



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 64 OF 2014

BETWEEN

ERICK MAINA MBULELE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Busia, (Hon. L. Kimaru, J.) dated 26th July, 2012

in

HCCR. 87 OF 2012)

JUDGMENT OF THE COURT

Introduction

[1] This is a second appeal by **Erick Maina Mbulele**, the appellant herein who was charged in the Chief Magistrate's Court at Busia with the offence of defilement of a girl contrary to section 8(1) as read with **Section 8(2)** of the Sexual Offences Act.

The appellant was charged with the alternative charge of indecent act contrary to section 11(1) (b) of the Sexual Offences Act.

[2] The particulars of the offence were that on 12th May, 2010 in Bunyala District within the Western Province intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of **BA** (name withheld), (the complainant), a girl aged 6 years.

[3] The learned trial Magistrate convicted the appellant for the offence of defilement and sentenced him to life imprisonment. Aggrieved by that decision, the appellant appealed to the High Court.

[4] After considering the evidence as a 1st appellate court, the learned Judge found that it was clear that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant, that the appellant was positively identified by the complainant and that the medical evidence corroborated the

complainant's evidence that she was defiled. The learned Judge dismissed the appellant's appeal for lack of merit. Aggrieved by that decision, the appellant preferred this appeal to this Court.

Submissions

[5] The appellant who was unrepresented at the hearing, relied fully on his written submissions, Memorandum of appeal and amended Memorandum of appeal. He raised the following grounds of appeal;

“1) That the appellant was not properly identified.

2) That vital witnesses were not called to testify.

3) That the appellant was not accorded a fair trial as the trial was not conducted in a language that he understood and there was no interpretation.

4) That the charge sheet was defective in that the name of the complainant was misspelt.

5) That the trial court did not comply with Section 214 of the Criminal Procedure Code as the charge sheet was amended towards the close of the trial.

6) That the appellant's alibi defence was not considered.

7) That the evidence of the Prosecution was contradictory and inconsistent.

8) That the 1st appellate court failed to re-evaluate and re-analyse the evidence.”

Respondent's counsel's submissions

[6] Mr Ketoo, the learned Prosecution Counsel opposed the appeal and pointed out that this is a 2nd appeal and therefore the court should only deal with issues of law. Counsel submitted that the gist of the appeal is that the appellant was convicted on the basis of a single identifying witness; that the complainant was 6 years old and by virtue of Section 124 of the Evidence Act, a Sexual Offence of the nature that the appellant was charged with (defilement) does not require corroboration; that the learned Judge properly directed his mind in this case.

Further that the act of defilement on the minor who was 6 years old was supported by the evidence of PW7 (the clinical officer) who adduced evidence that the injuries inflicted on the complainant were consistent with the offence of defilement; that the appellant's alibi defence was rebutted by evidence on record and that the appellant's allegation that the charge of defilement was made as a result of a grudge by the complainant's family against the appellant was an afterthought. Counsel urged us to dismiss the appeal and uphold both the conviction and sentence.

Determination:

[7] We have considered the rival submissions, the authorities and the law. This is a second appeal and this Court is limited to address itself only on matters of law. As this Court has previously stated, it will not normally interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making their findings. See **David Njoroge Macharia Vs. Republic [2011] eKLR.**

[8] On the issue that the evidence of the complainant, a minor, was not corroborated, although that the law is quite clear that the evidence of a complainant who is a minor requires corroboration, in sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction.

[9] Section 124 of the Evidence Act makes this quite clear. It provides that;-

“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 evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court satisfied that the alleged victim is telling the truth.”

[10] The complainant testified that she positively identified the appellant as the person who defiled her. She pointed out the appellant’s house to PW2 and PW3 about an hour after her defilement. PW6 corroborated this evidence when she testified that she had rented that particular house to the appellant.

[11] From the foregoing, the two courts below applied their minds based on the evidence of BA which in the trial court’s assessment found to be true and consistent. Further, PW7 the clinical officer testified that BA was defiled and the same view was held by PW2, the complainant’s grandmother in her testimony. PW3 (the complainant’s aunt) testified to seeing BA bleeding from her private parts. It is also notable that BA placed the appellant at the scene of the crime and identified him.

[12] Based on the record, it is clear that the trial magistrate carried out *Voire dire* and determined that;

“the witness (BA) is possessed of sufficient intelligence to give sworn evidence.”

We are guided by the case of Maripett Loonkomok v. Republic [2016] eKLR where this Court stated;-

“Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child’s answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child’s answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record.”

[13] The learned Judge found that the complainant pointed out the appellant’s house to PW2 and PW3 about an hour after the defilement; that there was no doubt that it was the appellant’s house as PW6 testified that she had rented the same to the appellant.

[14] On the issue that the appellant’s alibi defence was not considered, the appellant alleged that he was at his home at the date and time of the commission of the offence. In support of his alibi and his innocence, he claimed that he had personal differences with PW2 hence his evidence that he was framed so that he could lose his property. The 1st appellate court found that the allegation of the personal differences between the appellant and PW2 was not supported by evidence and was an afterthought as the appellant had the opportunity to cross examine PW2 in this regard but failed to do so. We find that in the circumstances of this case, the 1st appellate court considered the relevant facts and the law and arrived at the correct conclusion. This ground therefore has no merit and we dismiss it.

[15] From the record, the appellant raised some grounds which were not raised in the High Court. These included the claim that the charge sheet was defective in that it bore a different name to that in the medical report.

[16] In the case of Isaac Nyoro Kimita and Another v. Republic i.e Criminal appeal No.187 of 2009, this Court stated;-

“He (the appellant) therefore understood the charge against him to have been that on the material date, while together with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellant’s constitutional right to fair trial.”

[17] From the record, it is clear that the misspelling of BA’s name does not occasion a failure of justice. We therefore find that this was a mere misspelling of the name which did not prejudice the appellant and did not occasion any miscarriage of justice or violate the appellant’s rights.

[18] On the ground that the charge sheet was amended close to end of the trial contrary to Section 214 of the CPC, we note from the record that the prosecution applied to amend the charge to correct the name of the complainant both in the main charge and in the alternative charge. The record also indicates that the appellant expressly stated that he had no objection to the correction whereupon the court amended the names accordingly.

We find that the amended charge did not introduce any new matter into the main charge that would have necessitated recalling of witnesses. The amended charge did not prejudice the appellant as it was merely a correction of a typographical error and did not go into the substance of the charge. This ground of appeal therefore fails.

[19] On the ground that vital witnesses were not called, there is no legal requirement on the number of witnesses required to prove a fact. Section 143 of the Evidence Act Provides;-

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

[20] In the case of Keter v. R [2007] 1 EA 135 this Court held;-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

See Mwangi v. R [1984] KLR 595.

The appellant pointed out that T who the complainant had in cross examination testified that she was with when the appellant grabbed her hand, was not called to testify. From the record the appellant did not point out the possible materiality of her evidence and that ground of appeal therefore fails.

[21] It is clear that there were some inconsistencies in the testimonies given by the prosecution’s witness as pointed out by the appellant. They include the testimony concerning the distance between the minor’s home and the appellant’s and the different spellings of PW2’s name indicated as **Grace Omudho**, **Grace Omullo** and **Grace Omollo**. We however find that the said inconsistencies were not material and do not go to the root of the prosecution’s case. See Vincent Kasyula Kingoi vs. Republic, Nairobi Criminal Appeal No. 98 of 2014 which was quoted in Francis Maina Kamau v Republic [2016] eKLR.

“See also Vincent Kasyula Kingoi vs Republic Nairobi Criminal Appeal No. 98 of 2014, in which the court ruled that its role when faced with such assertions is to reconcile these and determine whether they go to the root of the prosecution case or not. We have accordingly reconciled the alleged inconsistencies and contradictions and in our view we find that they do not go to the root of the prosecution case.”

[22] On the ground that the trial was not conducted in a language that the appellant understood, the record

indicates that the language used in the trial court was English and there was interpretation in the Kiswahili language which the appellant used. The record also shows that the appellant was accorded adequate opportunity to cross examine the prosecution witnesses and to defend himself. This Court is satisfied that there were no procedural flaws reflected on the court record and that the appellant was accorded a fair trial. This ground lacks merit and is hereby dismissed.

[23] We are satisfied that the High Court carefully scrutinised the evidence and arrived at the right conclusion. The upshot is that the appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Kisumu this 15th day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR