



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 141 OF 2014

B K SAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case no 89 of 2013 of the Principal Magistrate's court at Kwale by Hon. C M Njagi -RM)

JUDGMENT

1. The appellant herein B K S was charged with the offence of defilement of a boy contrary to section 8 (2) of the Sexual Offences Act No 3 of 2006 in the main count.

The facts were that;

“On the 17th day of January,2013 at [particulars withheld] village in Kwale County within Coast Region the appellant unlawfully and intentionally committed and act which caused his penis to penetrate into the anus of A S, (a boy aged 13 years)

2. In the alternative, the appellant is charged with indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act code 3 of 2006.

The particulars were that;

“On the 17th day of January, 2013 at [particulars withheld] village in Kwale County within Coast Region, the appellant indecently committed an act to A S, a boy aged 13 years by touching his private part namely, anus”.

3. The appellant pleaded NOT GUILTY and was tried, convicted and sentence to serve twenty (20) years imprisonment.

4. This triggered and appeal by the appellant when he put four (4) grounds of appeal but later amended them into five (5) grounds. I will reproduce amended grounds of appeal in their original language, that the learned magistrate erred in law and fact by;

1.finding my conviction and sentence without considering that the charge of defilement was not proved to the standard of law hence the conviction and sentence imposed upon me was unsafe.

2. convicting me without seeing that the doctor who was alleged to have examined and treated the

complainant on the material day never testified to support his allegations.

3 by finding my conviction and sentence on failing to note that the source of any arrest was not established to have had a connection with the offence in question for the police officer who arrested me never testified to clear the doubt of my arrest hence failed in the rule of law.

4. by not considering that section 63(3) of the evidence Act was not put into consideration for the said exhibit that is shorts and knife were not brought to court for inspection.

5. by rejecting my defence which case doubt to the prosecution

It is trite law that on a first appeal, this court has the liberty to look at the evidence and come to its own conclusion while taking care because the advantage a trial court has as regards observing the demeanor of witnesses and the accused is not available to this court.

5. The prosecution called evidence of three (3) witnesses. Before the testimony of the complainant minor (Pw1), there is a record of what appears to be a “voire dire “ examination. They are answers recorded probably from some questions asked and to which the complainant was responding. It is not clear who was asking the questions that the court recorded answers which led to its conclusions that the minor knew and understood what the truth is.

6. Pw1, A S K, who is the complainant testified that on the evening of 17th January, 2013, he was playing alone at his home while his father with whom he stayed with, had gone to fetch water, when the appellant, who is an uncle emerged from the nearby bush while holding a knife. That the appellant took hold of his hand dragged him behind the house where he cut his pants from behind, removed his own pants then threatened him with violence if he did not remove his underpants. That the appellant did “tabia mbaya” to his buttocks and he felt pain and bled. Pw1 said that the appellant is a neighbour. He also said that his father found the appellant in the act but he ran away and disappeared.

7. Pw2, S K, is the father to the complainant and he told court that he lives with his son, wife and brother. He stated that he arrived home from work and found that his wife was sick. He then went to fetch water as she went to the market. On returning from the water point he heard screams coming from behind the house and he knew it was his son. He went there and saw the appellant holding a knife as his son washed clothes while bleeding from the anus. The appellant on seeing him took off. He took his son to Msambweni hospital for treatment and later to Msambweni police station where he reported the matter. He was issued with a P3 form which he took to the hospital for filling and returned it to the police station where he recorded his statement.

8. Pw3, No. 38655 P.C Francis Mulwa was the investigating officer in the matter. He testified that on 18.1.2013 at 1.20pm he received a report from Pw1 and Pw2 that Pw1 had been defiled by his uncle at their homestead. Pw1 told him that he had gone to hospital first before coming to report. PW3 issued them with a P3 form and referred them to hospital for filling of the same. He said that the appellant had ran away but he was later arrested and detained at Diani police station where he went to collect and transferred him to Msambweni. The appellant was charged with the offence before the Principal Magistrate’s court at Kwale.

9. From the records, after several adjournments, the doctor who treated the complainant and filled the P3 form did not appear in court.

10. The prosecution closed their case and on 23.6.2014, the accused person was placed on his defence. The appellant chose to remain silent for the court to determine his fate based on the evidence before court.

11. The trial magistrate assessed the evidence that was adduced before her and came to the conclusion that the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged on the offence of defilement. She sentenced him to serve twenty (20) years imprisonment.

12. The appellant, who was unrepresented filed written submissions in which he stated that a “voire dire” examination of the complainant minor was not conducted as the procedure provided for under section 19 of the Oaths, Statutory and Declarations Act.

13. He also submitted that the offence of defilement which he was charged with was not proved to the required standard of law by the prosecution.

14. Ms/Ocholla, learned counsel for the state opposed the appeal. She submitted that although the P3 from was not produced as an exhibit, the trial magistrate relied on Section 124 of Evidence Act in convicting the appellant as she was satisfied that Pw1 was telling the truth.

15. She also submitted the he was also charged with an alternative charge to section 11 (i) of the Sexual Offences Act. So that in the event that the court finds that the prosecution did not prove their case beyond reasonable doubt in respect of the main count, then she prays that it finds that there is sufficient evidence to convict the appellant for the same.

16. In evaluating and analyzing the evidence that was tendered before the trial court with regard to the grounds of appeal cited by the appellant. I find that the main issue for consideration is whether the prosecution’s evidence against the appellant was proved beyond reasonable doubt as required by law.

17. It is trite law that whoever asserts a fact and wishes the court to believe him or her the burden of discharging this is always on that party.

18. Section 107 of the Evidence Act (Cap 80), Laws of Kenya provides as follows;

(i) “whoever desires any court to give judgment as to any legal right or liability on the existence of facts which asserts must prove that those facts exist.

(ii) provides as follows;

“When a person is bound to prove the existence of any fact it is said that the burden of proof is on that person.”

This burden does not shift, unless, in certain circumstances, the law says so.

19. The appellant faced a charge of defilement of a minor under the Sexual Offences Act, No. 3 of 2006. The said charge were framed as stated in paragraph 2 of this judgment. The offence is enacted under the sexual offences Act No 3 of 2006 as follows:

Section 8 (1) provides;

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

Section 8 (3) states that;

“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.”

20. This is an offence the society shuns and treats very seriously hence the shift sentence prescribed to protect defenseless children.

21. The Honourable trial magistrate correctly appreciated the law when in her own words, summary as follows:

“In defilement, the court investigates whether a penetrative act happened and also whether

the age of the complainant was ascertained”.

Age of a victim and penetration are the two facts that need to be proved from the evidence that is tendered in a case of defilement.

21. I will not labour on the issue of the age of the minor (victim) as the same, despite the documents meant to prove the same not having been produced by the investigating officer, evidence to the effect that he was a minor aged between 12 and 13 years was not challenged by the appellant.

23. The next issue is whether the evidence tendered proved that there had been penetration of the minor
Pw1 testified as follows;

“I am 12 years old, I am in class 2 at [particulars withheld] primary school. I go to the Mosque, we go with my father M K is where I live with my father alone. Mother is away. I am the last born. We are told not to do bad things. It is a sin before God...I will tell the court the truth...i have not been forced to be here....”

“ ...I live with father. Never left ...on 17.1.2013 in the evening father was away fetching water. I was playing at home. B came from the bush.

“....he came to our home and found me alone. He caught me and showed me a knife and told me that he will do bad things to me and if I refuse he will kill me. He took me behind the house and cut my pants from behind with a knife. He removed his underwear and said he would kill me if I don't removed my underwear. He did “tabia mbaya” to me at my buttocks. I felt pain and bled. My father came and found us there. B ran away....”

24. On the same facts, Pw2 testified as follows;

“I live with my son, wife and my brother the accused. I am a tailor at Ukunda. I know A. He is my second child. He is 13 years old. The birth certificate is with the mother. On 17.1.2013, I came home from work at 5.30 pm. I saw my wife who was ill. I went to fetch water and she went to the shop. My son was alone. From fetching water, I heard screams and I knew it was my son. I found B holding a knife and my son was washing clothes. I looked at my son who was bleeding from the anus ..the person I found with the child is B K before court...”

25. From the evidence of minor, what is recorded are answers from Pw1 to, I think, questions, he was asked by an interviewer. One wonders whether a “voire dire” examination was conducted of the minor by the trial magistrate (court) as per the requirements under section 19 of the Oaths and Statutory Declarations Act (Cap 15) in order to satisfy itself.

1. That the child was possessed by sufficient intelligence to understand the recapturing of the evidence

2.. That the child appreciates the need of telling the truth and importance of the oath.

The question then becomes, does the minor's evidence have a probative value and should it first be assumed that the answers given by the minor were elicited by the questions asked by the magistrate?

26. There were also noted contradictions in the evidence of Pw1 and Pw2 on the basic fact of what was alleged to have happened. when Pw2 returned from fetching water.

According to Pw1,

“he did “tabia Mbaya” to me at my buttocks”

He did not refer to the anus as stated by his father. (Pw2) that.

“...i heard screams and I knew it was my son. I found B holding a knife and my son was washing clothes. I looked at my son who was bleeding from the anus....”

One is bound to ask why the son never said this in his evidence and why he would be washing clothes and not his anus.

27. It was also Pw1's evidence that he was living with his father alone since his mother had left. Pw2 on the other hand categorically told the court that he was living with the mother of the minor who was sick and had only left for the shop, leaving the minor alone in the home- stead, when the appellant took advantage of the opportunity and defiled him.

In such circumstances, it is hard to believe Pw1 or Pw2's version on these facts which are so basic that the evidence by both witnesses having been at the scene at the same time when Pw2 returned from fetching water ought to be in agreement on what was happening.

These contradictions have created a doubt as to who between w1 and Pw2 was telling the truth.

28. Furthermore, the said mother to Pw 1 was not called as a witness to clear any doubt on the family set up and what she witnessed.

In the circumstance, doubt has been cast on the prosecutions' evidence as to who between Pw1 and Pw2 was telling the truth.

29. Furthermore, there was a mention by Pw1 of parts which were cut, which would have been directed crucial evidence to support the evidence of Pw1. But Pw3, the investigating officer who prepared and produced exhibits before the trial court, did not incuse the said parts.

30. Worse, still, the doctor who treated and filled the P3 form was never called to testify and be tested on the treatment documents. This was fatal to the prosecution's evidence as his evidence in the documents would have been of corroborative value to it.

31. The failure by the prosecution to call the doctor to shed light on the findings when he examined the complainant combined with the failure to call the victim's mother to give evidence to the claims by the victim (Pw1) and his father (Pw2) amount to a total edipse on their evidence. It has also been noted that the O.B from Diani police station to explain what caused the arrest of the appellant.

32. The glaring contradiction I have pointed out ought to have made it unsafe for the trial magistrate to find the appellant guilty, convict and sentence him on the evidence of Pw1, Pw2 and Pw3.

33. For the reasons I have given above, I allow the appeal, quash the conviction and set aside the sentence that was meted against the appellant.

I proceed to order the appellant to be freed unless he is lawfully held.

Judgment read, signed and dated this 3rd day of March, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The appellant in person

C/clerk- Kiarie