



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 242 OF 2011

V M M.....APPELLANT

VRS

REPUBLICRESPONDENT

JUDGMENT

INTRODUCTION:

1. V M M, the Appellant herein was arraigned before the Chief Magistrate's Court at Kakamega on the 30/04/2009 in S.O. Criminal Case No. 899 of 2009 facing the charge of defilement with an alternative count of committing indecent act with a child.
2. He pleaded not guilty to the charges and he was placed on bail pending trial. From the record the charges were amended with the leave of the Court and the consensus of the Appellant on 19/06/2009.

TRIAL BEFORE THE COURT:

(a) The prosecution's case:

3. The prosecution called 5 witnesses in a bid to prove the charges against the Appellant.
4. **PW1 (K.L.)** was **the complainant** who testified on the 19/06/2009 and was recalled, with the leave of the Court, on 18/09/2009.

The complainant, a girl, informed the Court that she was aged 13 years and in class 6 at [*particulars withheld*] Primary School. Upon the Court conducting a *voire dire* examination, it directed that she gives sworn statement.

5. She stated that she was sickly as she experienced unusual blood flow. She recounted what transpired on 16/04/2009 at around 3.30pm that she was on her way home passing through the Appellant's home. She saw the Appellant seated outside his house. She knew the Appellant very well being a neighbour and a close relative. The Appellant was alone at home as his wife had attended a Women Group meeting. The Appellant called her and she thought that he wanted to send her some place only for the Appellant to hold her hand and led her into his house. He closed the door. As the complainant sensed danger she wanted to raise an alarm only for the Appellant to withdraw a panga and threatened to slash her if she so dared to cry. The Appellant took her into his bedroom removed her clothes including the panty as he also removed his and as he laid the complainant on his bed facing upwards he inserted his big penis into her vagina where she instantly started bleeding. The ordeal took around 30 minutes. After the Appellant was through with his mission he released her with a stern warning not to disclose to anyone. As a result of fear,

truly the complainant, an orphan who stays with his only brother, kept the events to herself until after one week when she began bleeding again from her private parts when she disclosed the past events to his brother, M.L. The brother immediately made a report to the Area Assistant Chief and on summoning the Appellant, the said Chief later on handed him over to the Mikoyani Police Post. His brother took her to Shiseso Health Centre and later to the then Kakamega PGH where she was examined and treated and the P3 Form filled. She identified the clothes she had worn on the day of the ordeal which she had eventually washed and also identified the P3 Form and the treatment health book and the treatment chits. The complainant repeatedly confirmed that it was the Appellant, whom he knew very well, who defiled her.

6. **PW2 (L.A.)**, was a neighbour and an in-law to the complainant. On receiving the news that the complainant had been defiled in the morning of 22/04/2009 she hurriedly went to see her and physically examined her private parts. She saw a lot of blood oozing from the vagina. She was among those who took the complainant to hospital and later on recorded her statement with the police.

7. **PW3** was the complainant's brother who gave his name as A A. He stated that upon returning home in the evening of 16/04/2009, the complainant told her of the day's happenings with the Appellant. He then reported the matter with the Area Assistant Chief where the Appellant was summoned and later on handed over to the Police.

8. **PW4** was a Clinical Officer at Kakamega PGH who filled in the P3 Form and the Post Rape Care Form for the complainant. He saw the treatment notes from Shiseso Health Centre. He examined and treated her on the 27/04/2009 who had a history of sexual assault. On examination, the vagina was swollen and bleeding whereas the hymen was ruptured. The examination revealed the presence of spermatozoa and red blood cells further to some infection. He deduced that it was a penile injury. The complainant also had stomach pains.

9. **PW5** was the Investigating Officer who was at the Malaika Police Patrol Base on 27/04/2009 when the complainant was brought by the Area Assistant Chief and her brother. He issued a P3 Form and referred her to hospital for treatment. He also recorded witness statements. It is the said Area Assistant Chief who also took the Appellant to the police where the Officer re-arrested him and latter preferred the charges in Court.

10. The prosecution thereafter closed its case and on 02/10/2009, the Court delivered a considered ruling and placed the Appellant on his defence.

b) The Defence Case:

11. The Appellant opted to give unsworn statement and called 2 witnesses.

12. The Appellant recounted the events of 16/04/2009 on how he was arrested. He recalls two people visiting him at home with a calling by the Area Assistant Chief and when he obliged and availed himself he was arrested and taken to Malaika Police Station and then to Court. He prayed for the Court's assistance as he stood to say he knew nothing about the charges he faced.

13. The Appellant's wife testified as **DW3**. She confirmed that the complainant was her sister-in law as the Appellant and the complainant were cousins and indeed stay in the same homestead.

According to her, on 16/04/2009, the Appellant left their home at 8.00 am to do some casual job at one Betty Khabuchi's place and returned at around 5.00pm while DW3 stayed behind the whole day without going anywhere. She was surprised when her husband was arrested the following day. She gave an interesting account touching the evidence of DW2. First, DW2 (Jenipher Ekhongo) was a neighbour and not a relative. Then, DW2, is also married to one Anzibo and had 5 children with him. DW2 did not stay in the same homestead with the Appellant and DW3 as alleged since she stayed with her husband and their 5 children. DW3 clarified that in their house was around 30m away from DW2's and that there is a long live fence separating the two homesteads such that if one is on one side cannot see what is happening on the other side and vice versa.

14. **DW2**, Jennipher Ekhongo, gave her version of the happened on the material day, quite contrary to the testimony of DW3. She stated that she was related to the Appellant but the Appellant's wife denied that. While she first says they stay in the same homestead with the Appellant she later changed to say that she is neighbour sharing a common boundary and their houses are about 80m apart. According to her, she was not married and was staying home and the area between the Appellant's house and hers was bare and without anything in between. However, DW3 was of the contrary view. She also stated that the Appellant stayed home on the material day and took his 3 cows for grazing from morning and returned in the evening and never came back for lunch. She however stated that it was not possible for her to have known if the Appellant entered into his house and defiled the complainant.

15. The Appellant having closed his defence without any submissions made the Court fix the judgment on 16/12/2009 where the Appellant was found guilty of defilement and later on sentenced to serve 20 years in prison. His right of appeal was equally explained.

THE APPEAL:

16. Having been so sentenced, the Appellant remained silent until sometimes on 15/09/2011 when he lodged an application to appeal out of time. This was through Messrs J.J. Khayumbi & Company Advocates. The application was allowed on 02/11/2011 and a Petition of Appeal filed on 09/11/2011.

17. The Petition of Appeal preferred 6 grounds of appeal which were tailored as under:-

1. That the trial Magistrate erred in law and in fact convicting the appellant on the encumbered evidence of the complainant and when the testimony of the complainant and her witnesses were inconsistent, contradicting and incredible and totally valueless.

2. That the trial magistrate erred in convicting the appellant on a charge of defilement and that the father erred by holding that the testimony of PW4 the clinical officer corroborated that of PW1 when the same had no absolutely evidential value in view of time lapses and in absence of any linkage with the appellants.

3. That the trial magistrate erred in law and in fact by merely attempting to restate the testimony of prosecution witnesses which he found was clear when it was not and he failed to analyze and/or consider the evidence as a whole and his conviction was therefore flawed and unsafe.

4. That the trial magistrate finally shifted the border of proof and he erred by dismissing out of hand the appellants defence and his decision was biased evidently predetermined and indefensible.

5. That the trial magistrate erred in law and fact in failing to consider that the appellants constitutional rights had been infringed upon having been in custody for 4 days before being arraigned in court and the whole trial was unfair and prejudicial on the part of the applicant.

6. That having considered and accepted the appellants mitigation the trial magistrate erred by ignoring the same and his sentence was vindictive and excessive in the circumstances.

The Appellant prayed that the appeal be allowed and the conviction and sentence to be set aside and/or modified.

18. The Appeal having been set for hearing on 03/11/2014 by Hon. Justice Dulu came before this Court and it proceeded on where Mr. Khayumbi Counsel, appeared for the Appellant and Mr. Oroni,

Learned State Counsel appeared for the State.

19. Mr. Khayumbi opted to address the Court on only two main issues that the evidence as tendered was full of contradictions and unsafe to sustain a conviction and that there was no proof of age of the complainant to sustain the charge of defilement. Mr. Oroni supported the appeal in that there was no proof of age. I proceed to take it that the Appellant's Counsel abandoned the other grounds of appeal preferred herein above.

ANALYSIS AND DETERMINATIONS:

20. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

21. In line with the foregoing, this Court in determining this appeal is to satisfy itself whether the offence of defilement was proved alternatively whether the offence of committing an indecent act with a child was committed and in either case if it was the Appellant who was the perpetrator.

22. The key ingredients of the offence of defilement includes proof the following: -

- (a) ***Penetration;***
- (b) ***Age;***
- (c) ***The Appellant being the perpetrator.***

On whether there was penetration, the complainant stated that a big penis entered into her vagina and she bled. PW4, the Clinical Officer, confirmed that the complainant's hymen was ruptured and the vagina swollen and that such an injury had been caused by a penile penetration. To this end, the ingredient of the offence was proved.

On the complainant's age, the Court notes that indeed there was no Certificate of Birth produced in such proof of age. However, the complainant's age was assessed by the Clinical Officer when he examined the complainant. This is evident on page 3 of the P3 Form where the Officer wrote as under: -

“Estimated age of person examined: 14 years”

Further there was the **Post Rape Care Form** (Exhibit 1b) which indicated the year of birth as 1996. The two documents therefore confirmed the complainant's testimony that she was aged 13 years old.

Under **Rule 4 of the Sexual Offences Act, (Rules of Court) 2014 which came into force on 11/07/2014 under Legal Notice No. 101**, a victim's age can be determined by way of a Birth Certificate, any School documents, a Baptismal Card or any other similar document. It is therefore this Court's holding that the P3 Form and the Post Rape Care Form fall in the category of “any other similar document” and can be safely used to confirm the complainant's age. Therefore the complainant's age was indeed proved.

23. **On whether the Appellant was the perpetrator**, it is well established in evidence that the Appellant was a Cousin to the complainant and that they lived in the same homestead. This being a case of recognition, there was no evidence to contradict the position that the two knew one another too well. Further, the offence was alleged to have taken place during daytime and again no indication of the possibility of mistaken identity came to play. It is therefore clearly demonstrated that it was the Appellant who was the author of the act of penetrating the complainant's vagina since the evidence was free from any possible error in the complainant recognizing the Appellant herein.

24. **On the issue of contradictory evidence** as urged by Appellant's Counsel, this Court has carefully reconsidered and analysed the evidence before the trial Court and found out the alleged contradictions are indeed reconcilable in law since they do not attain the status of causing injustice to the Appellant.

For instance, the issue of the complainant having washed her blood -stained clothes cannot be held to rapture the prosecution's case since there was more incriminating evidence than that. The aspect of the treatment notes having not been produced in Court in the first instance has nothing much to hold since it is on record that the complainant was recalled on 18/09/2009 where she produced the same.

On the variance of the dates, the complainant indicated that the ordeal took place on 16/04/2009 and due to the fear caused by the Appellant's threat she kept it to herself until when she sensed an abnormal flow of blood after one week when she told her brother, PW3. PW2 confirmed the foregone when she stated that she got the news on the alleged defilement on 22/04/2009 and proceeded to personally see the complainant. PW4, the Clinical Officer, stated that he examined the complainant on 27/04/2009. Further, the complainant was taken to the Malaika Police Station by the Area Assistant Chief on 27/04/2009 and on the same day she was taken to the hospital aforesaid. I therefore find that it is clearly demonstrated that the offence took place on 16/04/2009 and was reported one week later hence if any contradictions exist the same are reconcilable by virtue of Section 382 of the Criminal Procedure Code.

25. The Appellant also argued that since the evidence allegedly connecting him with the offence was only from the complainant, the Court would only believe the same on compelling reasons. First, the evidence of the complainant was corroborated by PW2 who upon examining the complainant stated: -

"I checked her vagina and saw lots of blood oozing therefrom."

This position was further confirmed by PW4, the Clinical Officer, who on examining the complainant also stated as follows:

"On examination, she had stomach pains and was bleeding from her vagina. The said injury had been caused by penis.... The complainant had ruptured hymen and swollen vagina."

Second, it must always be remembered that sexual offences are mostly committed in secrecy where the evidence of other eye-witnesses may not be forthcoming hence the proviso to Section 124 of the Evidence Act where, even in instances where the only available evidence is that of the complainant, the Court can still convict within the parameters raised therein.

26. The Appellant also wondered and interrogated the evidence of PW4, the Clinical officer, when he stated to have examined the complainant on 27/04/2009 and found the presence of spermatozoa and to him that was not possible if at all the complainant was actually defiled on 16/04/2009 as she had taken bath throughout. The record does not show if the Appellant raised the issue with the complainant or the Clinical Officer for any clarification. Since no evidence whether medical or otherwise was tendered to challenge the findings of the Clinical Officer, this Court may be less advantaged to step in such shoes and competently interrogate the same.

27. The Appellant's defence indeed is what amounted to tendering contradictory evidence instead. Whereas the Appellant only led evidence of his arrest allegedly on 16/04/2009, the two witnesses he called gave completely opposite pieces of evidence. This Court on a careful analysis of the evidence of DW2 and DW3 concurs with the finding of the Learned Magistrate in disregarding the same and holds that the defence, as tendered, did not shake the prosecution's case by creating any doubt.

28. On the issue of sentence, the Appellant was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Section 8(3) states as follows:-

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

The sentence handed down to the Appellant was therefore legal and indeed the minimum in law.

CONCLUSION:

29. The above analysis therefore leaves the Court with the only option in finding that the appeal is not merited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12th DAY OF February 2015.

A. C. MRIMA

JUDGE