



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 52 OF 2014

EZEKIEL MJOMBA KATU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 381 of 2012 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (Mrs) (RM) on 31st October 2012)

JUDGMENT

INTRODUCTION

1. The Appellant, Ezekiel Mjomba Katu, was tried and convicted by Hon M. Chesang (Mrs) Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment.
2. The particulars of the offence were as follows :-

“On 25th August 2012 in Taita Taveta County intentionally caused his penis to penetrate the vagina of F M a girl aged 9 years.”

3. The Alternative Charge was for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

“On 25th August 2012 in Taita Taveta County intentionally touched the vagina of F M a child aged 9 years with his penis (sic).”

4. Being dissatisfied with the said judgment, on 8th November 2012, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time. On 28th January 2015, M/S Mathew Nyabena & Co Advocates an Amended Petition of Appeal dated 19th January 2015 on the Appellant's behalf. This was subsequently deemed to have been duly filed. The said Advocates Notice of Appointment of Advocates dated 3rd February 2015 was filed on 4th February 2015.
5. M/S Mwanyumba & Co Advocates thereafter came on record for the Appellant on 16th September 2015 and were granted leave to file Re-Amended Grounds of Appeal on 3rd December 2015. The Amended Petition of Appeal was filed on 9th December 2015. The grounds of appeal were as follows:-

1. **THAT the Honourable Resident Magistrate erred in law and fact in holding that the Charge of Defilement had been proved beyond reasonable doubt.**
 2. **THAT the Honourable Resident Magistrate erred in law and fact in holding that the challenge as to the dates when the alleged offence was committed was immaterial to the case.**
 3. **THAT the Honourable Resident Magistrate erred in law and fact by ignoring the Appellant's Alibi that absented him from the alleged crime scene on 25th August 2012.**
 4. **THAT the Honourable Resident Magistrate erred in law and fact by failing to appreciate the absence of the exhibits in the circumstances.**
 5. **THAT the Honourable Resident Magistrate erred in law and fact by ignoring DW 2's unshaken testimony under cross-examination, that, he did not observe any difference in Complainant (PW 1- F M (sic)) walk.**
 6. **THAT the Honourable Resident Magistrate erred in law and fact by holding that the testimony of Complainant (PW 1- F M (sic)) was corroborated by PW 2, in the absence of any eye witness.**
 7. **THAT the sentence was manifestly excessive in the circumstances.**
6. His Written Submissions were dated and filed on 9th December 2015 while the State's Written Submissions and List of Authorities were both dated and filed on 11th December 2015.
 7. When the matter came up for the hearing of the appeal on 15th December 2015, both the Appellant and the State requested the court to render its decision based on the said Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

9. It did appear from the Written Submissions that the following were the issues that were placed before the court for its determination:-
 - a. **Whether or not the Prosecution had proved its case to the required standard;**
 - b. **Whether or not the Trial Court considered the Appellant's defence of alibi; and**
 - c. **Whether or not the sentence that was imposed upon the Appellant was excessive in the circumstances of the case herein.**
10. The court therefore dealt with the issues under separate heads shown hereinbelow.

I. PROOF OF THE PROSECUTION'S CASE

A. CORROBORATION OF PW 1'S EVIDENCE

11. The Appellant argued that there were no eye witnesses to the offence. The State was emphatic that PW 1's evidence was corroborated by the evidence of A M M, PW 1's mother (hereinafter referred to as "PW 2") who demonstrated to the court how PW 1's walking style had changed, Restituta Mghoi, the Clinical Officer (hereinafter referred to as "PW 3") who produced the P3 Form showing that there had been a full or partial penetration and an Age Assessment of PW 1's age and the evidence of Sgt Sebastian Wambua, the Investigation Officer (hereinafter referred to as "PW 4") who told the Trial Court of the sequence of events leading to the Appellant's arrest and emphasised PW 1's walking style.
12. It was the State's further contention that, in any event, the court had the discretion to convict the Appellant based on PW 1's evidence alone. It referred the court to the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is 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.

13. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must, however, record the reasons for believing that witness and not the alleged perpetrator.
14. PW 1 told the Trial Court that she was herding goats when the Appellant enticed her with a doughnut but instead of giving it to her, he forcibly removed her panty and penetrated her which she said, caused her a lot of pain. She screamed but the Appellant held her mouth with his hand and after he had finished his unlawful act, he told her to go. He threatened her that if she told PW 2, he would beat and throw her in the forest.
15. During cross-examination, PW 1 was steadfast in her evidence that she was herding goats when the Appellant raped her. She stated that they decided not to tell anyone lest he escaped. She explained that they went to the Appellant's sister's home but he was not there. She identified the Appellant in the dock as the person who defiled her.
16. Notably, in her judgment, the Learned Trial Magistrate observed as follows:-

“It is clear from the evidence on record that Pw1 suffered injuries on her vagina as stated by Pw1...”

17. Bearing in mind the facts of the case herein, there was no doubt in the mind of this court that PW 1's sole evidence could sustain a charge against the Appellant as she was very consistent in her evidence and was clear in her mind exactly what the Appellant did to her, a conclusion that the Learned Trial Magistrate correctly arrived at.
18. The above notwithstanding, PW 1's evidence was further corroborated by PW 2 who demonstrated to the Trial Court how PW 1 was walking with legs apart and that the Appellant had told PW 1 that he would beat and throw her in the forest, which PW 1 had earlier told the Trial Court.
19. PW 4 also demonstrated to the Trial Court how PW 1 was walking with her legs apart. DW 2 testified under oath that he did not see her walking in a strange manner. However, DW 2's evidence was displaced by that of PW 3 when she testified that she examined PW 1 a few days after the defilement and she noted that her vagina was red instead of pink and that she had pain on being touched. PW 3 denied that walking could cause friction and that the friction was consistent with the defilement PW 1 had suffered. PW 3's evidence scientifically proved that defilement of PW 1 actually took place.
20. Failure to submit in evidence the clothes PW 1 had worn on the material date and time was inconsequential. This is because as PW 1's evidence stood, it was sufficient and required no corroboration by further evidence, least of all, evidence of the said clothes. This would have been additional evidence to buttress her case.
21. Consequently, in view of PW 1's own evidence that she could not walk or sit properly and her identification of the Appellant and the physical observations by PW 2, PW 3 and PW 4 of the injuries that PW 1 sustained, it was this court's finding that the Learned Trial Magistrate arrived at the correct conclusion that the Appellant was guilty of having defiled PW 1. In this regard, the Appellant's Grounds of Appeal Nos 1, 4, 5 and 6, which were related, were not successful and are hereby dismissed.

C. DATE AND DAY OF THE ALLEGED OFFENCE

22. All the Prosecution witnesses were clear in their examination-in-chief that the alleged offence occurred on 25th August 2012 and it was only PW 3 who stated in her cross-examination that the said incident occurred on 28th August 2012. It was, however, evident from the P3 Form that she tendered in evidence that the date of the alleged offence was on 25th August 2012. She signed the said Report on 30th August 2012.
23. In her cross-examination, PW 3 stated that PW 1 was brought to hospital on 28th August 2012 and the injuries were not sustained on the same date. The P3 Form provides a part for approximation of the date of injuries. PW 3 gave the approximate date of the injuries as three(3) days which would have given the date of the alleged defilement as 25th August 2012. She further explained the erasure of the date from 28th August 2012 to 25th August 2012 was an error which she cancelled and counter-signed.
24. This court agreed with the Appellant that there was confusion in the evidence of the day of the week the alleged offence is said to have occurred. PW 1 stated that it occurred on Thursday while PW 2 stated that it occurred on Friday. There was also indication that the same occurred on Saturday.
25. However, this court was not persuaded by the Appellant's submissions that there was a conspiracy to tie the Appellant to the offence he was charged with or that the Learned Trial Magistrate did not analyse the evidence critically or that she took the issue of the disparity of the day casually or that there was no integrity in the proceedings in the Trial Court.
26. The Learned Trial Magistrate observed in her judgment that the disparity on the day of the week was immaterial for the reason that all witnesses were clear that the alleged offence took place on 25th August 2012, which according to the calendar fell on a Saturday. A perusal of the proceedings showed that all the witnesses were consistent that the date of the alleged offence was 25th August 2012.
27. It was therefore this court's conclusion that the disparity in the day of the week when the said offence was said to have occurred did not in any way weaken the Prosecution's case and that the Learned Trial Magistrate arrived at the correct conclusion. Consequently, Ground of Appeal No 2 was not successful and the same is also hereby dismissed.

II. APPELLANT'S DEFENCE OF ALIBI

28. The Appellant had submitted that he had gone to Mwatate on 25th August 2012. It was on the basis of this assertion that he had argued that the day when the alleged offence occurred was material. However, as this court found hereinabove that the disparity in the day of the week was immaterial and inconsequential, it therefore focused on the date of 25th August 2012 as the date of the alleged offence with a view to determining the question of the Appellant's defence of alibi.
29. In his unsworn evidence, the Appellant stated that he was not at Alia on 25th August 2012 but that he went there on 26th August 2012. PW 1 and PW 2 testified that they went to his home the following day after the alleged offence and found the Appellant's sister who told them that he had gone to Mwatate.
30. DW 2 also corroborated PW 1's and PW 2's evidence regarding their visiting the Appellant's home. It was his testimony that he went to the Appellant's home on 26th August 2012 when a woman came and claimed that the Appellant had defiled her daughter. As the Learned Trial Magistrate rightly observed, DW 2's evidence was of no assistance to the Appellant's case as DW 2 did not see him on 25th and 26th August 2012. He said that he only saw the Appellant on 27th August 2012.
31. Having said so, the State correctly pointed out that the Appellant neither mentioned where he was on 25th August 2012 nor did he bring any witnesses to confirm his alibi of where he was on that date. He merely stated that he was not at Alia on that date. DW 2 also confirmed that the Appellant was not at his home on 25th August 2012 and that he had told him that he would go to Mwatate.
32. Notably, evidence that the Appellant was in Mwatate on 25th August 2012 was introduced for the first time by DW 2 and not by the Appellant. As the Appellant raised his defence of alibi before

the conclusion of the case, the Prosecution was required to ascertain the veracity of his claims in line with the provisions of Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides as follows:-

“If the accused person adduces evidence in his defence introducing new matter which the advocates for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

33. The Appellant did not also call any witness who saw him in Mwatate to come and confirm the same. Indeed, Mwatate is a large place and the Prosecution would not have reasonably been expected to rebut the evidence that the Appellant was in Mwatate without any specific place being given.
34. The circumstances of the case herein were therefore distinguishable from those in the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** that was relied upon by the State wherein the Court of Appeal quashed the conviction of the appellant therein as the prosecution therein did not call additional evidence as provided for in Section 309 of the Criminal Procedure Code.
35. As the Appellant did not provide any contrary evidence to support his defence of alibi during the trial, this court found and held that the Learned Trial Magistrate acted correctly in convicting him. Hence, his Ground of Appeal No 3 failed and the same is hereby dismissed.

III. SENTENCE

36. The Appellant contended that the sentence that was meted upon him was harsh in the circumstances but did not elaborate how this was so. The Prosecution indicated that it was not the first time that the Appellant had been convicted of a sexual offence. As it could not produce the records, it asked that he be treated as a first offender.
37. There was nothing that persuaded this court to find that a Re-Trial of the case, being one of the options that the Appellant had proposed would correct the errors that it contended had been made by the said Learned Trial Magistrate, would be the most prudent in the circumstances of the case herein for the reason that this court had found that the Prosecution was able to prove its case beyond reasonable doubt.
38. In that regard, this court found and held that the sentence that was meted upon the Appellant must remain undisturbed as the law provides for only one (1) sentence, a fact that was correctly elucidated by the Learned Trial Magistrate.
39. Section 8 of the Sexual Offences Act Cap 62A (Laws of Kenya) provides as follows:-

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

2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

40. Having said so, in respect of the issue of compensation of PW 1 under the provisions of Section 171 of the Criminal Procedure Code, the Learned Trial Court clearly erred in law. A court cannot compensate a complainant under that Section. The said Section provides as follows:-
41. Assuming that there was an inadvertent error on the part of the said Learned Trial Magistrate and that she intended to proceed under the provisions of Section 175(2)(b) of the Criminal Procedure Code which empowers a court to order payment of such sum it considers could justly be recovered as damages in civil proceeding instituted by the injured party against the convicted person, she did not justify why she had ordered that compensation be paid to PW 1 to the tune of Kshs 100,000/= being the amount the Appellant had deposited as cash bail.
42. In this case, however, the Learned Trial Magistrate merely stated as follows:-

“The accused is therefore sentenced to serve life imprisonment as provided for by the law under which he is found guilty and convicted, I hereby order the accused do compensate the

complainant as provided for under section 171 of the criminal procedure code. The accused to compensate the complainant through her mother and guardian (PW2) Kshs. 100,000 to be recovered from the case bail deposited in court. Right of appeal within 14 days.”

- 43.Indeed, the said Learned Trial Magistrate did not demonstrate how civil liability accrued against the Appellant towards PW 1. A trial court is expected to give its rationale or justification why it should proceed under the said Section to enable an appellate court determine whether or not such compensation is lawful and justifiable. Failure to do so would cause grave injustice to a convicted person.
- 44.It is expected that this order had not been effected bearing in mind the provisions of Section 175 (4)(b) of the Criminal Procedure Code that expressly state that the order for compensation should not take effect before an appeal on conviction and sentence is heard and determined.
- 45.The said Section stipulates as follows:-

DISPOSITION

- 19.Accordingly, having considered the pleadings herein and the oral and written submissions in respect of each parties case and bearing in mind that the Appellant’s guilt was unequivocal, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the Trial Court. This court hereby declines to quash the conviction or set aside the life imprisonment sentence that was meted upon him by the Trial Court and instead affirms the said conviction and the sentence as the same was lawful and fitting for the offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offences Act.
- 20.However,as the order that was issued by the Learned Trial Magistrate to the effect that PW 1 was to be compensated from the cash bail that the Appellant had deposited in court was not justified at all, the same is hereby set aside. The Appeal herein therefore only succeeds to that extent.
- 21.If the said monies were released to PW 1, through PW 2, contrary to the provisions of Section 175(4)(b) of the Criminal Procedure Code, the Appellant is at liberty to pursue the same from PW 1 and PW 2 as a civil debt in the normal manner.
- 22.It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day of February 2016

J. KAMAU

JUDGE

In the presence of:-

Mwanyumba.....for Appellant

Sirima.....for State

Simon Tsehlo– Court Clerk