



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), W. KARANJA & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 42 OF 2016

BETWEEN

JACKSON MWANZIA MUSEMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from a Judgment of the High Court of Kenya at Machakos (**Mutende, J.**) dated 16th September, 2014*

in

H. C. CR. A. No. 99 of 2013)

JUDGMENT OF THE COURT

1. On the 8th March, 2012 at around 9:00 p.m. while MM, a minor aged 11 years old, was heading to a pit latrine outside her house, she saw a person standing in front of the latrine. The person called out to her and she immediately recognized him as one Jackson Mwanzia Musembi (the appellant) whom she knew very well. She approached the appellant who directed her to remove her underpants and lie down, which she did. The appellant then removed his trousers, laid on top of her and proceeded to defile her.

2. Meanwhile, J W (PW4), who was close by noticed some activity around the latrine and ran to a hotel which was nearby wherein he persuaded FMK (PW3) to follow him back to the scene. At the scene they caught the appellant still in the process of defiling the minor. The appellant was arrested at the scene by members of the public and the incident was reported at the police station. Dr. Shabaan Khalid (PW6) examined the minor about four days later and observed that her hymen was broken and the presence of discharge from her vagina. He concluded that the minor had been defiled.

3. Consequently, the appellant was charged with one count of defilement contrary to **Section 8(1) & 8(2)** of the **Sexual Offences Act** and an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the main count were that on the 8th March, 2012 at around 9:00 p.m. at [particulars withheld] within Makueni County, he intentionally and unlawfully caused his male genital organ namely, his penis to penetrate the female genital organ namely, the vagina of MM, a child aged 11 years. In the alternative count, the details were that on the

abovementioned date, place and time, he willfully and unlawfully manipulated his fingers to touch the genital organ namely, the vagina of MM, a child aged 11 years.

4. The appellant pleaded not guilty to both charges. In his unsworn statement he denied committing any of the offences; he maintained that on the material day he was in his house and only left at 4:00 p.m. to watch a football match and returned home at 6:00 p.m. At around 8:00 p.m. three men came to his house and led him to the police station where he spent the night. He was later charged.

5. Convinced that the appellant had been caught red handed, the trial court convicted him of the offence of defilement and sentenced him to life imprisonment. The appellant preferred an appeal in the High Court against his conviction which was dismissed. Unrelenting, he has now filed the current appeal which is predicated on the grounds that the learned Judge erred by-

- ***Failing to appreciate that the prosecution's case was marred with inconsistencies.***
- ***Failing to appreciate that there was no medical evidence linking him to the offence he was convicted of.***
- ***Failing to appreciate that the age of the minor was not proved to the required standard.***
- ***Failing to appreciate that the appellant was not given a fair trial.***
- ***Rejecting the appellant's alibi defence.***

6. At the hearing of the appeal, the appellant appeared in person while the State was represented by Ms. Maina, Senior Prosecution Counsel.

7. The appellant relied on his written submissions which were on record. He submitted that his right to a fair hearing under **Article 50(2)(c)** of the **Constitution** was violated during the trial because the prosecution had failed to avail to him copies of witness statements and exhibits. As such, he was not able to prepare a suitable defence. He contended that the contradictions in the prosecution's case ought to have been resolved in his favour. In his view, the age of the minor which was a crucial component to the charges against him had not been proved simply because the prosecution failed to produce the minor's birth certificate. He also faulted the learned Judge for failing to consider his alibi defence and urged the Court to allow the appeal.

8. On her part, Ms. Maina submitted that there was overwhelming evidence against the appellant; firstly, he was caught red handed by F and J and secondly, Dr. Shabaan confirmed that the minor had been defiled. Learned counsel contended that the P3 form was sufficient evidence of the minor's age at the material time. She prayed for the appeal to be dismissed.

9. We have considered the record, the grounds of appeal, the submissions tendered and the law. By dint of **Section 361(1)(a)** of the **Criminal Procedure Code** the jurisdiction of this Court on a second appeal such as the one now before us is confined to matters of law. In the case of **Dzombo Mataza vs. R [2014] eKLR** this Court succinctly observed;

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

10. An integral component of a fair trial is that an accused person ought to be furnished with all the details and evidence against him at the earliest opportunity to enable him/her prepare a suitable defence. From the record, we note that at the first date of hearing on the 28th March, 2012, the appellant requested for copies of witness statements and other relevant documents. As a result the trial court adjourned the hearing and directed the prosecution to avail the copies to the appellant. We have perused the record and it is clear the appellant never raised the issue again, which suggests that he was duly supplied with the

documents as ordered by the court. Consequently, we have no basis to hold that the appellant's constitutional rights were violated as he claims.

11. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. It is not in dispute that the minor was defiled as verified by Dr. Shabaan. However, the appellant contends that there was no medical evidence connecting him to the offence. As pointed out by this Court time after time, medical or DNA evidence is not the only way in which a charge of defilement can be proved against an accused. In Kassim Ali vs. Republic [2006] eKLR it was stated:

"... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

The same was further reaffirmed in George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012 (unreported) that-

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

12. In this case the minor gave a detailed account of what transpired between her and the appellant. Her evidence was further corroborated by F and J who caught the appellant in the act. The trial court which had the opportunity to observe the demeanour of these witnesses found them to be truthful and we see no reason to interfere with that finding. See Samuel Muriithi Mwangi vs. R [2016]. It cannot therefore be said that there was no evidence connecting the appellant to the offence and the ground of appeal accordingly fails.

13. Expounding on the issue of contradictions, the appellant stated that on the one hand, the minor testified that after she had been defiled she went back to the house and informed her mother, J K P (PW2), what had transpired. On the other hand, J testified that she heard noise coming from the latrine and she came out of the house. She found the appellant being held by some boys who informed her about the incident. As noted by the Uganda Court of Appeal in Twehangane Alfred vs. Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. As that court put it:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

14. Similarly in Philip Nzaka Watu vs. R [2016] eKLR this Court in its own words expressed itself thus-

"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

Like the trial court, we find that the said inconsistency which related to how the minor's mother learnt about the incident neither went to the root of the prosecution's case nor prejudiced the appellant's defence.

15. The significance of establishing the age of a victim of defilement was emphasized in *Hadson Ali Mwachongo vs. R* [2016] eKLR in the following terms: -

“It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v. Republic (2010) eKLR this Court stated as follows:

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...”

16. The only evidence adduced in respect of the minor's age was by Dr. Shabaan who indicated in the P3 form that she was 11 years old at the material time. Was this sufficient proof of age? **Rule 4** of the **Sexual Offences Rules of Court** stipulates that,

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

The Sexual Offences Act adopts the definition of a child in the **Children Act**.

Section 2 of the **Children Act** defines "age" as,

"Where actual age is not known means the apparent age".

17. Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the **Sexual Offences Act**. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu vs. R* [2016] eKLR, observed that –

“As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

Having taken the foregoing in mind, it is our considered view, that the minor's apparent age was proved by the P3 form.

18. Last but not least, we find that the foregoing evidence displaced the appellant's alibi hence the two lower courts did not err in disregarding the same.

19. Accordingly, we see no basis of interfering with the concurrent findings of the two courts below. This appeal lacks merit and we accordingly order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of February, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR