



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 73 OF 2016

BETWEEN

EZEKIEL KWIKWI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. T.K. Kwambai,

RM in Butali Cr. Case No. 341 of 2014 delivered on 16.02.2016)

J U D G M E N T

Introduction

1. The appellant was tried, found guilty and convicted of the offence of defilement contrary to Section 8(1) (3) of the sexual offences Act No. 3 of 2006. The particulars of the offence are that on the 21st day August, 2011 in Luanda Location. [particulars withheld] sub-county within Kakamega County intentionally caused his penis to penetrate the vagina of M.K a child aged 15 years. He pleaded not guilty. Upon conviction, he was sentenced to 20 years imprisonment.

The Appeal.

2. Being dissatisfied with both conviction and sentence, the appellant brought this appeal on grounds:

- 1) That I did not plead guilty to the appended charges
- 2) That the trial court Magistrate erred both law and fact in convicting me on the evidence that was fabricated, malicious uncorroborated and was meant to implicate me with this crime
- 3) That the trial court did not consider that there was malice in this case as this was preplanned case to implicate me in this offence.
- 4) That the charge sheet was defective.
- 5) That the court did not consider my defence which was sufficient to exonerate me from wrong doing.

- 6) That I was not medically tested to ascertain that it was me who committed the offence.
- 7) That there was no proof of age assessment of the complainant.
- 8) That there was no proof of age assessment of the complainant that the sentence meted was harsh in circumstance
- 9) That witnesses who to testify were from one family
- 10) That more grounds I will adduce when I get the lower court proceedings.

3. The appellant prays that the appeal be allowed conviction quashed and sentence set aside so that he is set free.

Submissions.

4. At the hearing of the appeal on 19.01.2017, the appellant relied on his written submissions filed in court on the same date. I have carefully read through the submission. Counsel for the respondent, Mr. Oroni conceded the appeal on grounds that the offence of defilement was not proved to the required standard of proof beyond any reasonable doubt. Secondly counsel submitted that if anything, the appellant was found in the act of attempting to commit the offence of defilement.

Duty of this court

5. As the first appellate court this court is under a duty to reconsider and evaluate the evidence afresh and come to its own conclusions in the matter. As was held in the case of **Mark Oururi Mose – vs – Republic [2013]eKLR** and in **Mwangi –vs- Republic [2006]2KLR 28**, an appellant on a first appeal is entitled to a rehearing of his case in an exhaustive and fresh manner though of course the appeal court has no opportunity of seeing and hearing the witnesses. Once the appellate court is satisfied that the law and the evidence support the trial courts findings, there would be no reason for interfering with these findings, but where the appellate court finds no basis for the trial court's findings, then it has to interfere with the findings by allowing the appeal.

The Prosecution Case

6. Briefly the prosecution case is that on the 21.08.2014 at around 3.00pm, M.K. who was aged 15 years at the time was sent for sugar at the appellant's shop. The appellant was a shop assistant. M.K. went to the shop and after buying the sugar, the appellant asked her to follow him so he could give her the change. Instead, the appellant pulled her into the house, threw her on the bed and removed her clothes, a full dress, a trouser and an underpant as well as his own clothes. He then lay on top of her and started having sex with her. Before long M.K's mother, S N L who testified as PW2 stormed the house where the appellant and M.K. were. The door to the house had not been closed. When PW2 stormed the house, M.K. ducked and hid under the bed and refused to come out of the house, forcing PW2 to bolt the door from outside,. PW2 called for help from other family members who came to the scene. Among those who came to the scene was J L K, PW3. PW4 C M M also went to the scene.

7. With the help of these other family members PW2 took M.K. to the administration police at Mukhonje and later to Matete police station. M.K was sent to the hospital for treatment and was also issued with a P3 form. At the Matete Health Centre, M.K. was seen and treated by Joseph Wanyama, a Clinical officer who testified as PW5. PW5 who examined M.K. testified that she had a broken hymen and some bruises on the lateral aspect of the vagina. M.K. was also tested for STD's and pregnancy but both tests were negative. She was also given some medication to prevent HIV infection. PW5 produced the duly filled P3 form and the treatment notes as PExhibit 1(a) and 1 (b) respectively. PW5 also testified during cross examination that M.K. had some whitish discharge which showed that there was forceful sexual intercourse and the presence of semen. PW5 testified that he examined M.K. on 22.08.2014 which was a day after the alleged incident. PW5 denied a suggestion by the appellant that he had been bribed to

fabricate a case against him(appellant)

8. PW6 was No.xxx Police Constable Caroline Kikuyu of Matete Police Station. She testified of how on 22.08.2014, M.K. and the appellant were escorted to the police station by PW2, PW3 and PW4. MK narrated her ordeal in the hands of the appellant on 21.08.2014 and how PW2 had found the appellant and M.K. in the act. PW6 entered the complaint in the OB and placed the appellant in the cells as M.K. was escorted to Matete Health Centre. PW6 also received M.K's birth Certificate from PW2. The birth Certificate No.xxxxx was produced in evidence as PEXh 2. According to PEXH2, MK was born on 03.03.2002 to PW2 and PW3. The evidence of PW6 brought the prosecution case to a close.

The Defence Case

9. At the close of the prosecution case, the appellant was found to have a case to answer and was placed on his defence. The appellant gave a brief sworn statement in which he alleged that the case against him was a fabrication. He denied committing the offence and also told the court that he was under 18 years of age, having been born in 1999. He produced his baptismal card issued on 13.03.2005, showing that he was born on 05.09.1999. During cross examination, the appellant testified that he did not have any grudge with both PW2 and PW4.

Judgment of the learned trial court

10. In its judgment, the learned trial court framed 4 issues for determination:- age of complainant(M.K.) whether M.K. was defiled (Penetration), whether it is the appellant who did it and finally whether the prosecution had proved its case beyond any reasonable doubt. The learned trial Magistrate answered all the fair questions in the affirmative and proceeded to find the appellant guilty as charged, convicted him and sentenced him to 20 years imprisonment as by law provided, hence this appeal.

Analysis and Determination

11. For the purpose of his judgment, I will adopt the issues framed by the learned trial court and since the state has conceded the appeal, I shall go straight to the issues. With regard to the first issue namely the age of MK, PEXh. 2 shows that M.K. was born on 03.03.2002 so that by the time of the alleged offence on 21.08.2014, she was just under 12 years old. So for all intents, and purposes, M.K. was 11 years old. During her testimony in 22.04.2015, M.K told the court that she was 15 years old. Which means that at the time of the alleged offence, she was just about 14 years. Does this mean that the age of the complainant was proved?

12. Section 8(1) and (3) of the SOA provides as follows;-

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence terms defilement.

(2.) A person.....

(3) 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.”

13. What the above provision means is that as long as there is evidence of the child being between twelve and fifteen years, Section 8(3) of the SOA will apply. The evidence on record establishes that M.K. was between twelve and fifteen years at the time of the alleged offence.

14. The second issue for determination is whether M.K was defiled namely whether there was penetration under Section 2 of the SOA, 206, penetration is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person,” and the courts have confirmed over time that penetration need not be complete for it to be so classified and that in many instances, the perpetrators of sexual offences do not have adequate time to achieve full penetration during the

commission of the offence.

15. PW5 Joseph Wanyama, the clinician who examined M K confirmed that there was penetration which was evident from a broken hymen and presence of bruises on the lateral aspect of the vagina and whitish discharge which meant the presence of semen.

16. The third issue whether it was the appellant who committed the offence. There is some serious contradiction between the evidence of MK and that of her mother. PW2 whereas MK stated that the appellant removed both her clothes and his own clothes, lay on her and defiled her, without the door being closed she also testified that the appellant did not ejaculate in her. So where did the whitish discharge come from? MK also testified that PW2 found when the appellant was on top of her. It is admitted by both MK and PW2 that the door to the appellant's abode was open.

17. When PW2 testified she stated the following in part of her evidence in chief: I went there and the door was open and on entering the house, I opened the curtain inside and found the accused and the complainant on the bed. I find the complainant was not having her under pant but had her skirt and blouse on. The accused had his clothes on, I then called the complainant but she tried to hide under the bed and refused to come, so I locked her inside. " this testimony by PW2 indicates in the same breath that she entered the house, pulled away the curtain and saw the two offenders on the bed, and at the same time it indicates that she was outside the house and that is why she says, " I then called the complainant but she tried to hide under the bed." It is also worth noting that whereas MK says the appellant removed all her clothes, PW2 says she (MK) had her skirt and blouse on. In fact MK testified that she was wearing a dress with a rouser underneath. MK also testified that the appellant also removed his clothes before he defiled her, but PW2 says, the appellant had his clothes on.

18. It is thus doubtful to me whether in the circumstances described by PW2, the appellant could have committed the offence of defilement. It may be as submitted by the respondents counsel that the appellant may have been in the act of attempting to commit the offence, but even such an assertion is not supported by the evidence. It is possible, as suggested by the appellant during cross examination of the prosecution witnesses and in his own defence that the case against him was a fabrication. If the offence of defilement was committed, then it was committed in circumstances other than those described by MK and her mother PW2. The situation is made more complex by the fact that both MK and PW2 do not give the time frames between the time MK was sent to the shop and the time PW2 ambushed the MK and the appellant in the appellant's house.

19. From all the above, it is my considered view that the prosecution did not prove the case against the appellant beyond any reasonable doubt. Accordingly, I find that the conviction was not safe. The same is quashed and the sentence of 20 years imprisonment set aside.

Conclusion.

20. For the above reasons, the appeal is allowed the conviction quashed and the sentence of 20 years is set aside. Unless otherwise lawfully held, the appellant shall be released from prison custody forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this9th....day of.....
March.....2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....present in person.....for appellant

.....Mr. Nge'tich(present).....for respondent

.....Polycap.....Court Assistant.