



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 167 OF 2011

PETER MUNENE NYAGAAPPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 384 OF 2011 at the Senior Resident Magistrate's Court at Runyenjes by Hon. M.W. MUTUKU - SRM on 20/9/2011

J U D G M E N T

PETER MUNENE NYAGA the Appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

PETER MUNENE NYAGA: On the 1st day of May 2011 in Embu County, intentionally penetrated his penis into the vagina of MM a child aged two years and three months.

ALTERNATIVE COUNT

Committing an indecent act with a child contrary to section 11(1) of Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

PETER MUNENE NYAGA: On the 1st day of May 2011 in Embu County, intentionally touched the private parts namely vagina of MM a child aged two years and three months.

The Appellant pleaded not guilty to the charges and the matter proceeded to full hearing. He was convicted of the Principal Count of defilement and sentenced to life imprisonment. He was dissatisfied with the Judgment and filed this appeal in person. He later engaged an advocate Mr. Ithiga who filed supplementary grounds as follows;

1. ***That the learned trial Magistrate erred in both law and fact by convicting the Appellant***

- without taking into consideration that the charge was defective.*
2. *That the learned trial Magistrate erred in both law and facts by convicting the Appellant when no age assessment report or certificate report was produced by the prosecution to prove the Appellant's age.*
 3. *That the learned trial Magistrate erred in both law and fact by convicting the Appellant even after the Prosecution failed to call crucial witnesses.*
 4. *That the learned trial Magistrate erred in law and fact by failing to consider the fact that the Prosecution witnesses failed to prove that there was any penetrating.*
 5. *That the learned trial Magistrate erred in law and fact by convicting the Appellant without taking consideration that the Appellant was not properly identified.*
 6. *That the learned trial Magistrate erred in law and fact by convicting the Appellant without considering that nobody witnessed the Appellant committing the alleged offence.*
 7. *That the learned trial Magistrate erred in law and fact by convicting the Appellant without considering the fact that the clothes that the complainant wore were not produced as exhibits.*
 8. *That the learned trial Magistrate erred in law and fact by failing to consider that the doctor who filled the complainant's P3 form failed to disclose his qualifications thus casting doubts on whether he was qualified.*
 9. *That the learned trial Magistrate erred in law and fact by failing to consider that the sexually transmitted disease that the complainant was infected with was not named and the Appellant was not medically examined to establish if he suffered from the same disease.*
 10. *That the learned trial Magistrate erred in law and fact by disregarding the Appellant's defence that he did not commit the alleged offence.*

The Prosecution case was that PW3 left her daughter (PW2) aged 2 years and 3 months at the home of an unnamed neighbour. This was on 1/5/2011 at 6pm. When she returned she found PW2 at home alone. The next day as she changed the child's pant she noticed that the child was in pain. When asked what happened the child mentioned the name of "**Peter**" as she pointed at her private parts. PW3 then knew it was her brother Peter (the Appellant) who was the culprit. She reported the matter and the Appellant was arrested. When she left PW2 in the neighbourhood the Appellant kept on coming in and out of the homestead. PW2 was taken to the hospital and she was treated (EXB1a). A P3 Form was on 19/5/2011 filled after examination (EXB1b). The Appellant was later arrested on 15/6/2011 and charged.

In his unsworn defence the Appellant stated that he was framed up because of grudges based on family issues. When this appeal came for hearing M/s Muthoni for Ithiga for the Appellant submitted on all the grounds together. She submitted that the charge sheet was defective because the word unlawful was omitted in the particulars. She cited two authorities i.e.

1. **CHARLES KARUGA KINYUA HCRA NO. 319/08 NYERI**
2. **ACHOKI –V- REPUBLIC [2000]2 EA 283**

Secondly she submitted that the complainant's age was not proved. She referred to the case of **JON CARDON WAGNER HCRA NO. 404/09 (NAIROBI)**. She raised the issue of failure to call material witnesses which to her was fatal. Finally she submitted that the Prosecution failed to prove that it was the Appellant who sexually assaulted PW2.

M/s Ing'ahizu for the State opposed the appeal saying the omission of the word unlawful in the charge sheet was not fatal as there is no lawful defilement. The trial Court had taken cognizance of the fact that the child was a vulnerable witness and this was communicated to the Appellant. The Prosecution evidence she submitted confirmed penetration and that the Appellant was the culprit. She said the alleged grudge had nothing to do with the charge facing the Appellant.

This being a first appeal this Court has a duty to reevaluate all the evidence and arrive at its own conclusion bearing in mind that it did not see nor hear the witnesses. The Court of Appeal in the case of **KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174** held thus;

- i. **An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a**

fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

- ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions by both Counsels and the grounds of appeal. I have equally reevaluated the evidence on record.

Ground 1

It was submitted that the charge sheet was defective because the word unlawful was not included in the particulars. The offence of defilement is not based on consent or lack of it. What is to be proved is that the victim was a child and that she was penetrated in her genital organ. In other words there is no lawful defilement. The authorities cited by Counsel refer to cases of rape which involve adults who have the capacity to consent or not consent. The two offences are distinguishable. That ground fails.

Ground 2

The charge sheet shows that the minor was aged 2 years and 3 months. This child was availed to Court and the Court clearly noted this at page 5 lines 1-10. The Court observed that this was a child of tender years. Even no *voire dire* examination could be conducted by the Court because of her vulnerability. The Appellant was informed of this and he had no objection to the mother testifying on her behalf. My finding is that even without documents a child of tender years can be assessed by the Court. Moreover PW1 even confirmed that this was a baby.

Ground 3

It is true Dr. Njoka Charles testified as PW1. He did not give his qualifications. He explained that he examined the child PW2. There is no evidence that he is not a medical doctor. This ground must also fail.

I consolidate all the other grounds of appeal and proceed to analyse the evidence. The evidence by PW1 was to the effect that PW2 was found to have the following in his genitalia;

- i. Pus cells or grain strain
- ii. Grain negative bacilli
- iii. Exgrain negative extracellular indicating that she had a STD
- iv. Labia majora was reddish. It was tender and painful
- v. Discharge from the vagina.

From this evidence it is clear PW2 had been sexually assaulted. There is no evidence of penetration. The next issue the Court has to determine is whether the Appellant is the person who did this to PW2. The evidence on this rotates around what PW2 allegedly told her mother (PW3). Was her evidence credible enough to be the basis of the Appellant's conviction? This witness told the Court she left PW2 with an undisclosed neighbour. This is what she stated at page 5 lines 13 - 16.

“On 1st May 2011 at 6pm, I was at the shamba. I had left daughter MM at my neighbour's house. I had left her with other children. We are very close and there is no fence or road between the two homesteads”.

She left PW2 with other children. Who were these children? On her return she found PW2 at home alone. Was it at her home or still at the undisclosed neighbour's homestead. This is what PW3 told the Court at page 5 lines 24 – 28

“As I left the homestead, I left the accused person in the neighbour’s homestead. He would keep on walking in and out of the neighbour’s homestead. She mentioned Peter as she cried and pointed at her private parts with her hands”.

She says when PW2 mentioned the name Peter she suspected that it was the Appellant who had defiled her. She therefore operated on suspicion. She was not sure. The Court itself did not hear this child say it was Peter who did these things to her. The mere fact that she knew the Appellant well and called him by his name while in Court as stated by the learned trial Magistrate (at page 11 lines 4-5) does not in itself confirm that he was the one who defiled the child. The learned trial Magistrate further stated in her Judgment at page 11 lines 9-10

“Further she had left the accused person at home when she went to the shamba, but did not find him at home upon return”.

That is not borne by the evidence on record. PW3 had stated this at page 5 lines 25-27

“As I left homestead, I left the accused person in the neighbour’s homestead. I did not find the accused person at the homestead”.

She was talking about the homestead where she left the child PW2 not her home. This evidence was of no assistance to the Court as the owner of this homestead and children were not called to testify of the ongoings of that particular day.

In as much as the Appellant’s line of defence was never put to PW3 in cross-examination, I still find that the evidence of PW3 on what the child (PW2) told her without any other evidence to support it is not credible evidence. The learned trial Magistrate made his finding at page 11 lines 19-24;

“Am alive to the fact that the minor is of tender years and that most of the evidence was adduced by her mother as an intermediary. The presence of accused at the scene at around the time the offence was committed and the mention of the accused’s name by the minor overwhelmingly points a finger at the accused committing the offence. The accused was also of guilty mind as he ran away when the police officer visited the scene”.

The issue of the presence of the accused at the scene is PW3’s word. This could only have been established by those who were in that homestead whom PW3 refused to disclose. There is no evidence that police officers visited the scene and the Appellant ran away. PW4 said he visited PW3’s home but was unable to establish where the offence took place because the child of very tender age. I have a lot of problems with this kind of evidence by the police officer (PW4). He visited PW3’s home I believe for investigations. Did PW3 show him where she had left the child? Did she show him where she went to the shamba? Why did he not interrogate the neighbor and children who were left with the child? He then states at page 6 line 26;

“I tried to arrest the accused but he ran away”.

When was this that he tried to arrest the Appellant? And from where did he try to arrest him? This is the same witness who told the Court;

“The accused is the uncle to the minor/complainant”.

Since he appears to have been the investigating officer he must be the one who charged the Appellant. He knew him as an uncle to the complainant. And he did not find it prudent to charge him with incest. And the learned trial Magistrate did not also detect this anomaly.

I am alive to the proviso to section 124 of Evidence Act where the Court in a sexual offence may rely on the evidence of the victim alone to convict an accused. The Court is under duty to observe and satisfy itself that such evidence is sound and credible. Secondly it must give reasons for reliance on such

evidence to convict. After analyzing the evidence adduced I have detected conflicts and discrepancies in the said evidence which I have outlined above. In the case of **JARED ONDANDA OGUYO –V- REPUBLIC [1982-88]1 KAR 1043** this is what the Court of Appeal had to say.

“The 1st appellate Court is under a duty to resolve any discrepancies or conflicts in the evidence at the trial and to decide the issues raised as failure to discharge this duty makes it difficult for the Court of Appeal to decide which evidence the trial and the 1st appellate Court would have accepted”.

In the face of the conflicts and discrepancies raised above I do find the conviction herein to be unsafe. The result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released forthwith unless otherwise held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c