



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO. 35 OF 2014
(FORMERLY MOMBASA HCCR A NO. 196 OF 2012)
A M M APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 114 of 2011 made on 12th October 2011 by the Senior Resident Magistrate's Court at Wundanyi (the Hon. Orange K.I.,RM)]

JUDGMENT

Introduction

1. This is a judgment on first appeal from original conviction and sentence of Senior Resident Magistrate's Court at Wundanyi Criminal Case No. 114 of 2011. The appellant was convicted for the offence of defilement of a girl contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 20 years on the 12th October 2011.

2. *The particulars of the offence were that –*

“PARTICULARS OF OFFENCE: *A M M - On the 3rd day of August, 2010 at [Particulars withheld] village, Kishushe location in Taita Taveta County, had unlawful carnal knowledge of C M a girl aged 15 years.”*

1. The prosecution called 4 witnesses in support of the charge and, when put on his defence, the appellant gave an sworn testimony and called no witnesses in defence.

The prosecution's case

1. The prosecution's case was that the appellant had defiled the complainant girl aged 15 years in a bush while on her way back from posho mill and threatened her not to tell anyone of the incident so that she did not tell anyone of the defilement until when 5 months later she was discovered to be pregnant and forced to tell her parents of the appellant leading to his arrest and arraignment in court.

2. The alleged facts of the case relied on by the Prosecution were set out in the evidence of the complainant PW1, as follows:

PW 1

I am C M. I am 15 years old. I was a student at [Particulars withheld] primary school at class 7. On 3/08/10 at around 5 pm I was from the posho mill. I found A and held me and led me to the forest and removed my underwear. He removed his trousers and pant and asked me to lie down. He then had sex with me. We stayed for about 30 minutes. Then we left and asked me not to tell anybody lest I face consequences. I went home and left the accused at the scene. I did not tell anybody at the time. I feared I did not report he had threatened to kill me. On 4/2/011 I was taken to hospital. I was not feeling well. My mother took me to hospital at Kishushu. I was referred to Wundanyi I was told that I was pregnant about five (5) months. On 14/02/11 we went to the chief and we asked to report the matter to Wundanyi police station. I was issued with P3 form- MFI-1. The accused is before court. He was known to me previously. We are related. I got pregnant and stopped going to school

On cross-examination, the PW1 is on record as having responded in the following confident unflinching mood:

“I found you standing on the road and you pulled me to the forest and defiled me. I had not had sex with anybody. You defiled me and got me pregnant. I did not have a boy friend. I was not your friend. I know you are married and have three children. You did not talk to me. There was nobody who saw when these happened. The incident happened two kilometers from home. I did not tell any you told not to say. I only reported when I was found pregnant. I have no grudge with you. You told me if I said you could kill me. You did not use a condom. I left you at the scene and went home.”

The Defence Case

1. When put on his defence, the appellant gave sworn testimony in which he raised an alibi defence that he was away throughout the material date of the alleged offence and suggested that the charges could have been framed because he had a land dispute with the father of the complainant.
2. The learned trial magistrate considered the evidence finding the charge proved against the accused and sentenced him to imprisonment for 20 years.

The Appeal

1. The appellant set out his grounds of appeal in his Amended Grounds of Appeal filed in court, as follows:

“AMENDED GROUNDS OF APPEAL

1. *The trial magistrate erred in law and fact by failing to consider that no birth certificate or age assessment report of the complainant was exhibited to prove the exact age of the victim and legality of the sentence imposed.*
2. *The trial magistrate erred in law and fact by failing to consider that the complainant (PW 1) went for medical examination after a period of 5 months from when she alleges to have been defiled.*
3. *The trial magistrate erred in law and fact by failing to consider the offence was reported to the police by the complainant after 5 months from when it was committed.*
4. *The trial magistrate erred in law and fact by failing to consider that no DNA examination report of the baby was processed, produced to connect the appellant to PW 1 pregnancy.*
5. *The trial magistrate erred in law and fact by failing to consider that the Resident Magistrate Court had no jurisdiction under section 7(3) (a) of the CPC to impose a sentence in excess of 2 years imprisonment.*
6. *The trial magistrate erred in law and fact by failing to consider that the Alibi defence advanced by the appellant was not adequately considered.”*

1. During the hearing of the appeals the appellant filed written submissions in court while, Ms. Nyakoni, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

1. The issue for determination before the court is whether on the evidence presented before the court the charge of Defilement of a girl contrary to section 8(10 as read with 8(3) of the Sexual Offences act 2006 No. 3 of 2006 had been proved.

DETERMINATION

Analysis of Evidence

1. As regards lack of a birth certificate or an age assessment report to establish the exact age of the complainant for purposes of computing the applicable penal provision under the Sexual Offences Act, the Court of Appeal (Koome, Musinga & Otieno-Odek, JJA.) in *J.W.A. v. Republic* (2014) eKLR held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report, and said as follows:

“The gist of the appellant’s appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1989 and was thus 10 years old in 2009, when the offence was committed; the P3 Form tendered in evidence as Exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years.”

Finding of the Court as 1st Appellate Court

1. Pursuant to the duty of the Court on first appeal is as set out in *Okeno v. R.*, 1972 EA 32, the court has determined that the complainant whose age was proved by her own testimony, that of her father PW2 and that of the Police Form P3 produced by a clinical officer to be 15 years. The complainant was the only witness to the alleged defilement and in terms of section 124 of the Evidence Act, cap 80 Laws of Kenya the court is entitled to rely on her evidence if it considers her truthful, 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.”

1. PW1 described the circumstances leading to the defilement by the appellant who she knew as a neighbor who was married with three children. No question of identity of the appellant arose. Having carefully considered the evidence of the complainant in chief and on cross-examination by the appellant, the court considers the complainant’s evidence as portraying consistent and flowing narrative of the incident in which she was defiled by the appellant, on which she remained steadfast even under the fire of cross-examination. The events that followed the discovery of the complainant’s pregnancy are consistent with the evidence of PW1. PW2 said he learnt of A the accused from his daughter and he immediately reported the matter to the Assistant Chief when he was referred to the Police station where they were issued with a P£ Form for medical examination. PW3, the clinical Officer produced the Medical

Examination Report showing the girl was pregnant, her hymen absent. PW4 the investigating officer confirmed from statements taken from the witnesses that the girl had reported to have been defiled by the appellant in a bush on her way from a posho mill and that she did not report the matter earlier as she had been threatened and that the matter came to light when she was found to be pregnant at school.

2. I find the evidence of the complaint PW1 was supported by the evidence of PW2 and the medical examination indicating sexual penetration and obviously the pregnancy. Even, in the absence of such evidence, the confident and consistent flow of the complainant's narrative of the alleged defilement would have been sufficient under section 124 of the Evidence Act to found a conviction in this case.

3. There is no merit in the appellant's complaint that the medical examination of the complaint was done 5 months after the alleged defilement and without DNA testing. The examination was done after the report was made to the police following the discovery of the girl's pregnancy. There was evidence from the complainant PW1 that she had been threatened by the appellant into not disclosing the defilement and only opened up when confronted by her mother after the discovery of the pregnancy at the Hospital where she had gone for treatment following sickness. There was no need for DNA testing because the issue before the court was not a dispute as to paternity, which may be the subject of a civil dispute between the parties. For determination before the court was only the question of defilement of the complainant which could happen independent of any pregnancy, or lack of it. The fact of the pregnancy, however, corroborated the PW1 evidence as to the defilement.

4. The appellant denied that he was at the place of the alleged crime on the material date. It is cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See **Karanja v. R.** 1983) KLR 501. The duty to prove the falsity of the defence and the guilt of the accused and therefore to discharge the alibi remains with the Prosecution. As held in **Kiarie v. R.** (1984) KLR 739, 740:

“An alibi raise a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

1. However, as held in **Kossam Ukiru v. R.** (2014) eKLR by Court of Appeal (Azangala, Gatembu and Kantai, JJA.) the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established. The court said -

“We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.”

I have no hesitation in rejecting the alibi defence of the appellant not only for being raised as an afterthought late in the proceedings but for reason of being totally out-weighed by the evidence produced by the prosecution particularly the coherent and confident account of the incident by the eye-witness PW1.

1. As pointed out by counsel for the DPP, the Resident Magistrate's Court has under section 7 (1) (b) of the Criminal Procedure Code jurisdiction to pass the sentence of upto 20 years and the claim that the trial court lacked jurisdiction is, therefore, without legal basis.

Findings of the trial court

1. As with the case in **Kossam Ukiru v. R.**, supra, it is not correct here that the trial court did not consider the appellant's alibi defence given in his sworn testimony when he claimed to have been at Kishushe and

at the evening of people came to him with regard to land dispute whose particulars he did not disclose and he was later arrested in connection to defilement taken to Kishushe police station and charged. The trial court found the appellant guilty as charged after considering the appellant's alibi defence as follows:

I have considered the evidence on record, the complainant alleges to have been defiled by the accused who was known to her. The complainant knew the accused very well, the accused was previously known to her. The complainant had positively identified the accused because it was during day light, she was from the posho mill. The accused had threatened the complainant of consequences if she reported. The complainant did not report until the time when she was discovered to be pregnant. The accused person has denied the offence and attributed it to a grudge with the complainant's family and then pleaded alibi. The court finds the defence of alibi was an afterthought because it was not raised during the hearing to enable the prosecution test the defence of alibi. The court is guided by Karanja versus Republic KLR (1983) 501. This defence of alibi was raised at the defence stage and the court finds it was an afterthought. The complainant had positively identified the accused on examination was found to have been pregnant out of the encounter with the accused. I find that the prosecution witnesses have given entry consistent and corroborative evidence. The prosecution proved its case as required in law. The accused will be convicted under section 215 of the criminal procedure code for defilement of a girl.

I agree.

ORDERS

1. Accordingly, for the reasons set out above, I find that appellant's appeal herein is without merit and dismiss the same.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Ms. Karani for the Respondent

Ms. Linda Court Assistant.