



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO.12 OF 2016

(Being an appeal from the Original Conviction and Sentence in the Chief Magistrate's Court at Kiambu in Cr. Case No.1527 of 2013 delivered by Hon. C. Aluoch, SPM on 28th March 2015).

I C M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

BACKGROUND

I C M, the Appellant herein was charged alongside another with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on diverse dates between 5th March, 2013 and 12th July, 2013 at within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of A W, a child aged 8 years. In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. It was alleged that on diverse dates between 5th March, 2013 and 12th July, 2013 within Kiambu County intentionally and unlawfully touched the vagina of A W, a child aged 8 years with his penis. His co-accused Musau Ngumbi Makau was charged with Count 2 of similar offence and an alternative charge of indecent act. Both pleaded not guilty to the offences. After the trial, they were convicted in the main counts and each of them sentenced to life imprisonment.

The Appellant was dissatisfied with both the conviction and sentence and he preferred the appeal herein. At the hearing of the appeal, he relied on Amended Supplementary Grounds of appeal and written submissions filed on 12th July, 2016. Under the grounds of appeal, he was dissatisfied that he was charged in an ordinary court as opposed to a juvenile court arguing that he was a minor as at the time the offence was committed. He was further dissatisfied that the charge sheet was defective since he was a blood-related relative to the complainant. As such, the charge that ought to have been preferred was incest as opposed to defilement. Further, he took issue with the conviction since the provisions of Section 124 of the Evidence Act were not given regard to. Finally, he faulted that the case was not proved beyond a reasonable doubt.

SUBMISSIONS

In his submissions, he stated that he informed the court that he was below the age of the majority at the time his evidence was heard but the court totally ignored his plight. In that regard, he ought to have been

charged in the Children's Court. He did also submit that the charge was defective having been drawn under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. His contention was that the age of the complainant having been proved as 8 years, the charge ought to have been drawn under Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

It was the Appellant's submission that he was a blood brother to the complainant as a result of which the proper offence that should have been preferred against him was incest contrary to Section 20(1) of the Sexual Offences Act. Under the provision, he submitted that the minimum sentence would have been 10 years imprisonment. He therefore contended that he was prejudiced for having been charged with the wrong offence.

On behalf of the Respondent, Learned State Counsel M/s Akuja submitted that all the elements for the offence of defilement were proved. On identification, she submitted that the Appellant was a brother to the complainant and the question of mistaken identity would not have arisen. Furthermore, the complainant had adduced consistent evidence on how her brother put her on the bed and defiled her. He then warned her of death if she revealed what had happened. However, the complainant disclosed to a neighbour and the matter was reported to the police. On prove of penetration, M/s Akuja submitted that PW5 Dr. Maundu confirmed that the complainant had indeed been defiled. It was her further contention that the age of the complainant was proved at 8 years at time of defilement. She conceded that no documentary evidence was adduced but argued that the age of the complainant could be proved by other means. She referred the court to the High Court decisions in **CWK –Vs- R [2015] eKLR** and **JWA –Vs- R [2014] eKLR**. M/s Akuja conceded that the offence that ought to have been preferred was incest but added that no prejudice was occasioned to the Appellant as both offences comprise similar elements. A further observation was that the charge ought to have been drawn under Section 8(1) as read with 8(2) of the Sexual Offences Act as opposed to both Section 8(1) and 8(3) of the said Act but was quick to add that the Appellant was not prejudiced by the anomaly. On the issue of the Appellant's age, M/s Akuja submitted that the trial court ordered an age assessment and the Appellant was assessed to be above 18 years old. She urged that the appeal be dismissed and both the conviction and sentence be upheld.

EVIDENCE

This being the first appellate court its duty is to re-assess and re-evaluate the evidence on record and come up with its own finding but bear in mind that it has neither seen nor heard the witnesses and give due regard to that. See the case of **Njoroge v Republic (1987) KLR 19**. The prosecution called a total of five witnesses. **PW1** was the complainant. She gave a candid narrative that his brother, who is the Appellant herein, when she was alone at home, would remove her clothes, lie on her and defile her. The same was repeated by one Musau who was his father's friend. The said Musau would come home with his father after drinking sprees. When his father left the house and there was nobody else except the Appellant both Musau and the Appellant would defile her. According PW1, the defilement was done on many days but on dates she could not recall. She testified that the Appellant warned her not to tell anyone but she eventually disclosed to her aunt after which the matter was reported to the Chief and the Appellant arrested.

PW2, Josephine Mukami testified that she was approached by a brother to PW1 one G N who informed her that the Appellant had defiled PW1. The witness called two of her sisters and together took PW1 to hospital where the offence was confirmed. On interrogating PW1, she disclosed to her that both the Appellant and Musau used to defile her.

PW3, G W was an aunt to PW1. She was married to the brother of PW1's father. Her testimony was that after learning of the incident she escorted PW1 to the Chief's Office after which they were referred to Nyari Police Station.

PW4, Police Constable Boniface Lolmigam was the investigating officer then attached to Nyari Police Station. He confirmed that PW1 was accompanied by a lady and the Appellant when the matter was reported to the police station. He testified that PW1 narrated to him that when his father was away his brother (Appellant) and her father's friend would defile her. He issued PW1 with a P3 form which was

filled by PW5 Dr. Maundu of Police Surgery. According to Dr. Maundu he examined PW1 on 15th July, 2013. He observed no physical injury and her external genitalia were normal. He however noted that the hymen was broken. He signed the P3 form on the same day and concluded that PW1 had been defiled.

After the close of the prosecution's case, the court ruled that the Appellant had a case to answer and was put on his defence. He gave an unsworn statement of defence. He stated that at the material time he was a student in Standard 8. On the 13th July, 2013 he had gone for tuition in school. On his way back at about midday he met his aunt with some other people. They enquired from him if they knew what had happened at home. They then started beating him and ordered him to go and record a statement with police.

DETERMINATION

I have considered the respective submissions and the evidence. I have narrowed down the issues for determination to be whether the charge was defective and whether the offence was proved beyond a reasonable doubt. Several issues were raised under the first question for determination which I will address accordingly. It was the Appellant's contention that he ought to have been charged for the offence of incest as provided under Section 20(1) of the Sexual Offences Act. The failure to do so according to him was prejudicial in that he was sentenced to life imprisonment whereas under Section 20(1) of the Act, the penalty provided is imprisonment of not less than 10 years. It then behoves this court to revisit both the evidence and the law.

There is no doubt that the Appellant was a blood brother to PW1. This was attested by the prosecution witnesses which the Appellant did not also deny. Ultimately therefore, the offence that ought to have been preferred was incest by a male person. The same is provided for under Section 20(1) of the Sexual Offences Act which reads as follows:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

The proviso to the provision is in clear words that *if the victim to the offence is under the age of 18 years the accused shall be liable to imprisonment for life*. Therefore, should the court find that the age of PW1 was proved to be under 18 years it follows that the Appellant was liable to imprisonment for life notwithstanding that the offence preferred was defilement. The court would also find that his being charged with defilement did not prejudice him or occasion a failure of justice. This is so because both defilement for a child below the age of 11 and incest against a child below the age of 18 carry a mandatory sentence of life imprisonment. I will then revisit this issue at the end of the judgment.

The other issue raised was that the charge was defective because the charge was drawn under Section 8(3) as opposed to 8(2) of the Sexual Offences Act. It is trite to emphasize that citing the correct provision of the law in sexual assault cases is paramount because penalties for the offences under the Sexual Offences Act especially defilement are determined by the age of the victim. Under Sub-section (2) of Section 8 any person who defiles a child aged 11 years or less shall be sentenced to life imprisonment. Under Sub-section (3) a person who defiles a child between the age of 12 and 15 years is liable upon conviction to a term of not less than 20 years. It then behoves this court to determine whether the age of the complainant was proved to be 8 years so as to warrant a life imprisonment.

Her evidence at the time of the testimony was that she was 9 years and then was in Standard 4. No Birth Certificate or other documentation was adduced in proof of the age. In the course of the trial, the prosecutor made an application for her age assessment. A report in this regard does not appear to have

been adduced in court. However, Dr. Maundu who filled the P3 form indicated that PW1 was 8 years old as at 15th July, 2013. PW1 testified on 14th July, 2014 in which case her age was 9 years. It is now settled that the age of a child in sexual assault cases need not be proved by a Birth Certificate. It can be proved by other means such as observation and age assessment. In my view, PW1 would not have deviated from the truth as she knew her age. Furthermore, it is common knowledge that a child in Standard 4 is aged between 9 and 10 years. Moreover, Dr. Maundu who filled the PW3 indicated her age as 8 years. It follows then that her age was below 11 years as at the time of the incident. The charge then ought to have been drawn under Sub-section (2) of Section 8 which provides for life imprisonment for the offender. The Appellant was sentenced to the said life imprisonment in which case he was not prejudiced by the charge having been drawn under Section 8(3) of the Act. In any case the error can be curable under Section 382 of the Criminal Procedure Act.

The Appellant contended that he was below the age of 18 years as at the time of the incident and the time of the trial. Indeed in his defence he supported the submission by stating that he was in Standard 8. On 15th July, 2013 the date the Appellant took the plea, the court ordered that he be escorted to hospital for age assessment. A report was filed back on the following day 16th July, 2013 by the Medical Superintendent, Kiambu District Hospital confirming that he was above 18 years. That report is comprised in the original trial record. As such, the Appellant's contention that he was treated as an adult as opposed to a minor has no merit.

On proof of the offence, it is without doubt that the Appellant was a blood brother to PW1. In her brief but candid evidence, PW1 narrated how the Appellant and another Musau used to defile her when there was no one else at home. In fact, according to her this had happened on several occasions but she found it prudent not to conceal the offence anymore. Although her evidence was not corroborated by any other eye witness, the proviso to Section 124 of the Evidence Act mandates the court to convict an offender in a sexual assault case notwithstanding lack of corroboration if it believes in the evidence of the victim. The learned trial magistrate believed in the evidence of PW1 as truthful. I hold a similar view as it was not demonstrated that there existed any reason that would have compelled PW1 to implicate her brother. As I have observed above, her age was adequately established as well. On penetration, the same was proved by PW5 Dr. Maundu who noted that PW1's hymen was broken and made a conclusion on the P3 form that she had been defiled.

From the foregoing, it is safe to conclude that the offence of defilement was sufficiently proved beyond a reasonable doubt. Therefore, although the Appellant was charged with defilement as opposed to incest, having noted that both offences carry the same punishment, the error cannot invalidate the trial. I emphasize that no prejudice or a miscarriage of justice was occasioned to the Appellant by the omission. In the result, this appeal lacks merit and the same is dismissed in its entirety. I uphold both the conviction and sentence. It is so ordered.

DATED AND DELIVERED THIS 6TH DAY OF SEPTEMBER 2016

HON. G.W. NGENYE-MACHARIA

JUDGE

In presence of:

1. Appellant in person.

2. Miss Wario for Respondent.

