REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 44 OF 2013

JULIUS MAHURU GICHUI……...……...……..APPELLANT

VERSUS

REPUBLIC ……...…….…….RESPONDENT

(Being an appeal against sentence and conviction in Kangema Principal Magistrate's Court Criminal Case No. 196 'B' of 2007 (Hon. S.N. Mbungi) on 29th August, 2008)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8(1) of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the offence, on the 21st day of August, 2007, in Murang'a district within central province, the appellant unlawfully had carnal knowledge of C.W.K, a girl aged 11 years.

In the alternative, the appellant was charged with the offence of indecent assault of a female contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. Under this alternative count, it was alleged that on the 21st day of August, 2007 in Murang'a district within central province, the appellant unlawfully and indecently assaulted C.W.K by touching her private parts.

In the judgement delivered on the 29th August, 2008, the learned magistrate held that the prosecution had proved the principle count against the appellant beyond reasonable doubt and convicted him accordingly; the appellant was sentenced to life imprisonment, which is the mandatory sentence for any person convicted of defiling a girl aged 11 years.

The appellant was dissatisfied with the decision of the learned magistrate and therefore appealed to this court against both the conviction and the sentence. In his amended grounds of appeal which he filed together with his written submissions dated 16th October, 2013, the appellant faulted the learned magistrate's decision on several grounds including what he had alleged to be the learned magistrate's apprehension of facts; his failure to resolve the contradictions in the prosecution case in favour of the appellant; his failure to analyse the evidence in its entirety; and his rejection of the appellant's defence without stating his points of determination contrary to section 169(1) of the Criminal Procedure Code. All these omissions, argued the appellant, constituted the learned magistrate's errors in law and in fact.

Before arriving at the decision he did, the learned magistrate had occasion to hear and take the evidence of six prosecution witnesses and the unsworn statement of the appellant. As the first appellate court, this court has the legal obligation to analyse and evaluate the evidence afresh and ultimately come to its own conclusions bearing in mind that it is only the magistrate's court that

heard and saw the witnesses themselves. This legal position was stated in the case of Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336. It was applied by the Court of Appeal in Okeno versus Republic (1972) EA 32 and has since been consistently followed in subsequent decisions in criminal appeals such as the appeal herein.

The first prosecution witness was the complainant herself; the court noted that she was a minor and therefore being a child of tender years as contemplated under section 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya, the learned magistrate properly took her through a *voire dire* examination before taking her evidence. This evidence was given on oath after the learned magistrate established that the complainant understood the nature of an oath and that she also understood the duty of speaking the truth.

According to this witness, she knew the appellant as Mahuru; the appellant found her somewhere around her teacher's house from where he dragged the complainant to a nearby bush where he defiled her. The appellant had initially called her and pretended that he wanted to send her. In her testimony, she gave a vivid account of what the appellant did- he removed his trouser and the complaint's pant; he applied his saliva to the complainant's vagina in which he proceeded to insert his penis. After the appellant was done he asked the complainant to go home. The complainant related this ordeal to one Njeri (PW2) who then told the complainant's mother. She was thereafter taken to Kangema police station where she was given a P3 form which, together with the treatment notes were marked for identification.

Irene Njeri Kuria (PW2) was a house girl employed in that capacity by one Nancy. On 22nd August, 2007 she was in Nancy's house when she saw the appellant talking with the complainant. At around 6 pm the complainant came to her crying. This witness enquired of the complainant why she was crying but the complainant could not tell her; it is then that the witness called the complainant's mother to talk to her daughter. On cross-examination the complainant told the court that she knew the appellant before; according to her the appellant was a cobbler and that she had even engaged his services for which she paid before. She denied owing the appellant anything. Later in her evidence she said that she owed the appellant Kshs. 100 for repairing her shoes and further in re-examination she said that she was to pay the money once she was put in funds.

The third prosecution witness was a minor; it is clear from her statement that she was twelve years old. According to this witness she knew the complainant as her friend and that on the, 21st day of August, 2007, she was collecting firewood with her friend when she saw the appellant with the complainant. The witness told the court that the appellant asked them to go deeper into the bush to look for firewood while he together with the complainant took a different direction. When they came back they neither found the complainant nor the appellant where they had left them.

The clinical officer who examined the complainant was Gerald Njagi; at the material time he was based at Kangema. In his evidence he said that upon examination of the complainant he noticed that she was bleeding from her libia majora and libia minora. She was injured on the outside of her vagina. The complainant's pant was torn. He informed the court that the complainant told him that she had been defiled by a person she knew. The witness said in re-examination that penetration can occur even without the hymen being broken because, in his view, the outside of the female sexual organ can also be penetrated.

The complainant's mother testified that her daughter was eleven years old and that though she was in class two, she had a mental problem. On 21st August, 2007 at around 6pm she was called by Njeri and Nyambura; it is not clear what these people told her but it appears that at some point, she took her daughter to hospital and also made a report to the police. She said that she was told that the appellant had defiled her daughter though it is not clear from her evidence who it was that gave her this report.

After this witness testified, the prosecutor applied to have the complainant examined to establish her mental status; this, perhaps, was because of this witness' allegation that her daughter was

mentally handicapped. The appellant had no objection to this application and though the court never gave any order to the prosecutor's application, the prosecutor informed the court at some stage in the proceedings that the complainant had been examined by a psychiatrist and wanted him to come to court and produce the psychiatrist report.

When the case resumed for hearing on 18th January, 2008, the investigating officer and not the psychiatrist took to the witness stand. In his evidence, the officer confirmed that on 21st August, 2007 the complainant's mother reported a case of defilement of her daughter by the appellant. He booked the report and escorted the complainant to hospital where she was treated and discharged. In the course of the investigations, so testified the investigating officer, the complainant took him to the scene of crime where she had been defiled; she also identified the appellant. Interestingly the investigations officer claimed that the complainant had a mental problem and as a proof to his allegations, he purported to produce a P3 form that contained an opinion to that effect. The officer also produced the complainant's petticoat and dress which were allegedly torn and soiled when the appellant was struggling with the complainant.

When the appellant was put on his defence, he gave an unsworn statement, in which he stated that he was arrested at his aunt's place by police officers on 24th August, 2008. The appellant said that the officers asked complainant in his presence and in the presence of a person he referred to as his boss whether "the appellant had done anything". The complainant is said to have answered them in the negative. Though he denied having defiled the complainant the police arrested him anyway and charged him with the offence for which he was convicted and sentenced. The appellant stated that on the date and time he is alleged to have defiled the complainant, he was away attending a funeral and that his so called boss knew that he reported to work on 24th August, 2008.

According to the appellant, the complainant never gave his name to the police; it was the complainant's mother who did. In his evidence, he said that the name that the complainant gave to the police was Magona and not Mahuru. The appellant denied ever having met Irene Njeri (PW2), who in the appellant's view was out to settle scores with the appellant for demanding his Kshs. 200 which she owed him and having declined her sexual advances. The appellant disputed the complainant's testimony because, in the doctor's view, she was an incompetent witness.

Section 8(1) of the Sexual Offences Act under which the appellant was charged defines defilement as a person's act which causes penetration with a child.

That section demands that the accused person must have had *penetration* of the complainant for him to be liable. It provides that:

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

The word "penetration" in Section 8(1) is a technical term and it is defined as such in Section 2 of the Act as "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

The alternative charge against the appellant was based on section 11(1) of the Sexual Offences Act, No. 3 of 2006; that section provides:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

It is apparent from this provision of the law that liability is founded upon two ingredients that must be proved to exist; firstly, that a person has committed an indecent act and secondly, that the indecent act has been committed upon a child. Section 2 (1) of the Sexual offences Act defines these

two fundamental elements of the offence. Indecent act" is defined in as "an unlawful intentional act which causes-

a. **Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration;**

b. **Exposure or display of any pornographic material to any person against his or her will."**

For purposes of this appeal it is part (a) of Section 2 of the Act that is relevant.

As for the meaning of a child, Section 2(1) of the same Act directs us to the Children Act, 2001 where a child is defined in Section 2 thereof as "any human being under the age of eighteen years."

The complainant's age was established to be eleven years and evidence to this effect was neither controverted at the trial nor has the appellant taken any issue with the learned magistrate's finding on this aspect of the trial in his appeal. It is not in dispute therefore that the complainant was a child as defined in law as at the time the crime is alleged to have been committed.

In evaluating the evidence the evidence as presented at the trial court, this court is concerned with whether, as regards the principle count, the complainant's genital organs were penetrated and if so, whether there was sufficient proof that the appellant was responsible for this penetration. If proof of the principle count against the appellant is lacking, this court would be concerned with whether there was proof to the required standard that there was contact between any part of the body of the appellant with the genital organs, breasts or buttocks of the complainant.

The evidence of the complainant was crucial in both respects. The complainant knew the appellant by name; she related to court how the appellant led her to a bush and gave a vivid account of how the appellant defiled her. According to her testimony the appellant inserted his genital organs into her genital organs. The learned magistrate took her evidence on oath, as he should, after *a voire dire* examination. (**See the case of Sakila versus Republic (1967) EA 403 on the evidence of children of tender years). He had the advantage, which I do not have, of seeing and hearing this witness and he was no doubt best placed to assess the witness' demeanour, amongst other aspects of her evidence. He found the complainant's evidence credible and believable and convicted the appellant accordingly.**

Under the proviso to section 124 of the Evidence Act, the court can convict on the evidence of the evidence of the complainant only, if the complainant is a victim of a sexual offence, as long as the trial court records its reasons for doing so. That section provides:

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 an alleged victim, 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.*(Underlining mine).*

Under the proviso to section 124 of the Evidence Act, the trial court could have properly convicted on the evidence of the complainant alone; however, her evidence was not the only evidence. A medical officer was called to confirm that she was indeed defiled as contemplated under section 8(1) of the Act. The officer examined the complainant the same evening she is alleged to have been defiled. According to him, the complainant was bleeding from her libia majora and libia minora. She sustained injuries on the outside of her vagina. The complainant's pant was torn. No spermatozoa was detected. In the P3 form which he produced and was admitted in evidence, it was

indicated that the complainant's hymen was intact but in his opinion, penetration could occur even without the hymen being broken because, in his view, the outside of the female sexual organ can also be penetrated.

PW2's (Irene Njeri Kuria's) evidence was more of circumstantial than an eyewitness' account of what happened. According to her, she only saw the appellant talking with the complainant on the material day. She knew the appellant before, a fact that the appellant did not dispute; in fact he alleged that the witness owed him some money for services that he had rendered and that he had previously rebuffed her sexual overtures. The witness, according to the appellant, had a grudge against him and to that extent her evidence against him was malicious and therefore not credible.

There were indeed some inconsistencies on the part of PW2's evidence; she initially denied in her evidence that she owed the appellant any money but later admitted that she owed him money for his services. She also said that the complainant never told her why she was crying yet the complainant said she told her that the appellant had defiled her. It is also noted that she said that she saw the appellant talking to the complainant on 22nd August, 2007 and not on 21st August, 2007 when the offence is alleged to have been committed. I agree with the appellant that these contradictions in her evidence could create doubt as to whether she was a credible witness. The question that then follows is how material was her evidence in the conviction of the appellant.

The court has already noted that pursuant to the proviso to section 124 of the Evidence Act, a court can legitimately convict solely on the evidence of the victim of a sexual offence and therefore in my view, unless the PW2's evidence was inconsistent in some material particular to the complainant's testimony, the court could disregard it and convict.

This then leads us back to the issue raised by the appellant against the complainant's evidence that she was not mentally fit to testify. The complainant's mother testified that her daughter "has a mental problem". She did not indicate the nature of the mental problem. The investigations officer, PW6, also said "the complainant has some mentally disturbed (sic)".

The complainant who is alleged to be mentally disturbed was a pupil in class two; when she was taken through a *voire dire* examination, she answered to the satisfaction of the court, all the questions posed to her. Indeed the court found that she understood the nature of an oath and so proceeded to take her evidence oath. Throughout her evidence in chief and cross-examination, there was no indication, as far as I can gather from the record, that the complainant was mentally disturbed.

It is apparent that the investigations officer intimated to court that he would subject the complainant to a medical examination by a psychiatrist. There is no evidence, however, that the complainant ever underwent such an examination. The investigation's officer purported to produce a P3 form allegedly made up of a psychiatrist's findings on the complainant's mental status. Although the form is part of the record from the trial court, there is nothing on record to suggest that it was ever admitted in evidence and, of course, it could only have been admitted in evidence if it was produced by the psychiatrist himself, if he examined the complainant at all.

If there was any doubt as to the complaint's mental status, it would have been more appropriate to have her examined before her evidence was taken; in any event, in the absence of any evidence that the complainant was mentally unfit or that she was examined and diagnosed as having a mental problem, her evidence could not be discredited on the basis of her mental status. I find that there is no basis to fault the learned magistrate's finding that the complainant was a competent and credible witness.

The complainant's and the clinical officer's evidence suggest that indeed the complainant was sexually assaulted; she sustained injuries on her libia majora and libia minora and outside the vagina; the evidence that her hymen was intact would suggest that that the penetration was partial and not complete. For purposes of liability under section 8(1) of the Sexual Offences Act,

penetration does not have to be complete; an offence of defilement is established even if the penetration is partial.

In my view, the appellant's defence did not raise any reasonable doubt on the credibility and truthfulness of the complainant's and the clinical officer's evidence. The appellant gave unsworn evidence, as he was entitled to. He said he was at a relative's funeral on the material date. Due to the nature of his evidence, the weight of the appellant's testimony was not and could be tested by cross-examination. No witness testified on behalf of the appellant to corroborate his evidence. While the burden is always on the prosecution to prove its case beyond reasonable doubt and not to rely on any gaps in an accused person's defence, it is up to the accused person to raise such reasonable doubt whenever he is put on his defence. The appellant's contentions that he was away at a funeral on the material date; that his boss was aware that he was at work on 24th August 2007; that the complainant was couched by the mother to testify against him and that she never mentioned his name to the police yet he did not cross-examine the investigating officer on this issues does not appear to me to have raised what could properly be regarded as a reasonable doubt on the prosecution case.

In the premises I find that the appellant's conviction was safe and since the only sentence under the Sexual Offences Act for the sort of offence of which the appellant was convicted was life sentence the appellant was properly convicted, in accordance with the law. For the foregoing reasons, I do not find any merit in the appellant's appeal and it is dismissed.

Dated, signed and delivered in open court on 10th February, 2014

Ngaah Jairus

JUDGE

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