



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA, J.J.A)

CRIMINAL APPEAL NO. 9 OF 2017

BETWEEN

SAFARI CHENGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 3rd March, 2016

in

H.C.C.R.A No. 35 of 2014.)

JUDGMENT OF THE COURT

1. On 4th April, 2009, Zainab was taken by surprise when SM (PW1) came back home at around 10:00 a.m. since he had just left for school a few hours before and was expected back later in the evening. At the time Zainab used to work as a house help to SM's family. Zainab waited for SM's sister, LM (PW2), who was his legal guardian to return from work at around 6:00 p.m. and informed her about what had happened. LM went looking for SM around the house and found him lying down on a sofa.

2. No sooner had LM asked SM why he came back home early than he broke down and began crying uncontrollably. It took LM about thirty minutes to calm him down. It is at this point that she noted SM was having difficulty sitting down. She decided to call her other brother, AKK (PW3), who also upon observing SM, noticed he was not his usual self and could not sit properly. He too tried to find out from SM what was wrong but once again he began crying. They decided to take him to Tawfiq Hospital and upon examination the doctor informed them that SM had bruises on his anus. He was given medicine and they went home.

3. At home, LM and AKK interrogated SM and this time round he opened up. He stated that there was a certain man, who he did not know by name, who kept following him when he went to school. The first time the said man asked him to untie a bicycle which was tied around a mango tree and he obliged. The next thing he remembered is that he woke up in a house which was still under construction and it was dark. His mouth had been taped shut and the door had been locked. Moments later, the man came into the house brandishing a knife and warned him not to tell anyone otherwise he would kill him. He was released at around 8:00 p.m. and went home. No one seemed to notice that he had come home late that day.

4. Thereafter, he met the man on two other occasions. His last encounter with the man occurred in the early morning of 4th April, 2009 while he was making his way to school. The man gave him a stick and asked him to break it, which he did. From that point on everything became obscure and once again he woke up in the same house with the said man. This time he was released at around 10:00 a.m. and he went back home. It was his evidence that on all the above occasions whenever he regained his senses he felt pain in his anus and the same had escalated to a point that sitting down was a problem.

5. After further inquiry, SM revealed that he knew where the particular house he was taken to was located. Apparently, it was close to where he lived. He led AKK and LM to the said house which seemed to be under construction. They found no one there. With that information, AKK and LM reported the incident to the police the following morning. The police instructed AKK to keep watch over the house and alert them when he saw anyone there. SM was also taken for another examination at Malindi General Hospital where Ibrahim Abdullahi (PW4), a clinician filled in the P3 form.

He gave evidence that he had observed that SM's anus was tender which could be an indication that he had been sodomized.

6. A few days later AKK noticed that someone was inside the house in question. He called the police and informed them as much. According to him, he was directed to apprehend the occupant before the police got there. He got assistance from members of public and apprehended the appellant who SM identified as the perpetrator who had preyed on him.

7. It is on the basis of the above circumstances that the appellant was arraigned and charged with the offence of defilement at the Chief Magistrate's Court at Malindi. The particulars of the charge were that on diverse dates between 31st March, 2009 and 4th April, 2009 in Malindi District within Kilifi County the appellant intentionally caused his genital organ namely penis to penetrate into the genital organ namely, the anus of SM a boy aged 9 years old.

8. In his defence, he gave a sworn statement and denied the charge against him. In short, he said that at the material time he was a caretaker of a storey house which was undergoing construction and that he also lived there. On 8th April, 2009 at around 10:30 p.m., a number of people came to the house and ordered him to follow them. They led him into a large crowd which was a few meters away. In the crowd, there was a young boy who he later learnt was SM and he heard the boy being asked whether he could identify him. At first SM kept quiet but when he was asked for the third time he told the crowd, '*ni yeye*' which translated in English means that he is the one.

9. According to the appellant, he did not know for what purpose SM had identified him. Be that as it may, immediately he was identified the crowd descended on him with kicks and blows and were it not for the intervention of the Sentry Security personnel who were close by he would have died. The security personnel arrested him and handed him over to the police. It was while he was in custody that he was informed of the charge he was facing.

10. Faced with the foregoing evidence the trial court was convinced that the prosecution had proved its case against the appellant. Consequently, the appellant was convicted and sentenced to life imprisonment. Aggrieved with his conviction, the appellant lodged an appeal in the High Court which was equally dismissed vide a judgment dated 3rd March, 2016.

11. Unrelenting, he is now before us on a second appeal faulting the learned Judge (**Chitembwe, J.**) for:

i. Failing to appreciate that the appellant's conviction was based on a defective charge sheet.

ii. Failing to appreciate that the identification of the appellant was a dock identification and could not be the basis of his conviction.

iii. Failing to appreciate that the medical evidence did not establish the offence of defilement.

iv. Dismissing the appellant's defence without any justifiable cause.

12. The appellant who appeared in person relied entirely on his written submissions which were on record. He challenged his conviction on several fronts. First, he argued that his conviction was based on a defective charge sheet. Elaborating on this ground, he submitted that the statement of offence in the charge sheet read, '*defilement of a boy contrary to Section 8(2) of the Sexual Offences Act ...*' **Section 8(2)** does not create or define the offence of defilement rather it provides for the penalty for such an offence. The relevant provision which prescribes the offence of defilement is **Section 8(1)** of the **Sexual Offences Act** hence its omission from the charge sheet rendered his conviction a nullity.

13. Second, the identification evidence was not sufficient to link him to the offence in question. This is because the minor had not given any description of the perpetrator to the police prior to his arrest. The description given by the minor at the trial court, that the perpetrator was tall and black, was too general to single him out to the exclusion of others. Moreover, no identification parade was organized to test the veracity of the minor's identification evidence. According to him, his identification by the minor was a mere dock identification and more than likely influenced by the fact that immediately after his arrest he was taken to the minor who was asked to identify him. All in all, the identification evidence had no probative value. In support of that proposition reference was made to the case of ***Oluoch vs. R [1985] KLR 549***.

14. Third, he contended that the prosecution had failed to call crucial witnesses with regard to the circumstances of his arrest. Towards that end, he asked us to draw a negative inference against the prosecution for failing to call such witnesses.

15. Fourth, the prosecution had failed to demonstrate that he committed the offence of defilement to the required standard of proof. For the reason that the minor gave evidence to the effect that upon his examination at Twafiq Hospital the doctor formed the opinion that there was no sign of defilement/sodomy. It was curious that Ibrahim Abdullahi (PW3) who examined the minor three days later and allegedly relied on the treatment notes from Tawfiq hospital found that there was a possibility that the minor had been sodomized.

16. In conclusion, the appellant posited that looking at the evidence as a whole the case against him was based on mere suspicion which could not warrant a conviction for the offence of defilement.

17. Opposing the appeal, Mr. Yamina, Principal Prosecution Counsel, asserted that the charge sheet was clear and the appellant understood the nature of the case against him as evidenced by the defence he put up. He also submitted that this ground of appeal was never raised in either of the two courts below and was being raised for the first time in this Court. He added that the minor gave a description of the appellant as the perpetrator which the two courts below found satisfactory and what is more, the appellant was arrested at the scene of crime. In his closing remarks, counsel indicated that he had no objection with respect to the revision of the appellant's sentence save that he urged us to uphold the life sentence pending legislative intervention.

18. We have considered the record, submissions by the appellant and counsel as well as the law. In determining the appeal before us, we bear in mind that this being a second appeal, the limit of this Court's jurisdiction is delineated under **Section 361** of the **Criminal Procedure Code**. We are bound to entertain only issues of law. Nonetheless, we can interfere with findings of fact by the two courts below where they are not based on any evidence at all, or on a misapprehension or perverted construction of the evidence. See **Karani vs. R [2010] 1 KLR 73**

19. It is settled that not all defects in a charge sheet will render a conviction, based on such a charge sheet, a nullity. See **Benard Ombuna vs. R [2019] eKLR**. It is not in dispute that the charge sheet as drafted was defective in that it omitted **Section 8(1)** of the **Sexual Offences Act** which establishes the offence of defilement in the statement of the offence. What is the consequence thereof? The applicable test of determining the effect of the said defect on an appellant's conviction is whether it occasioned a miscarriage of justice resulting in great prejudice to the appellant. See the case of **Edward Katana Safari vs. R [2018] eKLR**. In our view, notwithstanding the said omission, the appellant appreciated the nature of the charge against him and was not prejudiced in any way. It follows therefore, that this ground fails.

20. For a conviction of defilement to arise three essential elements should be established, namely, the age of the victim, penetration and identity of the perpetrator. See **Section 8** of the **Sexual Offences Act**. Here SM's age is not an issue as LM did produce his birth certificate which clearly indicated that at the material time he was 9 years old.

21. On the issue of penetration, the appellant contends that the same was not proved because firstly, SM was not able to give details of how he was assaulted and secondly, the medical evidence on that aspect was inconclusive. Penetration under **Section 2** of the **Sexual Offences Act** is defined as follows:

“... the partial or complete insertion of the genital organs of a person into the genital organs of another person;...”

22. From the record, we cannot help but note that SM testified that he was not aware of what took place from the moment he met the perpetrator up to when he woke up in the house. All he noted was that at all material times he felt pain in his anus. Could SM's evidence to that extent prove penetration while he did not testify on how it happened, if at all?

23. In such circumstances, the provisions of **Section 33** of the **Sexual Offences Act** come into play. It stipulates in part that:

“33

Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—

(a) whether a sexual offence is likely to have been committed—

i. towards or in connection with the person concerned;...”

24. Applying the above provision to this case, did the surrounding circumstances establish penetration on SM by way of sodomy? We believe it did. We say so because to begin with, it was SM's uncontroverted evidence that each time, he woke up feeling pain in his anus and the same had escalated to the point that he could not sit well, a fact that was corroborated by LM and AKK. Likewise, the treatment notes from Tawfiq Hospital indicated that there were bruises on SM's anus and further, Ibrahim who also had the opportunity to examine him confirmed as much. In our minds, the fact that Ibrahim testified that he could not conclusively attribute the tenderness on SM's anus to sodomy did not rule out as he had noted in the P3 form that it was highly likely that SM was sodomized and we find as much.

25. As for the identity of the perpetrator, the only evidence in that respect was circumstantial. Circumstantial evidence must meet a certain threshold before an inference may be drawn as to the commission of a criminal offence. The criteria was succinctly summarised by this Court in **Jackson Juma Kenga vs. R [2017] eKLR** as follows:

“However, to form the basis of a conviction, the circumstantial evidence must satisfy several conditions. It must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken or destroy the inference of guilt.”

26. The chain of events which constituted the circumstantial evidence were that SM testified that it was the appellant who accosted him while he was on his way to school. He stated that he did not know the appellant by name but due to the number of times they had met he could be able to identify him if he saw him. This clearly was not a case of identification of a stranger but recognition. As a result, contrary to the appellant's allegations, there was no need for an identification parade whose purpose is to test the veracity of identification of a stranger by an identification witness. See **Patrick Muriuki Kinyua & Another vs. R [2015] eKLR**.

27. Being a matter of recognition and taking into account that on all the occasions SM ran into the appellant it was during the day we find that the possibility of a mistaken identity is unlikely. Our position is fortified by this Court's sentiment in the case of **Anjononi & Others vs. R [1976-80] 1 KLR 1566** to the effect that recognition is more satisfactory, more assuring and more reliable as it depends upon personal knowledge of accused person in one form or another. The fact that SM was initially hesitant to identify the appellant did not derogate that he positively recognized him as the man who waylaid him while he was on his way to school. The hesitation is explained by the fact that he was threatened with death should he disclose what had happened. What is more, the trial court found SM to be a truthful witness and we see no reason to interfere with that finding. See **Samuel Muriithi Mwangi vs. R [2016] eKLR**.

28. The other piece of evidence was that the appellant was arrested from the same house which SM had identified as the one he found himself in on every occasion. Additionally, the appellant did admit that he lived in the said house and at no point did he allude to the fact that

he was living with someone else. Taken as a whole we find that the evidence forms unbroken chain of events that lead to the irresistible conclusion that it was the appellant and no one else who was with SM in the house in question and committed the offence. In light of the foregoing evidence we find that the two courts below did take into account the appellant's defence and dismissed the same and rightly so.

29. Similarly, we find no merit in the ground that the prosecution failed to call essential witnesses. The witnesses that the appellant was talking about were the Sentry Security personnel. Basically, their evidence, as per the appellant, would be in regard to how they rescued him from the angry crowd. To us, the failure by the prosecution to call the said personnel as witnesses did not prejudice the appellant. We do not see how they would have added or negated to the appellant's conviction for the offence of defilement.

30. Last but not least, on the issue of sentence, we see no reason to interfere with the life sentence meted out to the appellant. We say so, because taking cognizance of the victim's age and the fact that the said offence was done repeatedly as well as its prevalence in this country the sentence will act as a deterrent.

31. In the end, this appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

D. MUSINGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR