



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 144 OF 2014

REUBEN MULATIA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 465 of 2013 in the Senior Magistrate's (sic) Court at Taveta delivered by Hon R. K. Ondieki (PM) on 26th June 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Reuben Mulatia, was tried and convicted by Hon R. K. Ondieki, Principal Magistrate for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No 3 of 2006 and sentenced to life imprisonment. The alternative charge was that of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main Charge were as follows:-

“On 6th day of September at about 6.00pm at [particulars withheld] Village in Taita Taveta County of the Coast Province unlawfully and intentionally caused his penis to penetrate the vagina of A C a child aged 4 years.”

3. The particulars of the alternative charge were as follows:-

“On 6th day of September at about 6.00pm at [particulars withheld] Village in Taita Taveta County of the Coast Province unlawfully and intentionally touched the vagina of A C a child aged 4 years with his penis.”

4. Being dissatisfied with the judgment therein, on 23rd September 2014, the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-

1. THAT the trial magistrate erred in law and in fact by Filing (sic) to consider that there were material contradictions of witnesses: (sic) the age of the complainant was not established with witnesses contradicting themselves.

2. THAT the trial magistrate erred in fact by failing to consider that the charge sheet was defective in the circumstances in that he was confused by the charge read to him and the age of the said child.

3. THAT the trial magistrate erred in law and fact by using the perceived weakness of the defence case to suppress the whole prosecution (sic).

4. THAT the trial magistrate erred in both law and fact by failing to note that the prosecution did not prove their (sic) case beyond reasonable doubts(sic).

5. THAT the sentence that was imposed on him was too harsh and excessive in the circumstances.

6. THAT the trial magistrate erred in law and fact by failing to appreciate that most of the prosecution witnesses were from one family and no independent witness was called to prove the said allegations.

5. On 5th September 2016, the court directed the parties to file their respective Written Submissions. Through his counsel, the Appellant filed his Written Submissions dated 16th September 2016 on 19th September 2016. The State filed its Written Submissions dated 3rd October 2016 on 4th October 2016.

6. When the matter came up on 4th October 2016, both the counsel for the Appellant and counsel for the State requested this court to rely on their respective Written Submissions in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

8. Ground of Appeal No 3 which related to the defectiveness of the Charge appeared to have been abandoned as the Appellant’s counsel condensed the remaining Grounds of Appeal for determination by this court as follows:-

1. Whether or not the learned magistrate court erred in law and facts when he convicted the accused person on bases of contradictory evidence and therefore the prosecution had not proved its case beyond reasonable doubts(sic);

2. Whether or not the learned magistrate erred in law and facts in convicting the appellant based on uncorroborated evidence;

3. Whether or not the learned trial magistrate erred in law and facts when he held that the age of the complainant had been established and dismissing the accused person’s defence and failing to consider the circumstances under which the offence was alleged to have been committed;

4. Whether or not the learned trial magistrate erred in law and fact when he dismissed the fact that the material witnesses had not been called and proceeded to convict the accused person on bases of unsubstantiated evidence and imposed on him a custodial sentence of life imprisonment when no proof had been tendered in court to warrant such a conviction.

9. Having looked at the aforesaid Grounds of Appeal and the respective parties’ Written Submissions, it was apparent that the issues for determination by this court were really:-

1. Whether or not the Prosecution had proven its case beyond reasonable doubt; and

2. If the question to Issue No (a) herein was in the affirmative, whether or not the sentence that was meted upon the Appellant herein was harsh and excessive in the circumstances of the case herein.

10. The court therefore addressed the said issues under the different heads shown hereinbelow.

i. PROOF OF THE PROSECUTION'S CASE

11. This court dealt with Issues Nos 1, 2 and 3 that had been raised by the Appellant's counsel together as they were all related. They essentially addressed Grounds of Appeal Nos 4, 5 and 7 of the Appellant's Grounds of Appeal.

12. The Appellant argued that there were contradictions in the evidence that was adduced by C J (hereinafter referred to as "PW 1"), the child, A C (hereinafter referred to as "PW 2"), Tshael Joseph (hereinafter referred to as "PW 3") and No 75301 PC Susan Lelei (hereinafter referred to as "PW 5).

13. He argued that PW 1, who was PW 2's mother, contradicted herself on the sequence of events regarding the taking of PW 2 to hospital. He pointed out that PW 1 said that she took PW 2 to hospital after inspecting her and finding that she was bleeding and again went on to say that she was referred to the hospital when she reached the police station. He contended that this contradicted PW 5's evidence who told the Trial Court that she was the one who took PW 2 to the hospital.

14. It was also his submission that there were also inconsistencies in how it came to be known that PW 2 had been defiled. He averred that while PW 1 had said that PW 2 told her that she was not feeling well upon her reaching home, PW 3 said that PW 2 had complained of pains in her private parts while she was bathing her. He added that this contradicted PW 2's testimony that she told her grandmother what had transpired.

15. To support his argument that this evidence ought not to be accepted by this court due to the said contradictions and inconsistencies, he placed reliance on 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. He also relied on several other cases which he did not attach to his Written Submissions.

16. It was his further submission that Reuben Mwawasi (hereinafter referred to as "PW 4") was not a competent witness because he neither told the Trial Court what his qualifications were nor was he the author of the P3 Form that he submitted in evidence. He urged this court to expunge his evidence and accordingly find that no penetration had been proven.

17. He argued that lack of spermatozoa was proof that no penetration had occurred as had been contended and that because PW 2's evidence was not corroborated and her grandmother was not called as a witness in the case, the Prosecution had not proved its case beyond reasonable doubt.

18. On its part, the State submitted that PW 1, PW 3 and PW 5 all confirmed that PW 2 was taken to hospital and that PW 2 did herself testify as much. It urged this court to consider that both PW 2 and PW 3 were minors and having testified about five (5) months after the incident, they may not have remembered all the details.

19. It submitted that the Appellant was well known to PW 2 as they were neighbours and because the incident occurred during the day, PW 2 was able to recognise him as her defiler. It relied on the case of **Anjononi & Others vs Republic (1976-1980) KLR 1566** regarding recognition by witnesses but it did not attach the same to its Written Submissions.

20. It further argued that PW 1 observed PW 2's private parts and found that she had been defiled and

consequently, her evidence was sufficient to have corroborated that of PW 2's evidence. It referred this court to the case of **Julius Kiunga M'mirithia vs Republic [2013] eKLR** to support its argument on corroboration and single witness identification.

21. It was its further argument that the Appellant did not object to the production of the P3 Form by PW 4 and being an expert, his evidence could only be challenged by another expert witness. It also stated that in any event, medical evidence was not the only basis of establishing that a sexual offence had been committed.

22. It referred this court to Section 143 of the Evidence Act Cap 80 (Laws of Kenya) which provides that it is not mandatory that a particular number of witnesses be called to prove a fact. It said that it was evident from the evidence of the Prosecution witnesses that PW 2 told PW 1, PW 3 and her grandmother what had transpired.

23. It was correct as the Appellant argued that he could not be found liable of the offence of defiling based on the sole evidence of PW 2 without corroboration because firstly, she was a child of tender years. Secondly, she had adduced unsworn evidence. This was a position that was well-articulated by the Court of Appeal in the case of **Johnson Muiruri vs Republic [2013] eKLR**.

24. Although counsel for the State pointed out that PW 2 and PW 3 were children of tender years, there did not appear to be any inconsistency in the manner PW 2 explained what had happened to her. It was not necessary that she had to tell all her relatives of what had happened to her. Each gave their version of the story as she had told them.

25. It did appear to this court that PW 2 informed her grandmother of what had transpired immediately after the incident. She then informed PW 1 that she was unwell when she got home and further told PW 3 that she was having pain in her private parts when she was bathing her.

26. Notably, PW 2 was examined within hours of being defiled. The P3 Form showed that she had a broken hymen with minimal bleeding but there were no tears or lacerations. PW 4 attributed this kind of trauma to forceful penile penetration (sexual intercourse). The Appellant never objected to him producing the said P3 Form as evidence before the Trial Court. He was therefore estopped from arguing that PW 4 was not qualified or competent to have produced in evidence, the said P3 Form, at this appellate stage.

27. This court therefore found itself in agreement with the Learned Trial Magistrate's finding that PW 2 had been defiled as her evidence and that of PW 1 and PW 3 was corroborated by the said medical evidence that was tendered by PW 4.

28. Having established that PW 2 had been defiled, the next question for determination was, who defiled PW 2? PW 2 testified that the Appellant called her to his house, put her on his bed, removed her pant and inserted his penis in her vagina. Considering that she was aged four (4) years at the material time, the details and sequence of the whole occurrence was very consistent with what would happen during a sexual act and left nothing to doubt that indeed, the Appellant defiled her.

29. The Appellant may very well argue that PW 2 was a single witness and had adduced unsworn evidence. However, her evidence was corroborated by PW 1 who testified that she saw her playing outside the Appellant's home. This placed the Appellant squarely near the scene of the offence.

30. It was therefore not necessary for PW 2's grandmother to have been called as a witness as the evidence that had been adduced by PW 1 was sufficient to have corroborated PW 2's evidence and thus sustained a conviction against the Appellant herein. Notably, there is no legal requirement that an independent witness other than a family member should testify to prove that defilement has occurred.

31. Section 143 of the Evidence Act that was relied upon by the State stipulates that **“that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact.”**

32. Having said so, the burden of proof to prove its case lies with the prosecution as envisaged by Section 107 of the Evidence Act. An accused person is not therefore obligated to give evidence to prove that he is innocent. However, this burden of proof can shift to an accused person in certain instances such as when such accused person asserts, alludes or infers a particular fact.

33. The Appellant had a right to adduce unsworn evidence and not call any witnesses. He also had a right to adduce sworn evidence that would have given the Prosecution an opportunity to test the veracity of the same.

34. In his unsworn evidence, the Appellant herein appeared to remove himself from the scene of the incident herein. It was his evidence that on the material day, he went home after work at 5.00 pm. However, he did not tell the Trial Court where he was after 5.00 pm on the material date. This was crucial evidence because the offence was said to have been committed at about 6.00pm.

35. It was abundantly clear to this court that the Appellant did not adduce any evidence to remove himself from the scene. Indeed, his unsworn evidence had no probative value and was worthless. It made his defence totally wanting and amounted to a mere denial. At most, his unsworn evidence could only be persuasive rather than evidentiary.

36. On this issue of unsworn evidence, in the case of **May vs Republic (1981)KLR**, the court therein rendered itself as follows:-

“An unsworn statement...potential value is persuasive rather than evidential...”

37. The Learned Trial Magistrate concluded that as the Appellant did not call any witnesses or offer any evidence to support his defence, he did not prove his alibi. The said Learned Trial Magistrate also observed that his unsworn evidence which had little or no probative value.

38. In the absence of any tangible evidence of the Appellant removing himself from anywhere near the scene, the only logical conclusion that could be made was that he was within the vicinity of the scene of the incident. He was placed squarely in the scene where the incident occurred.

39. This court came to that conclusion because PW 1 said she went home at about 6.00 pm and saw him outside his house with PW 2 and other children playing outside his house. Further, PW 2 was categorical that the Appellant called her to his house and defiled her. Additionally, PW 4 confirmed that indeed PW 2 had been defiled as there was minimal bleeding.

40. It was thus evident to this court that the Appellant did not provide any alibi after 5.00 pm and that his unsworn evidence failed to displace the evidence that was adduced by the Prosecution witnesses to the effect that it was him who had committed the offence he had been charged with. Consequently, this court could not fault the Learned Trial Magistrate for having arriving at the conclusion that he did.

41. This court thus wholly concurred with the findings of the said Learned Magistrate as well as with the submissions by the State that the Prosecution did actually prove its case beyond reasonable doubt.

42. In the premises foregoing, Grounds of Appeal Nos 4, 5 and 7 of the Appellant’s Grounds of Appeal were not merited and the same are hereby dismissed.

ii. SENTENCE

43. In respect of Issue for determination No 4 herein which covered Grounds of Appeal Nos 2 and 6, the Appellant had contended that the sentence that was meted upon him was harsh and excessive in the circumstances of the case herein and that in any event, PW 2’s age had not been proven.

44. Notably, PW 2 had stated in her evidence that she did not know her age. PW 1 produced a Medical Health Card that showed that PW 2 was born on 29th July 2008. She also stated in her Examination-in-

chief that PW 2 was aged four (4) years. The P3 Form also indicated PW 2's age as four (4) years.

45. The Appellant never raised any objection as regards PW 2's age. He did not even Cross-examine any witnesses on PW 2's age. He was thus estopped from raising the issue regarding PW 2's age at this appellate stage.

46. For the foregoing reasons, in the absence of any evidence to the contrary, this court found the Appellant's submissions that PW 2's age was not proven to have been an afterthought intended to get him off the hook by whatever means.

47. The penalty for defiling a child aged four (4) years is stipulated in Section 8(2) of the Sexual Offences Act Cap 62A (Laws of Kenya). The same provides as follows:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

48. It therefore follows that once a trial court convicts an accused person of the offence of defilement under Section 8(2) of the Sexual Offences Act, it is mandated to impose on such convicted person, a **minimum** (emphasis court) sentence of life imprisonment. A trial court has no discretion in the sentence that it can mete upon such a convicted person.

49. In that respect, Issue No 4 of the issues for determination by the court which encompassed the Appellant's Grounds of Appeal Nos 2 and 6 were not merited and the same is hereby dismissed.

CONCLUSION

50. Accordingly, having perused the evidence that was adduced, the Written Submissions by both the Appellant and the State and the case law they each relied upon, this court came to the firm conclusion that from the evidence that was adduced in the Trial Court, the Prosecution had proven its case beyond reasonable doubt and that the Appellant's defence was a sham and a mere denial. It did nothing to assist his case.

DISPOSITION

51. Accordingly, as the Appellant's guilt was unequivocal, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the Trial Court. This court hereby declines to quash the conviction and/or set aside the sentence that was meted upon him by the Trial Court. It instead affirms the said conviction and the sentence that was imposed on him as the same was lawful and fitting.

52. The upshot of this court's judgment, therefore, was that the Appellant's Appeal that was lodged on 23rd September 2014 was not merited and the same is hereby dismissed.

53. It is so ordered.

DATED and DELIVERED at VOI this 16th day of February 2017

J. KAMAU

JUDGE

In the presence of:-

Kitindiyo Musembi..... for Appellant

Miss Anyumba..... for State

Josephat Mavu- Court Clerk