



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 112 of 2016

HENRY KASIANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the

Senior Principal Magistrate's court at Limuru delivered

by Hon. G. H. Oduor, SPM. On 27th April, 2016).

JUDGMENT

Background

Henry Kasiani, the Appellant herein was charged with defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars of the charge were that on 12th June, 2012 in Kiambu County, unlawfully and intentionally caused his penis to penetrate the vagina of M N, a child aged 15 years. He was charged, in the alternative, with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that on the same date and place he intentionally and unlawfully touched the breasts, buttocks and vagina of M N, a child aged 15 years.

The Appellant was arraigned in court and after the trial he was found guilty in the main charge. He was consequently sentenced to 20 years imprisonment. He was aggrieved by both the conviction and sentence and has lodged the present appeal. His Petition of Appeal dated 28th July, 2016 was filed by M/S Amendi & Co. Advocates. His grounds of appeal were that; the learned trial magistrate erred when he failed to find that the prosecution failed to prove their case beyond reasonable doubt, that the learned trial magistrate erred when he failed to consider the evidence on record that pointed to the innocence of the Appellant, that the learned magistrate erred when he failed to find that a forensic examination report was necessary in the circumstances of the case, that the learned trial magistrate erred when he convicted the Appellant based on unsatisfactory, contradictory and unreliable witnesses, that the trial magistrate erred when he found that the complainant's age was sufficiently proved, that the learned magistrate erred when he failed to warn himself when relying on the uncorroborated evidence of the complainant and that the learned trial magistrate disregarded the defence evidence.

Submissions

The appeal was canvassed by way of filing written submissions which were briefly highlighted. In summary, counsel for the Appellant submitted that the prosecution evidence was unsatisfactory, contradictory and unreliable. He submitted that there were contradictions with regard to whether the complainant informed her guardian of the incident. He submitted that the contradictions in the evidence made the witnesses unreliable and that in the circumstances the trial magistrate erred when he found that the witnesses were truthful. Accordingly, the evidence adduced did not support the charge of defilement. In furtherance to this submission, counsel added that the medical evidence, specifically that of PW6 did not prove penetration. Furthermore, the Appellant was not examined so as to establish that he is the one who had infected PW1 with a sexually transmitted infection.

Counsel submitted that the age of PW1 was not conclusively proved. He pointed to the contradictory evidence adduced on her age. For instance, PW1 testified that she was 15 years old while her guardian testified that she was 16 years old. He submitted that the age assessment done by PW9 was full of omissions as the doctor never got to meet the complainant in person when carrying out the assessment.

Counsel added that the appellant's defence was not considered. This was primarily based on the Appellant's erectile dysfunction that was supported by medical evidence of his witness. Counsel also faulted the learned trial magistrate's reliance on uncorroborated evidence of the complainant and failing to warn himself on the same. He took issue with the complainant's behavior immediately after the incident which did not conform to that of a person who had been defiled. Amongst the cases cited to buttress the submissions were **Andrew Mulika Kithusi v. Republic[2014] eKLR** and **Pius Arap Maina v. Republic[2013] eKLR**. Counsel urged that the appeal be allowed.

Learned State Counsel, Ms. Nyauncho filed written submissions dated 23rd May, 2017. She submitted that the prosecution adequately proved the complainant's age through the evidence of PW9 who carried out an age assessment and found that she was 15 years of age. She submitted that this was sufficient evidence in lieu of production of a birth certificate whose production was opposed by the Appellant. She submitted that the medical evidence produced by PW8 was sufficient and proved that the complainant was defiled. She submitted that the means used by the complainant to get home immediately after the incident were immaterial to the case and that the contradiction as to the date when PW3 and PW2 met was curable under Section 382 of the Criminal Procedure Code. She submitted that the failure by the investigators to take the Appellant for a medical examination was not fatal to the prosecution's case. She relied on **Joshua Ochieng Omollo v. Republic[2017] eKLR** to buttress this submission. She concluded by submitting that the Appellant's defence that he had erectile dysfunction was not supported by his own witness, DW2, who was a medical doctor. She urged that the appeal be dismissed.

Evidence

PW1, M N the complainant testified that she was 15 years old and a Standard 8 pupil. She recalled that on 12th June, 2012 she went to school at 7:00 a.m. but was sent away for being late. She made a stop-over at Mabrouke Nursery School to drink some water. On her way home she met the Appellant who lived within her area of residence. He suddenly grabbed her sweater which tore. He then grabbed her hand and as she tried to scream he gagged her mouth before carrying her off on his shoulder into a nearby forest. That is where he defiled her. The Appellant then left and she too went home crying. She did not tell her aunt whom she lived with as she feared she would beat her. She even sewed up her torn dress on the lower part to ensure her aunt did not find out. She recalled that earlier one Dorcas had found her crying in the forest and had informed Wesonga (PW4) of the incident who then informed her aunt who took her to Tigoni Police Station from where she was referred to Tigoni Hospital that evening. She was again referred to Kenyatta National Hospital. She testified that she knew the Appellant as she used to see him around the settlement area.

In cross examination, she stated that she met the Appellant at a deserted place on the road. She testified that Dorcas met her with the Appellant and that she was crying. She stated that the Appellant had threatened to kill her if she revealed what had happened.

PW2, Dorcas Ayako was a casual worker at Mabrouke. She recalled that on 12th June, 2012 while on her

from taking her child from hospital she found PW1 standing in Mabrouke Forest with a man she identified as the Appellant. PW1 was in school uniform and crying. She testified that she did not ask what was going on and that after a few yards she looked back and saw the Appellant give the complainant something from his pocket. She testified that she met Wasonga, a neighbour, down the road and asked him to go and confirm what was happening between the appellant and PW1 as he was walking in that direction. She testified that the next day the complainant's mother, one N went to her house at around 1600hrs and informed her that the child had been defiled.

PW3, ENN an aunt of PW1 recalled that on 12th June, 2012 she escorted PW1 to school. She later met PW4 in the afternoon who told her that PW1 had not gone to school and she should take her to hospital. PW4 accompanied her home where PW1 disclosed to them that the appellant had defiled her. She reported the matter to the police where PW1 was referred to hospital. She identified PW1's school uniform and her stained pant in court.

PW4, Vitalis Wasonga Opanga corroborated the evidence of PW2 and 3. He recalled that on 12th June, 2012 at around 1000hrs he met Dorcas, PW2, who informed him that she had seen the complainant crying. He knew the child. Deeper into the forest he met the appellant whom he also knew. He later enquired from PW3 whether PW1 had gone to school. He informed her that he had heard that PW1 had been defiled by the appellant.

PW5, Sgt. Solomon Ng'ang'a an Administration Police officer attached to the Royal Media installation at Limuru West Division helped effect the arrest of the appellant on 14th June, 2012. **PW6, CPL Janet Odhiambo** was the investigating officer. She summed up the prosecution case, recorded necessary statements and preferred the charges against the appellant. She also visited the scene which she confirmed was in a bush

PW7, Dr. Susan Kerubo Omundi, then working at Tigoni District Hospital examined PW1 on 13th June, 2012. She observed a whitish fluid on the external genitalia and her hymen was broken. Her vagina was swollen. The injuries were one day old and that a UDRL and pregnancy test were both negative. An infection was noted from a swab of the whitish fluid and the same was treated with antibiotics. She filled and signed a P3 form which she adduced in court.

PW8, Dr. Wilson Ndahera Ngobe a consultant radiologist at Kenyatta National Hospital carried out an age assessment of PW1 on 29th August, 2013. He assessed her skeletal age was 15 years oat age. In cross examination he testified that he did not see the complainant but relied on the x-ray images to make a decision.

After the close of the prosecution the court ruled that a prima facie case had been made out and accordingly put the appellant on his defence. He gave a sworn statement of defence and called two other witnesses. He testified as **DW1**. He recalled that on 12th June, 2012 he left work at 0700hrs in the morning having reported the previous day at 1800hrs. He walked home at Gathara Camp and went straight to bed. He woke up at around noon and went to buy milk at Luku Farm but he found none and decided to head back home. On his way back through a tea plantation he came across a school girl in uniform who was crying. He knew the girl as she lived in the same estate. The girl told him that a lady had brought them from Nakuru and had been mistreating them. The child in question was wearing torn clothes and she complained about the lack of school fees and amenities. He pitied her and decided to give her fare home, Kshs. 20/=. He recalled that there was a security barrier about 30 meters from the point they met which was manned by security guards.

He recalled seeing one Dorcas, a neighbour carrying a child but she passed him. He testified that he looked back and saw the woman talking to the girl and gesturing in an agitated manner. He denied he defiled the girl. He testified that he had 5 sons and 4 daughters. He stated that he was framed due to a grudge between Dorcas and himself and further due to a debt owed to him by PW3. He stated that he had had a problem with his genitalia which caused him erectile dysfunction for about 6 years for which he underwent a surgery. He produced documents evidencing the treatment.

DW2, Dr. James Nyabanda a consultant surgeon at Nazareth Hospital recalled that the Appellant was admitted to Nazareth Hospital in November, 2010 with difficulties passing urine. He was diagnosed with a benign prostate hyperplasia and was scheduled for surgery which he underwent. He testified that the surgery was minimally invasive in nature. The Appellant made a good recovery and was discharged on 16th November, 2010. He had no post-operative complications. DW2 testified that the surgery usually had no effect on libido and neither did it cause impotence. He testified that the Appellant never informed him that the condition had affected his libido or ability to perform sexually. That he never brought it up during his reviews after the surgery, other it would have been treated. He submitted that erectile dysfunction can be occasioned by the reduction of testosterone and that the condition the Appellant was suffering from did not reduce testosterone levels.

DW3, Lenah Shicheti was the appellant's wife since 2001. She testified that they had two children. She recalled that on 12th June, 2012 at around 0900hrs she was in the house when the Appellant returned from work and slept. Shortly afterwards, PW1 went to their house requesting to have some tea which she made for her. She was known to her. She next time she saw PW1 was on 14th June, 2012 when she informed her that Madam Veronica, a nursery school teacher had convinced her to frame DW1 on rape charges since she had been chased from the company. She testified that her husband was arrested on 14th June, 2012. The same was a result of a grudge between her and the complainant's guardian due to non-payment of money for milk supplied. She stated that she had not had sex with the Appellant for four years as he was unwell having suffered from difficulties passing urine.

Determination

After considering the evidence on record, I have narrowed down the issues for determination to be; whether the complainant's age was adequately proved, whether the Appellant's defence was considered, whether Section 124 of the Evidence Act was properly applied and whether the offence was proved beyond reasonable doubt.

The first issue for determination is whether PW1's age was adequately proved. According to the appellant, no Birth Certificate was produced and the age assessment done in hospital was questionable. The latter was in view of the fact that the doctor who did the age assessment did not see the complainant. It is worth noting that PW1's Birth Certificate was ably identified by her guardian, PW3. The investigating officer applied to have it produced as an exhibit but the defence objected on grounds that the investigating officer was not the maker. This led the prosecution to call for PW1's age assessment. Therefore, the evidence that the court needs to interrogate is whether the age assessment was properly done. The same was done by PW9, a consultant radiologist at Kenyatta National Hospital. The witness interpreted the X-ray images presented to him. He was therefore not required to physically see the patient. Moreover, he adequately expressed the methodology he used in arriving at PW1's age. He stated that the same was premised on the study of the skeletal structure of the patient on viewing the x-ray images. He was also candid that it was best that he did not see the patient because in his assessment, the images did not hinder his ability to act objectively. I accordingly hold and find that the age of PW1 was properly established.

Learned counsel for the appellant submitted that the above notwithstanding, the court ought to have given credit to the appellant's submission that age was not proved based on the contradiction of witnesses' testimonies. According to PW3, PW1 was aged 16 years, whereas PW1 had testified that she was 15 years. In my view, this minor contradiction was ousted by the candid medical age assessment adduced by PW9.

The defence further submitted that the appellant's defence was not considered. Counsel pointed to the appellant's defence that he was not capable of defiling PW1 on account of his erectile dysfunction which the learned magistrate dismissed. The appellant chose to call DW2, Dr. James Nyabanda, a consultant surgeon at Nazareth Hospital. This is the hospital where he was admitted for a surgery on presenting himself with difficulties passing urine. The surgery was successfully done and the blockage removed. In the witnesses' opinion, he was candid that the appellant made full recovery and that his condition did not occasion loss of libido or erectile dysfunction. He also testified that the condition did not cause a decrease

in testosterone which would otherwise cause erectile dysfunction. The learned trial magistrate therefore properly arrived at a finding that the appellant's defence was contradictory and did not absolve him from the offence. More specifically that he was in a position to have sexual intercourse.

The appellant further submitted that the learned trial magistrate erred in relying on uncorroborated evidence and did not adequately apply the provisions of Section 124 of the Evidence Act. The provision reads as follows:

124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

It is trite that under the proviso to Section 124 a court can convict an accused person in a sexual offence even though the evidence of the minor victim is not corroborated if it believes in it. It follows then that even if PW1's evidence were not corroborated and the court believed in it, it would nevertheless convict the appellant. In the instant case though, the testimony of PW1 was corroborated by that of PW2 and 4 who are witnesses who placed the appellant at the scene of crime. They had seen the appellant in the company of PW1. In fact, PW2 had found PW1 crying. The appellant was not a stranger to PW1, 2 and 4. Indeed, PW1 referred to him by name as she knew him as a person who lived in the neighborhood. He was also well known to PW2 and 4. He was seen in broad day light when the issue of mistaken identity could not arise. It could not therefore have been a coincidence that PW1 could claim that it was the appellant who defiled her while in fact no other person had been in her company. He did also confirm in his defence that he was PW1 at the material time. He was properly identified as the culprit. I accordingly hold that PW1's evidence was properly corroborated and that the court properly convicted the appellant.

This now leads me to determine whether the two other elements of the offence of defilement namely, penetration and identification were sufficiently established. I have already touched on the issue of identification. I wish to add that the same was by way of recognition. The appellant was in addition placed at the scene of crime by both PW2 and 4. Without a doubt in my mind, I am convinced that the appellant was the culprit. His spirited defence in the circumstances could not bail him out.

With regard to penetration, PW1 gave a candid account of how the appellant pulled her into the bush and defiled her. In an attempt to entice her not to disclose what had happened, he gave her Kshs. 20/=. When the incident was known PW1 was taken to Tigoni Hospital where she was examined and it was confirmed that she had been defiled. Dr. Susan Kerubo Omundi then working at Tigoni District Hospital examined her on 13th June, 2012. She confirmed that her hymen was broken and that the injury was one day old. This was consistent with the fact that she had been defiled on 12th June, 2012. Her evidence thus proved penetration. The appellant on the other had challenged the fact that he was not tested for an infection that was diagnosed on PW1. That is factual as no examination was conducted on him. However, the same did not oust the fact that it is him who defiled PW1.

In the result, I find that the prosecution proved its case beyond a reasonable doubt. I dismiss the appeal in its entirety. I uphold both the conviction and the sentence. It is so ordered.

Dated and Delivered at Nairobi this 7th day of June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.
2. M/s Kimiri for the Respondent.