



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 93 OF 2014

PATRICK CHOMBA WANJOHI.....APPELLANT

VS

REPUBLIC RESPONDENT

(Appeal from the judgment of the Mukuruweini Principal Magistrate's Court delivered by Hon.V.Chianda SRM on 11/11/2014 in Criminal Case No.302 of 2014)

JUDGMENT

1. The Appellant, **Patrick Chomba Wanjohi** was charged with the offence of defilement of a girl contrary to **Section 8(1) (3)** the **Sexual Offences Act**. The particulars of the charge was that on diverse dates between the 1st day of June, 2014 and 9th day of July,2014 at [*particulars withheld*] Village in Mukuruweini sub-County within Nyeri County he intentionally caused his genital organ to penetrate into the genital organ of **JNI** a child aged fifteen (15) years.
2. In the alternative count, the appellant was charged with Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**.
3. The facts of the case as recorded by the trial magistrate are; on the 9/07/2014 the complainant (**PW1**) was headed to the shops at Kiangai Trading Centre to buy headache medicine; that she was accosted by the appellant who grabbed her by the hand and led her to his house and undressed her and defiled her; days later **PW1** started feeling unwell and skipped school severally; she confessed to her parents what had been going on between her and the appellant; the parents took her for a pregnancy test and it turned out to be positive;
4. The matter was reported at Mukuruweini Police Station; the Appellant was arrested and subsequently charged, tried and convicted on the main charge and sentenced to twenty (20) years imprisonment.
5. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on 2nd November, 2012, raising the following grounds of appeal; that the charge sheet was defective; the complainants age was not proved; that the matter was not properly investigated; that the prosecution did not prove its case beyond reasonable doubt and that the trial magistrate disregarded his defence of alibi.
6. The appeal was heard on the 5/04/2016 with Ms Gicheha appearing for the State and the appellant being present in person; the appellant relied on his written submissions whereas the State made oral presentations and hereunder is a brief summation of their respective submissions.

APPELLANTS' SUBMISSIONS

7. That due to the complainants age a “*voire dire*” examination ought to have been conducted to gauge her credibility as a witness; failure to do so rendered her evidence unworthy and the trial court erred in relying on it;
8. That the Charge Sheet was defective as the words “**unlawfully**” had been omitted in contravention of Section 214 of the Criminal Procedure Code;
9. That the evidence adduced by the complainant was in contradiction to the particulars in the Charge Sheet; that the complainants evidence only refers to defilement on one day which was on the 9/07/2014 and the Charge Sheet indicates diverse dates; that no further evidence was adduced by the complainant of any other dates; that the complainant stated that she informed her father on the 13/07/2014; yet **PW2** who was her father stated that he had been informed on the 11/07/2014; that the evidence of **PW5** stated that the complainant had been defiled on the 13/07/2014 and that the injuries were fifteen days old when he examined her;
10. That the conviction was based on unproven charges; and the appellant cited the case of **Charles Kibara Muraya vs R Cr.App. No.330 of 1987 C.A at Nyeri**;
11. That the appellant was denied a fair trial as the trial was conducted in a language that he did not understand; therefore he was not able to properly cross-examine the prosecution witnesses and also properly defend himself;
12. That the trial court overlooked his sworn defence which raised an alibi;
13. The appellant prayed that the evidence be re-evaluated and a different conclusion be reached; and prayed that the appeal be allowed.

RESPONDENTS SUBMISSIONS

14. The appeal was opposed by the State and submitted that the appellant had been properly convicted and sentenced.
15. That the age of the complainant was proved to be fifteen (15) years; that due to the complainants age there was no need for a “*voire dire*” examination to be conducted; that the Notification of Birth was produced into court as an exhibit (“**PExh.3**”) to prove the complainants age; and that it indicated that the complainant was born in 1999;
16. The appellant had contended that the trial was conducted in a language he did not understand; and that he was not given an opportunity to cross-examine the witnesses; Counsel submitted that the appellant was accorded a fair trial; the trial was conducted in English and translated into Kikuyu which was the language he understood; that the appellant was given an opportunity to cross-examine the prosecution witnesses but he opted not to do so;
17. That the omission of the word “**unlawful**” did not render the Charge Sheet as defective; that the word used to be in the Penal Code but was not in the current Sexual Offences Act; that the Charge Sheet was properly drafted;
18. That there were no inconsistencies or contradictions in the complainants evidence; that she had stated in her evidence that she had been defiled on the 9/07/2014 but had other sexual encounters that is why the Charge Sheet had the words diverse dates;
19. Counsel prayed that the appeal lacked merit and prayed for its dismissal; and that the conviction and sentence be upheld;

ISSUES FOR DETERMINATION

20. After taking into consideration the above submissions these are the issues framed for consideration;

- (i) Whether the Charge Sheet was defective;
- (ii) Whether the appellant was accorded a fair trial;
- (iii) Whether there were material inconsistencies in the prosecution's case;
- (iv) Whether the prosecution proved its case to the desired threshold;
- (v) Whether the trial court disregarded the appellants defence without giving sound reasons.

ANALYSIS

21. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32**.

Whether the charge sheet was defective:

22. The appellant contends that the Charge Sheet is defective as there is an omission of the word **"unlawfully"**; I have had the occasion to peruse the particulars of the Charge Sheet and note that it only uses the word intentionally and indeed the word unlawfully is not there;

23. Section 8(1) of the Sexual Offences Act reads as follows;

"Section 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;"

24. The section only uses the words **"causes penetration"**; it is this courts considered view that the makers of this piece of legislation must have good reasons when they deliberately left out the words unintentionally or unlawfully so that there would be no doubt as to the issue of consent particularly when dealing with minors.

25. This court is satisfied that the particulars on the Charge Sheet clearly stated the offence and that the omission of the word **"unlawfully"** in the particulars section did occasion any miscarriage of justice as the appellant was always aware of the charge against him and the essential elements of the offence had been disclosed to him.

26. This court notes that the particulars on the Charge Sheet were set out in clear and unambiguous terms; the record also shows that the appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was given an opportunity to cross-examine all the prosecution witnesses but chose not to; and was also invited to defend himself;

27. The grounds of appeal on the charge sheet being defective is found lacking in merit and is disallowed;

Whether the appellant was accorded a fair trial:

28. The appellant contends that the trial was conducted in a language that he did not understand and therefore he was unable to cross-examine the prosecution witnesses and also properly defend himself;

29. Upon perusal of the court record it is noted that when the appellant took his plea he was asked by the trial magistrate;

"Crt - Which language do you speak /understand?"

“Accd – Kikuyu

“Crt – Reads out the charge and all its particulars in kikuyu language and asks the accused person if he admits or denies the truth of the Charge.”

30. The trial commenced on the 20/08/2014 and this court notes that the record reflects that there was an interpretation of English to Kikuyu; on that date **PW1, PW2, PW3, PW4** and **PW5** all gave evidence and when invited to cross-examine the witnesses the appellant opted to only to cross-examine **PW1**;

31. The case came up for further hearing on the 2/09/2014 and again the record clearly indicates that there was an interpretation from English to Kikuyu; the prosecution called **PW6** and **PW7** to testify; and the appellant was invited to cross-examine them but had nothing to ask them;

32. The court record reflects that the trial was conducted in a language that the appellant understood; the record shows that the trial magistrate ordered that prosecution avail to the appellant the Charge Sheet, all the witness statements and all documents to enable him to prepare for the trial; that he was accorded an opportunity to cross-examine the prosecution witnesses but did not do so; and also invited to defend himself;

33. This court is satisfied that there were no procedural flaws reflected on the court record and that the appellant was accorded a fair trial;

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

Whether there were material inconsistencies in the prosecution’s case; Whether the prosecution proved its case to the desired threshold;

35. On the issue of age of the complainant; the appellant contended that the prosecution failed to avail a vital document; but does state in his submissions the vital document the prosecution ought to have produced; again upon perusal of the court record it is noted that the prosecution produced a Notification of Birth (**PExb.3**) which this court finds to sufficiently corroborate the evidence of **PW1** and **PW5** on the complainants age;

36. This court is satisfied that the prosecution proved the age to the desired threshold.

37. On the other vital ingredient which is penetration; the appellant submitted that there were contradictions particularly on the dates that the incident is said to have occurred; this court has had occasion to read the court record at length and has noted that the Charge Sheet states that there were diverse dates; but notes that the complainant only gave evidence of one incident that was on the 9/07/2014; she stated that she reported the incident to her parents on the 13/07/2014 when she started feeling unwell and most likely had missed her periods; the evidence of **PW2** was that she was briefed by the complainants father (**PW3**) on the 11/07/2014; **PW4** who was the Area Chief talks about being informed on the 12/07/2014 by a constituent who informed him that her child had refused to go to school; this court will assume that this constituent may have been the mother of the child as the prefix used was “her”; **PW3** the father of the complainant used the word “later” and did not give a particular date; **PW5** the doctor examined the complainant on the 17/07/2014 and in her evidence she stated that the complainant had no vaginal tears but her hymen was broken and the pregnancy test was positive;

38. The only point of departure is that this witness’ (**PW5**) evidence which evidence is that of an expert is contradictory to the other prosecution witnesses evidence particularly that of **PW1** and **PW3** as the doctors evidence reflects that the injuries were 15 days old; which then means there is no evidence to corroborate the fact that an incident occurred on 9/07/2014 as stated by **PW1** and **PW3**;

39. Upon re-evaluating the prosecutions’ evidence on the dates it is this courts considered view that the prosecution case has material contradictions on the dates of the incident which go to the root of the prosecutions’ case as to whether any incident occurred as alleged; it is incumbent upon the prosecution to

prove the exact dates the offence occurred; otherwise serious doubts are raised; on this ground this court is satisfied that the prosecution failed to address this issue to the desired threshold; that the conviction is found to be unsafe; and on this point alone the appeal succeeds.

40. This ground of appeal is found to have merit and is hereby allowed.

Whether the trial court disregarded the appellants defence without giving sound reasons.

41. This court will not belabor itself on this issue as it has found that penetration was not proved to the required threshold.

FINDINGS

42. For those reasons this court makes the following findings;

(i) This court finds that the appellants rights were not violated;

(ii) There were material inconsistencies in the prosecution's case and that the prosecution did not prove its case to the desired threshold;

(iii) The conviction is found to be unsafe.

DETERMINATION

43. The appeal is found to be meritorious and it is hereby allowed.

44. The conviction is hereby quashed and sentence hereby set aside.

45. The appellant be set at liberty unless otherwise lawfully held

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 6th day of October, 2016.

HON.A. MSHILA

JUDGE.