



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 90 OF 2014

EDWIN WAHOME KABECHEKI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against conviction and sentence from the judgment of Hon.J.Aringo (RM) Nyeri dated 30th October, 2014 in Criminal Case No. 24 of 2013)

JUDGMENT

1. The Appellant, **Edwin Wahome Kabecheki**, was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The particulars of the main charge are that on the 6th day of August, 2013 at [particulars withheld] Village in Nyeri County, the appellant intentionally and unlawfully defiled **RKD** a child aged 10 years.
3. After the trial, the Appellant was found guilty and was convicted by the Resident Magistrate's Court at Nyeri and sentenced to life imprisonment.
4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Amended Grounds of Appeal which grounds are summarized as follows;
 - (i) The trial court based the conviction on evidence that was contradictory; the prosecution failed to prove the act of penetration;
 - (ii) The Charge is defective as Section 8(1)(3) is non-existent in the Sexual Offences Act;
 - (iii) The trial court erred in rejecting his defence without giving reasons.
5. The appellant was unrepresented and appeared in person whereas Ms. Gicheha appeared for the State; the appellant chose to rely on his written submissions whereas the State made oral presentations; hereunder are the respective submissions of the parties;

APPELLANTS SUBMISSIONS

- (i) On the main charge and also on the alternate Charge the prosecution failed to prove its case beyond reasonable doubt as required in law; that the trial court believed the evidence of **PW1** and **PW2** without considering that without proof of age and the act of penetration the offence of

defilement was not proved;

(ii) The prosecution ought to have summoned Dr. Njuguna the maker of the P3 Form and therefore the prosecution failed to comply with the provisions of Section 77 and Section 34B (2)(a) of the Evidence Act.

(iii) There was contradictory evidence relating to the dates as to when the offence was committed; **PW1**, **PW2** and **PW3** had stated that it occurred on the 6/08/2013 whereas the P3 Form was dated the 5/08/2013 and the medical evidence of **PW4** was that the minor had been defiled on the 4/08/2013;

(iv) The charge sheet was defective as the sections outlined were non-existent; that it should have been Section 8(1) creating the offence as read with Section 8(3) that provides for the punishment; that this defect was not curable by the provisions of Section 382 of the Criminal Procedure Code; that the trial court ought to have noted this defect when passing the sentence of life imprisonment.

(v) It is contended that the first report was made to the village chief who was not called by the prosecution to testify as a witness; his evidence would cleared the air on why the appellant had been arrested;

(vi) The appellant had opted to give a sworn statement of defence that the trial court failed to analyze this evidence and his defence of alibi which was plausible;

(vii) That due to the fact that the **PW1** had failed to positively identify him and due to the defects and contradictions in the prosecutions' case the appellant urged the court to analyze the evidence and out with a different conclusion; and prayed that his appeal be allowed in totality.

RESPONDENTS SUBMISSIONS

6. In response Prosecuting Counsel for the state made the following submissions;

(i) It was the appellants contention that the trial court relied on the evidence of **PW1**, **PW2** and **PW3** which did not prove penetration;

(ii) To this Counsel submitted that **PW1** in her testimony gave a clear account of what transpired on the 6/03/2013; She told the court how she met the appellant who accused her of having stolen his bicycle; he then followed her and took her to a bush; she described how he removed her clothes and unzipped his trousers and removed his thing and then did '*tabia mbaya*' to her.

(iii) That **PW2** and **PW3** repeated to the court what **PW1** had informed them; **PW3** had also seen the appellant together with the complainant and upon realizing that he had been seen he walked away and disappeared from the scene;

(iv) **PW4** the Doctor produced the medical report and testified to having found a broken hymen; the evidence corroborated that of **PW1**;

(v) Section 77 and 34B of the Evidence Act relates to evidence of experts; **PW4** explained to the trial court that the doctor who had examined **PW1** and had filled in the P3 Form had since left Government employment and therefore **PW4** gave evidence on Dr. Njuguna's behalf;

(vi) The appellant raised the issue of the contradictory evidence relating to the dates as to when the offence was committed; **PW1**, **PW2** and **PW3** had stated that it occurred on the 6/08/2013 whereas the P3 Form was dated the 5/08/2013 and the medical evidence of **PW4** was that the minor had been defiled on the 4/08/2013; this notwithstanding it was the submission of counsel that the offence was committed on the 6/08/2013;

(vii) The Charge was not defective and the appellant was not charged under Section 8(1)(3) as contended by the appellant but was charged under Section 8(1)(2) and that any typographical error did not invalidate the evidence or the fact that the offence did take place;

(viii) The evidence of **PW6** on the mode of arrest was that the appellant was arrested upon being identified by the complainant; the complainant's mother (**PW2**) had reported the matter to the chief who was not called as a prosecution witness; but that the evidence of **PW6** on the manner in which the appellant was arrested was sufficient;

(ix) The defence of alibi was rejected as the appellant had indicated that he was away together with his employer; yet he never called his employer as a witness; it was clear that the appellant was with the complainant on that material day as he had been seen by **PW3**; the trial court found his defence to be a mere denial; he had been with the complainant that day and had been positively identified as the assailant; and that it was not a case of mistaken identity;

(x) Counsel prayed that the appeal be dismissed and that the conviction and sentence be upheld;

ISSUES FOR DETERMINATION;

7. After taking into consideration the submissions of both the Appellant and Respondent this court finds the following issues for determination;

- (i) Whether the charge was defective;
- (ii) Whether the appellant was positively identified;
- (iii) Whether the prosecution proved its case to the desired threshold;
- (iv) Whether the trial court gave good reasons for rejecting the appellants defence;
- (v) Whether the circumstances of the case warrant interference with the sentence.

ANALYSIS

8. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the charge was defective;

9. The appellant contends that the Charge was defective in that he was charged under Section 8(1)(3) which is non-existent; that by failing to split the section creating the offence 8(1) and the section providing for the punishment 8(3) with the words '**as read with**' (**emphasis mine**) rendered the charge defective; and that such defect was incurable by Section 382 of the Criminal Procedure Code.

10. Counsel in response stated that the appellant was correctly charged under Section 8(1)(2) and not Section 8(1)(3) as contended; and that the typographical error of omitting the words '**as read with**' did not invalidate the evidence or the fact that the offence did take place;

11. The record shows that the Charge Sheet refers to the offence of defilement contrary to Section 8(1)(2); it is this court's considered view that the mere omission of the words "**as read with**" does not render the charge as being defective; the record shows that the appellant at all times knew the charge he faced and fully participated in the trial from the beginning to its determination;

12. Indeed the Charge Sheet ought to have had separated the sections and it ought to have referred to the

offence as **“defilement contrary to Section 8(1) as read with Section 8(2)”**; non-the-less this court concurs with Prosecuting Counsels submissions that this was a typographical error that did not invalidate the evidence adduced; and this court is satisfied that the omission of the words **‘as read with’** did not occasion any prejudice or injustice to the appellant.

13. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the appellant was positively identified;

14. The incident happened during the day and the complainant in her evidence stated that she did not know appellants name but that she could still remember him; the trial court in its judgment it is noted that it took cognizance of the fact that she was slow and was below the average mental capacity for her age;

15. A witness Susan Wothaya aka Mama Gerson (**PW3**) testified and told the court that on the 6/08/2013 at about 11.00am she was outside her shop and saw the appellant passing by accompanied by **PW1**; that at about 4.30pm she again saw **PW1** and the appellant in the shamba where there were bananas and nappier grass; that she called out to **PW1** and the appellant fled; upon interrogating **PW1** she was told that the appellant had taken her into the bush and done **‘tabia mbaya’** on her; **PW3** told the trial court that the appellant was a person known to her as she had seen him working around the neighborhood.

16. She then made a report to **PW5** who then made a report via cellphone to the village chief who told them to assist **PW1** to get to the police station and hospital; the mother **PW2** was also informed.

17. The evidence of **PW6** the arresting officer was that he had been informed that the appellant worked as a night guard at a school; that on the 15/08/14 with the help of the complainant and her mother he went to Pembe Tatu where the complainant pointed out the appellant by herself; he then proceeded to arrest and charge the appellant.

18. This court reiterates that the trial court took cognizance of the mental capacity of the complainant; and stated as follows;

“She appears slightly slow and below the average mental capacity of her age. Her testimony was not linear nor chronological but piecing it together tells a coherent story which tallies and is consistent with the testimony of the other prosecution witnesses.

.....It appears that the accused was aware of her mental capacity and that is why he preyed on her.”

19. Upon re-evaluating the evidence of identification this court notes that the complainant assisted the police in arresting the appellant; and that at the time of arrest it is the complainant who pointed out and identified the appellant; that the evidence of **PW3** placed the appellant at the scene of crime and linked the appellant to the offence; this court is satisfied that the appellant was positively identified by **PW1** by way of recognition; that the incident also occurred during the day and that the circumstances and conditions were favorable for identification and that both **PW1** and **PW3** had the opportunity to observe the appellant for a considerable length of time and that this was not a case of mistaken identity;

20. This court is satisfied with the trial courts that the appellant was positively identified.

Whether the prosecution proved its case to the desired threshold;

21. The key ingredients of the offence of defilement are penetration and age; the appellant in his submissions stated that both had not been proved to the desired threshold;

22. **On penetration:** **PW1** stated that the appellant lured her into the bush on the pretext of showing her where the stolen bicycle had been hidden; in the bush he removed her clothes; that he then unzipped his trouser and removed his thing; that he lay on top of her and did **‘tabia mbaya’** and that she felt pain;

23. That upon examining the minor the medical officer (**PW4**) found that the hymen was broken and made a finding of defilement; she tendered into court the P3 Form as an exhibit (**PExb.1**);

24. The trial court in its judgment made the following observation;

“The medical evidence seem to bear out that the accused engaged in an act which causes penetration with the complainant as to disclose defilement.”

25. Penetration is defined in the Act as;

“The partial or complete insertion of the genital organs of a person into the genital organs of another”

26. This court is satisfied that from the narrative of the ordeal that he lay on her and the use of the word **“tabia mbaya”** by **PW1** and that she felt pain afterwards, that this was a sufficient description of the ordeal and goes to prove penetration; and that the evidence of **PW4** is found to corroborate the evidence of the minor on penetration;

27. This court finds no reason to interfere with the trial courts finding that the appellant engaged in an act that caused penetration; and is satisfied that the prosecution proved this key ingredient to the desired threshold.

28. **On age**; The Charge Sheet reads ten (10) years and in the **‘voire dire’** test and in her testimony **PW1** states her age as being ten (10) years; her mother **PW2** stated that **PW1** was 11 years and that she had lost **PW1’s** Birth Certificate; the evidence of **PW4** the Doctor who testified and produced the medical evidence was that **PW1’s** estimated age was ten (10) years at the time when the examination was carried out. The P3 Form tendered in evidence indicates the age of the Complainant as ten (10) years.

29. The age of the victim is a crucial factor as it determines the sentence to be imposed. Age can be proved by medical evidence and it can also be proved by either a Birth Certificate or a Notification of Birth. In this instance there was the medical evidence of **PW4** who was a medical officer based at Nyeri Provincial Hospital who gave the estimated age of the Complainant as being ten (10) years at the time the offence was committed and also at the time of the medical examination. The P3 Form was produced by this witness and this court has had occasion to peruse the P3 Form and confirms that the age of the Complainant indicated therein as being ten (10) years.

30. This court is satisfied that a medical officer is the only professional who can determine the age of a victim of defilement; and that in the absence of the Birth Certificate the medical evidence tendered by **PW4** was sufficient proof of the age of the Complainant.

31. **On the contradictory evidence on the dates when the offence is said to have been committed**; The appellants contention was that there was contradictory evidence relating to the dates as to when the offence was committed; the record shows that **PW1**, **PW2** and **PW3** had stated that it had occurred on the 6/08/2013; the P3 Form is dated the 14/08/2013 and the medical evidence of **PW4** was that the minor had been defiled on the 4/08/2013 and on the 6/08/2013.

32. This court opines that the additional date of 4/08/2013 on the P3Form maybe the discrepancy that the appellant is alluding to; but after careful analysis of the evidence the discrepancy is reconciled by the evidence of **PW1** who gave the exact date of defilement as the 6/08/2013 and this was corroborated in detail by the evidence of **PW3** who saw **PW1** accompanied by the appellant on the same date at 11.00am and at 4.30pm as they emerged from the shamba; this court is satisfied that the discrepancy was reconciled and that it did not create any uncertainty or doubt as to the credibility, reliability and or truthfulness of the evidence of **PW1**, **PW2**, **PW3** and **PW4**;

33. This court finds that the prosecution proved all the key elements of the offence to the desired threshold; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court gave good reasons for rejecting the appellants defence:

34. The trial court recited the evidence of the prosecution witnesses in its judgment; and is found to have properly directed its mind to all the issues; and having weighed the appellants defence of alibi as against the prosecutions the trial court was satisfied that it did not displace the prosecution's case and that the evidence of PW3 placed him at the scene on that material date; the trial is found to have arrived at a correct conclusion;

35. This court finds no reason to interfere with the conviction.

Whether the circumstances of the case warrant interference with the sentence imposed:

36. The trial magistrate addressed the punitive section in his judgment before passing sentence and stated as follows;

‘The accused was charged with defilement under sections 8(1)(2) which covers children aged 11 years and below. This court is satisfied with the evidence on record that the complainant falls within the group set out under the provision which the accused was charged.

.....the accused is sentenced to life imprisonment as provided for under Section 8(2) of the Sexual Offences Act. He shall stay in prison for the rest of his life.’

37. The appeal is against conviction and sentence; the sentence imposed is legal but the trial court ought to have taken into consideration the age of the appellant which is 65 years and that he was a first offender; it is this courts considered view that a term of twenty years for a person of such advanced age is still equivalent to imprisonment for life which is the term prescribed by Section 8(2) of the Sexual Offences Act; this court reiterates that the appellant is advanced in age and is a first offender and for those reasons this court finds that in the circumstances of the case there is good reason to interfere with the sentence imposed; and sets aside the term imposed and substitutes it with a term of twenty (20) years.

FINDINGS

38. In the light of the forgoing this court makes the following findings;

- (i) This court finds that the charge as framed was not defective;
- (ii) That the appellant was positively identified.
- (iii) This court finds that the prosecution proved its case to the desired threshold.
- (iv) That the trial court gave good reasons for rejecting the appellants defence;
- (v) The circumstances of the case warrant interference with the sentence.

DETERMINATION

39. The appeal on conviction is found to be lacking in merit and it is hereby disallowed.

40. The conviction is hereby affirmed.

41. The sentence is hereby set aside and substituted with a term of twenty (20) years from the 30/10/2014.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 11th day of May 2017.

HON.A.MSHILA

JUDGE