people at that time. The defence evidence is that the complainant was attended at 2.30 pm and left. DW3's evidence is that she saw PW1 at the chief's office in the company of a man. DW3 saw PW1 leaving the chief's office with some document. DW4 was also present at the chief's office attending a merry go round meeting for women. According to her, the meeting ended at 4.15 pm. DW3 was the last person to leave the chief's camp.

According to PW1, the defilement took place at about 3.00 pm. She left the chief's camp at about 4.00 pm. It is not clear why the report to the village elder was made at about 11.00 pm. According to PW1, the chief's office is not far from her parents' home. Further, her friend F's home is also not far from her parents' home. The incident was not reported to anyone between 4.00 pm upto 11.00 pm when PW1 and F went to the village elder's place.

This is a criminal case which has to be proved beyond reasonable doubt. The defence evidence is that by 4.00 pm the meeting for the women was still on. Assuming that there was no meeting and it was only the chief and PW1 at the office, there is no evidence that pw1 was threatened by the appellant. Pw1's evidence is simply that she was defiled and the appellant told her that it was their secret. F who was the first person to be told by PW1 that she had been defiled was not called to testify. According to PW1 F was in class six but she has since been married.

Given the defence evidence, I do find that the evidence of PW1 is doubtful. It is doubtful that the appellant cleared all the members of public and remained with PW1 alone in his office. This is a public office and the defence evidence, which is not an afterthought, indicate that DW3 runs a hotel nearby and she was the last person to leave the place. It is unlikely that the appellant would call PW1 to a maize store and defile her while members of the public are waiting to be served. The defence confirms that PW1 went to the chief's office and she was served and left. She did not complain to anyone at the chief's office. Her home is near the village elder's place but from 4.00 pm to 11.00 pm, she did not make any complaint.

The complainant's evidence is that she was impregnated by another man. The man is at home. The police did not bother to charge that man with defilement. At one time the man lived with PW1. Since PW1 was under the age of 18 years, the police ought to have charged Muvera Kenga Kashindo with defilement. By the time the complainant's father (PW4) was testifying on 18.10.2013, the complainant had delivered another child. She was still under 18 years. Her father testified that she had not revealed he father of the second child.

Although the law allows the court to convict an accused if the evidence of the complainant in a sexual offence is believable, I do find that the evidence of the complainant is doubtful. The investigating office visited the scene and found no maize in the store. The police searched the appellant's house to recover the alleged Kaunda suit the appellant was wearing on the material day but it was to recovered. There is no evidence that the appellant was aware of an impending search and hid the clothes. The appellant fully cooperated with the police. The person who impregnated PW1 was arrested and taken to the police by the area assistant chief but was released without being charged. The evidence shows that PW1 was defiled by two different men who impregnated her but none has been charged in court. The defeats the whole essence of defilement. The area assistant chief testified and it is his evidence that no defilement took place. He was with the appellant who is the area chief. The two worked together in one office filling death and birth notifications. The defence evidence does raise doubt on the prosecution case.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 8th day of February, 2017.

S.J. CHITEMBWE

JUDGE