REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 28 OF 2016

ALARIC MGANGA JEMBE ……..……..…..APPELLANT

VERSUS

REPUBLIC ……..……..……RESPONDENT

(An appeal from the judgment of the Principal Magistrate Hon. R. K. Ondieki delivered on 9th March, 2016 in Criminal case No. 133 of 2012).

JUDGEMENT

The Appellant, ALARIC MGANGA JEMBE was charged with defilement of a child contrary to section 8 (1) as read with sections 8 (2) of the Sexual Offences Act No. 3 of 2006 in the main count.

The particulars were that;

> ***"On the 22nd day of May, 2012 in Kaloleni District within Kilifi County, the appellant unlawfully and intentionally committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely vagina of KA, child aged 8 years".***

The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual offences Act No 2 of 2006.

The facts were that:

> ***"On the 22nd day of May, 2012 in Kaloleni District within Kilifi County, the appellant unlawfully and intentionally caused his penis to touch the vagina of KA, child aged 8 years."***

The appellant was arraigned before the resident Magistrate at Kaloleni where he pleaded NOT GUILTY and the case proceeded to full hearing. On 9th March, 2016, Honourable R. K. Ondieki, Principal Magistrate pronounced judgment whereby he found the appellant guilty for the offence of defilement, convicted and sentenced him to serve life imprisonment.

It is this conviction and sentence that triggered this appeal where the appellant raised four (4) grounds of appeal namely;

> ***(1) The learned magistrate erred in convicting the appellant on the charge of defilement contrary to Section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No 3 of 2006.***
>
> ***(2) The learned magistrate erred in law and fact in convicting the Appellant on evidence that***

did not meet the standards required in law to uphold a conviction for the offence.

(3) The learned magistrate erred in law and fact by meting upon the appellant and excessive sentence in the circumstances;

(4) The learned magistrate erred in not properly considering the evidence and the Defendant's submission hence arriving at an erroneous decision.

The Appellants prayed to court for the appeal to be allowed, conviction quashed and sentence imposed against him set aside.

This being a first appeal it is my duty is to analyse afresh and re-evaluate the evidence that was adduced before the trial court in order to draw my own conclusion on whether or not to uphold the conviction and sentence of the said courts. This principle was asly laid down in the case of OKENO VRS REPUBLCI (1972) E.A 32 which has been followed up to date. It is emphasized by the court of appeal in the recent case of COLLINS AKOYO OKEMBA & 2 OTHERS V REPUBLIC (2004) e KLR, where it stated;

"It is a duty to re-evaluate, re-analyse and reconsider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision".

The prosecution called six (6) witnesses who testified in supporting the charge.

The complainant, (herein referred to as K.A) testified as Pw1. She was aged 8 years old at the time and so a voire dire examination was conducted to ascertain if she understood the importance of telling the truth and meaning of that.

The trial magistrate found the complainant was an intelligent girl and had her affirmed.

According to the prosecution, Pw2, AB and father to the complainant, he was selling mnazi (Palm wine) other food stuffs at his kiosk at his home. He said that there were many people who included his wife, appellant and the complainant. They needed more palm wine and so each one of them contributed Ksh 200 to purchase more wine. They then sent the appellant to go and get a jerrican. At the same time, Pw3, AA, mother of the complainant sent her to collect a sack from the appellants home. That they took long to return and so Pw2 decided to go for the appellant. That on the way, he heard some screams of someone in pain and he moved closer. He said he found the appellant having removed his trousers halfway and was having sexual intercourse with the complainant (Pw1) PW2 raised an alarm and many people gathered at the scene. He informed his wife (PW3) what the appellant had done. Pw2 took the complainant to the office of the Assistant chief who referred him to Jubana Health center. From there, he was referred to Mariakanai District Hospital for examination and treatment. He then went to Kaloleni police station and reported the incident. He was issued with a P3 form which was duly filled and signed by one WEKESA , a clinical officer. Who was working at St Lukes hospital . According to the P3 form which was produced by Pw6, PATRICK BASHISHI clinical officer who worked with the said WEKESA and could recognize his handwriting and signature. According to the P3 form , Pw1 was examined and found to be 8 years old and had bruises on her labia which was swollen .it was also indicated that blood was oozing from her private parts, two hours after the incident had taken place. Pw6 stated that an age assessment was conducted and the complainant was found to be eight (8) years old at the time. He produced the P3 form as exhibit P6, the treatment notes as Exhibit P4 and the age assessment report as Exhibit P7.

The matter had been reported to Pw5, No 92503, CORPORAL CAROL KANGOGO, at Kaloleni police station on 22.5.2012. And apart from issuing them with a P3 form (Exhibit P6) ,she also escorted the complainant to hospital for age assessment, received clothing in the name of a shirt, T-shirt and pant which she sent to government chemist for analysis vide an exhibit Memo form (Exhibit P9). At the Government chemist, Pw4 LAWRENCE OGUDA, a government chemist analyst conducted a DNA test as requested and prepared a report which he produced as exhibit P8 and the clothing as exhibit P1,2,and 3 respectively. The appellant was identified by the witnesses and charged with the offence(s) before court.

The appellant, upon the close of the prosecution's case, was found to have a case to answer after a prima faice case had been established and was placed on defence. He opted to give an unsworn statement in defence and called no witness.

The Appellant, ALARIC MGANGA JEMBE, denied the charges against him and went on to state that on 22.5.2012 at about 8.00pm, he and others were taking palm wine and each had a turn to pay for it. That the complainant's father then sent him home to get a container of palm wine, which he did and returned. He said Pw2 offered to pay for him and he agreed. He went on to state that the complainant's mother also wanted a sack from her home and so the complainant was sent to accompany him. He brought out the sack and gave it to the girl. The appellant said that on their way back to Mangwe, the complainant slid and fell down. And it was while he was bending to lift her up, that her father who happened to be relieving himself in the bush nearby shouted that he was defiling his daughter. That the people who were taking palm wine his wife and children rushed to the scene. He denied having been half naked. He said he went away and left the people there. And three (3) days later he was arrested and arraigned in court.

The appellant's counsel, Mr Lewa, upon close of the defence case submitted that the testimonies of the prosecution's witnesses revealed glaring discrepancies or differences in their account of the events of the 22nd day of May, 2012 and even thereafter. He went on to point the various instances of these discrepancies and or differences in the evidence that was adduced before the trial court.

In her judgment the trial magistrate found;

> ***"On account of the evidence on record, it is common ground that the accused was in the company of the complainant on the fateful day and time of the alleged offence. It is also common ground that the accused was taking palm wine with the father of the complainant, when the accused in the company of the complainant went to his house to fetch a sack. The accused also concedes the fact that the two were going back to the kiosk when according to the accused, the complainant fell into a ditch and so the father who was relieving himself nearby shouted that the accused had defiled her. As at the time, the screams were raised, the only person in the company of the complainant was the accused and upon rushing to the scene, the complainant was found to bleeding from her private parts and was rushed to Jibana District Hospital. At the hospital, it was discovered that the complainant had been defiled. So, who then defiled the complainant apart from the accused? It was argued that the male prolife was never corrected with the accused, but who else was found with the complainant from the ditch. I am convinced that indeed the accused defiled the complainant. Even circumstantially, the fact of the circumstance points the accused person as the culprit ……..I neither gathered of any bad blood why the accused would be implicated in the offence nor did I gather of any person in the company of the accused and the complainant at the time the screams were raised…"***

So, upon excluding these other possibilities, the only person who stands to be the culprit is the accused and no other……."

The appellant's counsel, Mr Mogaka, advocate filed written submissions what were orally highlighted by Mr Chamwada , the learned counsel. He submitted that the prosecution's evidence revealed discrepancies as to what transpired during the incident, the place the incident happened and whether or not the incident happened so that a doubt was created in the prosecution's evidence, hence unsafe to sustain a conviction.

The learned counsel for the state, M/s Ocholla, opposed the appeal and submitted that the prosecution was able to prove the three (3) ingredients required in the offence of defilement. She also submitted that the sentence that was meted against the appellant was lawful and in accordance with the provisions of section 8 (1) as reads with section 8 (2) of the Sexual Offences Act, where life imprisonment is provided for, for one found guilty. She urged the court to dismiss the appeal and sustain the conviction and sentence against the appellant.

In determining the appeal, I have read through the evidence that was adduced before the trial court, analyzed and evaluated the same as is the duty of the first appellate court (see OKENO VRS REPUBLIC (19720 EA 32) I have also read through the submissions by both the appellant and state counsel in support of their respective cases. I have further considered the law and cited authorities. I have doneeen all these in line with the ground of appeal which have been advanced by the appellant.

I find that the main issues for determination are;

1. whether the prosecution managed to prove its case against the appellant

2. whether the trial magistrate imposed excessive sentence against the appellant.

With regard to the issue of whether the prosecution proved their case against the appellant beyond reasonable doubt, I wish to state that it is trite law that the onus of proof in a criminal trial was upon the prosecution and it never shifts.

The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No.3 of 2006 in the main count.

In a case of defilement, the prosecution must prove beyond reasonable doubt;

(i) the age of the victim;

(ii) the act of penetration;

(iii) the identity of the culprit.

For the victims age, it was the evidence of Pw1 (Victim) that in 2012 she was 8 years old. This was also the evidence of her father, Pw2, who also said that an age assessment was conducted and he identified the report (Exhibit P7) Pw5, Corporal Carolyne Kagongo old court that she escorted the complainant for age assessment at the hospital and she was assessed to be 8 years old. She also said that she saw her clinic card and it showed that the victim was born on 26.11.2014, therefore 8 years old at the time of the alleged incident. Pw6, Patrick Bashishi, a clinical officer at St Luke's hospital stated that they assessed the complainant's age and found that she was 8 years old. He produced an age assessment report as exhibit P7.

It is worth noting that the age assessment was conducted by Pw6, a clinical officer contrary to the requirement that the same be conducted by a dentist. However, a clinic card produced as Exhibit P5 shows that the compliant was born on 26.11.2004 which put her age to have been 8 years at the time of the alleged incident. This was not contested, hence the victims age has been proved as convicted under section 4 of the Sexual Offences Rules of the court, 2014 which provides that;

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

Proof of age of victim is important because in the case of ALFAYO GOMBE OKELLO VRS REPUBLIC, (2010) e KLR, the court of appeal said;

"In its wisdom, parliament chose to categorise the gravity of that offence on the basis 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)"

With regard to the act of penetration, under section 2 (1) of the Sexual offices Act, penetration is defined to mean;

"the partial or complete insertion of the genital organ of a person into the genital organ of another person".

In the case before the trial court, Pw1 testified that the appellant defiled her. Her exact words at page 46 of the proceedings were:

"The accused undressed and fucked me……."

It is worth-noting that by virtue of her age (being 8 years at the time) the victim would not be expected to use such strong language to describe what was done to her by the appellant, if at all.

Pw2, father of Pw1 told court that;

"I found the accused had half way removed his trouser and playing sex with the complainant"

Pw3, mother to Pw1 said that

"…I rested to the direction and met the accused fucking the complainant…."

Pw 6 Patrick Bashishi, a clinical officer produced a P3 form (Exhibit P6) which was filed by his colleague, Wekesa who is retired. He confirmed that he had worked with him for 10 years and was conversant with his handwriting. He pointed out that the P3 form indicated that the complaint (Pw1) was in cross examination, examined on 25.5.2012, and found to have injuries on the labia which was also swollen. It also indicted that there was blood oozing from her private parts. Pw6 told court that the complainant had sustained bruises on the external genitalia and that the P3 form(Exhibit) did not indicate the hymen was broken. He also confirmed that the information used to fill the P3 form was picked from intimal treatment notes (Exhibit P 4) which appears to have been filled by two people.

From the evidence of Pw1, Pw2 and Pw3, the appellant was identified as the person who defiled the victim on the alleged night. He was said to be a person well known to them, with Pw1 saying he was his uncle. The appellant did not deny having been sitting with the victim's family prior to the incident where he was implicated with the offence of defiling the complainant. He said that he had seen the victim slip and fall into a ditch and was only found trying to assist her come out of the ditch.

I have analysed the evidence that was adduced by the prosecution witnesses to establish whether the trial magistrate was right in convicting and sentencing the appellant on the strength of the same.

I find so many discrepancies in the evidence that was adduced by the prosecution's witness.

Firstly there was a glaring discrepancy in the evidence of Pw1, Pw2 and Pw3 as relates to what happened on 22nd May, 2012 when the appellant allegedly defiled her.

According to PW 1, in her evidence in chief, she said;

"The accused undressed and touched me. I felt pain. I did not scream because he lay on me".

In cross examination, she also said;

"I was pushed into a small hole next to a road, I did not scream….."

Pw2, her father, who is said to have caught the appellant in the act said;

"Before I reached at his home, I heard some screams as if one was in pain and so I decided to move close. I found the accused had half way removed his trouser and was playing sex with the complainant ……"

Pw3, Mother to Pw1 told court that;

> ***"……..my husband A went for her but midway he heard some screams that she should be left alone because she was in pain. As a result of the screams, I rushed to the direction and met the accused fucking the complainant who was eight years old……"***

The testimonies of the three witnesses elicit the question,

> ***"Did the complainant scream or not ?***

It is difficult to tell who among them was telling the truth

Also, when cross examined, Pw1 told court that appellant was not attacked by the mob. Her father (Pw2) on the other hand, when cross examined aid that;

> ***"a number of people who arrived and they wanted to set him a blaze"***

His wife (Pw3) only said that many people witnessed the incident.

There was evidence by Pw1, the complainant that she bled and identified the shirt and pant she wore on the alleged day (Exhibit P2 and P3).

Pw2 told court that they handed the clothing to the police and they were blood stained.

A T-shirt (A1) , shirt (A2), pant (A3) and blood from the complainant were taken to the Government analysis by P.C Agnes Muchemi and P.C Judy Nyambura for analysis. The same were tested and analyzed by Pw4, a Government analyst, one George Lawrence Oguda who found that the pant (A3) generated a DNA profile of a man. He prepared a report referred to as the Human identification report on 18th November, 2014 which he produced as Exhibit P8.

It is worth-noting that there is no evidence that there was blood sample taken from the appellant. Also the report (Exhibit P8) does not indicate the identity of the male whose profile was generated, and therefore it would be erroneous to find that that the male was the appellant.

Then there is medical evidence which was produced by Pw6 on behalf of a colleague who is alleged to have retired. In cross examination, he admitted that the P3 was filled based on initial treatment notes.

According to Pw6, the complainant was attended at the hospital on 25.5.2012 on allegations of having been defiled on 22.5.2012 at 8.00pm and also said that she was examined two hours after the incident took place. She then said that the P3 form was filled on 24.5.2012.

From this evidence, if the complainant was defiled on 22.5.2012 and attended to on 25.5.2012, then it means she was attended to on 3rd day of the incident. This also means that she could not have been examined two hours after the incident because then it would have been on 22.5.2012 at about 10.00pm.

Further, if the P3 form was filled on 24.5.2012, then it means it was filled a day before the complainant was attended to at the hospital.

There was reference of treatment notes (Exhibit P4) from Jibani sub District Hospital. It was pointed out by the defence counsel in his submissions at the close of the entire case that the name had entries made in different handwriting and colour of pen. On page 2, and entry made on 23.5.2015 was also made in a different handwriting and colour of pen. In perusing the said treatment notes (Exhibit P4), I confirmed the submissions that the treatment notes appeared tampered with or as put by Pw6 in cross examination, filled by two people, which is contrary to the expected form when one goes to hospital.

With all the discrepancies that have been pointed out in the evidence that was adduced before the trial

court, it is clear that doubt was cast upon the prosecution's evidence as to whether the appellant did commit the act of penetrating the complainant, as was alleged whose benefit he ought to have been awarded.

I find that the trial magistrate convicted the appellant on evidence that lacked credibility and fell below the required standard of proof.

Having found so, I believe it will be an academic exercise to deal with the other ground on issues that were raised.

I accordingly quash the conviction and set aside the life imprisonment that was imposed upon the appellant by the trial court.

The appellant be and is hereby set at liberty unless lawfully held.

Judgement read, signed and dated this 10th day of May, 2017.

D.O.CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The Appellant in person

C/clerk- Mbithe