



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 54 OF 2015

BETWEEN

ABDALLA KHASO KOMBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 4th June, 2015 in

H.C.C.R.A No. 29 of 2014)

JUDGMENT OF THE COURT

1. **A. M. A.** (PW1) suffered for the better part of her childhood from epilepsy and her family had run out of options of finding a cure. In that state of desperation, A.M.A's mother was informed that **Abdalla Kahaso Kombe** (the appellant), a herbalist popularly known as '*mganga*', who was based at Mnarani could cure her daughter. In a heartbeat she organised for A.M.A to travel to her aunt's place, **U J H** (PW3), which was close to the herbalist. On 6th June, 2016 A.M.A was accompanied to the appellant's home by her grandmother, **A S** (PW2), and U.

2. Upon arrival the appellant informed them that he performed all his treatment procedures at the beach. Since U was expectant the appellant managed to convince her and A to take a motorcycle under the guise that it would be a long distance for U to walk. The appellant and A.M.A used a shortcut to the beach and arrived before the rest. He took A.M.A into a cave and instructed her to undress and cover herself with a black cloth. He then directed her to lie down facing up and covered her eyes with a red cloth.

3. According to A.M.A, the appellant begun caressing her while chanting, '*Huyu na apoe! Huyu na apoe!*'. When she tried to resist, the appellant warned her not to because it was part of the treatment process. The appellant then proceeded to defile her and when he was done he instructed her to put on her clothes and they left the cave. Meanwhile, U and A who had arrived at the designated area saw the appellant and A.M.A coming from the opposite direction. They were shocked when the appellant told them he had already finished treating A.M.A.

4. The four of them headed back to the appellant's house wherein the appellant instructed U and A to wait outside while he gave A.M.A. medication. Inside the house the appellant gave her Kshs.100/=. As they left both U and A noticed that A.M.A's demeanour had changed, she was quiet and unhappy. It was while she was in her aunt's house that she informed U what had transpired.

5. The matter was reported to the police the following day and the appellant was arrested. A.M.A underwent medical examination which confirmed that her hymen had been broken. Thereafter, the appellant was charged with one count of defilement contrary to **Section 8(1)** as read together with **Section 8(4)** 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**.

6. The particulars of the main count were that on 6th June, 2012 at Mnarani beach in Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of A.M.A a child of aged 17 years. On the alternative charge, the particulars were that on the above mentioned date and place the appellant intentionally and unlawfully touched the breasts, buttocks and vagina of A.M.A a child aged 17 years.

7. In his sworn statement, the appellant denied the charges against him. He testified that he neither knew the complainant nor her relations. He was a chef by profession and not a herbalist. He claimed that he had been framed with the offence.

8. Faced with the foregoing evidence, the trial court was convinced that the prosecution had established its case against the appellant beyond reasonable doubt. As such, the appellant was convicted of the offence of defilement and sentenced to 15 years imprisonment. As would be expected, the appellant filed an appeal in the High Court which was dismissed vide a judgment dated 4th June, 2015. It is that decision that has provoked this second appeal before us which is premised on the grounds that the learned Judge erred in law by failing-

- **To appreciate that the appellant's conviction was based on a defective charge sheet.**
- **To appreciate that the complainant's age had not been ascertained as required under Section 8(4) of the Sexual Offences Act.**
- **To appreciate that the prosecution's evidence was marred with contradictions.**
- **To take into account the alibi defence put forth by the appellant.**

9. At the hearing the appellant appeared in person while Mr. Daniel Wamotsa, Senior Prosecution Counsel, appeared for the state.

10. The appellant relying on his written submissions argued that the charge sheet as drawn was defective. It did not reflect the actual offence which he was charged with. In particular, the charge was framed as,

“Defilement contrary to Section 8(1)(4) of the Sexual Offences Act...”

The same hindered the appellant from putting forth an adequate defence. Moreover, the charge sheet was contrary to the evidence adduced at the trial court. The prosecution witnesses testified that they had gone to see ‘*mganga*’ to treat the complainant and that it was he who defiled her; they never referred to the appellant’s name. Yet the charge sheet described the accused as Abdalla Kahaso Kombe. In that regard, he referred to this Court’s decision in ***Yongo vs. Republic [1983] KLR***.

11. He contended that ascertaining a victim’s age in a case of defilement was integral to the sentencing of a convicted person. In this case, the complainant’s age was not established. Elaborating further, he submitted that the complainant had testified she was 18 years whilst the P3 form indicated she was 17 years old. There was no evidence to ascertain the complainant’s age let alone her allegation that she had turned 18 years old a few months after the incident.

12. Not only was there no medical evidence connecting the appellant to the offence contrary to **Section 36** of the ***Sexual Offences Act*** but there was also no evidence that the complainant had been defiled. He added that the prosecution failed to produce crucial exhibits, *to wit*, the black cloth and red cloth which were used during the incident as well as the medication allegedly given to the complainant.

13. Giving instances of inconsistencies, he stated that while A.M.A testified that she first lay on the ground and then the appellant removed his clothes. Cpl. Dorcas Kagwiria (PW5) in contrast testified that A.M.A first removed her clothes and then lay on the ground. On one hand, A testified that while they waited for the appellant and A.M.A there were fishermen at the beach. On the other, hand Cpl. Dorcas testified that there were no fishermen at the beach at the material time. The inconsistencies went to show that the prosecution’s evidence was unsafe.

14. Lastly, he argued that the two lower courts failed to take into consideration his alibi defence. We understand the appellant to mean that his testimony to the effect that he was a chef and not a herbalist was his alibi. He urged the Court to allow the appeal on those grounds.

15. In opposing the appeal, Mr. Wamotsa begun by stating that the error in citing the relevant sections of the law in the charge sheet was not fatal. This was because the appellant knew the charges he faced evidenced by the way he cross-examined the prosecution witnesses. The said defect is curable under **Section 382** of the ***Criminal Procedure Code***. He submitted that the complainant was 17 years old when the incident occurred. The trial court correctly relied on the P3 form to ascertain her age. There were no inconsistencies with regard to her age and the complainant was also clear on her age. In his view, the High Court adequately addressed the said issue. Towards that end, counsel cited the case of ***Stephen Nguli Mulili vs. Republic [2014] eKLR***.

16. Emphasizing that the evidence against the appellant was overwhelming, Mr. Wamotsa urged that A.M.A, A and U gave a clear and consistent account of what transpired on the material day. The incident occurred during daylight hence the said witnesses correctly identified the appellant. In addition, the P3 form corroborated that A.M.A was defiled. He urged the Court not to interfere with the concurrent findings of the two lower courts.

17. We have considered the record, submissions by counsel and the appellant as well as the law. As stated by this Court many times before, we will not normally interfere with 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 the findings. See ***Chemangong vs R [1984] KLR 611***.

18. The applicable test by an appellate court when determining firstly, the existence of a defective charge, and secondly, its effect on an appellant’s conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of ***JMA vs. Republic [2009] KLR 671***, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

19. Applying this principle we are satisfied that in the instant case, the error in citing the provisions of the law in the charge sheet did not

prejudice the appellant. It is clear that he knew the charges against him. Equally, we find the discrepancies as to at what point in time A.M.A was undressed and whether there were fishermen at the beach did not go to the root of the appellant's conviction. Accordingly the charge sheet and the inconsistencies are curable under **Section 382** of the **Criminal Procedure Code**.

20. **Section 8 (1)** of the **Sexual Offences Act** defines the offence of defilement in the following manner:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Therefore, penetration is an essential ingredient and ought to be established in respect of any charge of defilement. **Section 2** of the **Sexual Offences Act** defines penetration thus,

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

Contrary to the appellant's allegations, the evidence is clear that there was penetration on A.M.A. The P3 form which was produced by **Dr. Faraj Taler** (PW4) confirmed that her hymen was broken.

21. As to the identity of the perpetrator, the only available evidence was that of A.M.A. It is trite that under the proviso to **Section 124** of the **Evidence Act**, a trial court can convict on the sole evidence of the victim of a sexual offence. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. See **Arthur Mshila Manga vs. Republic [2016]** eKLR. The trial court found that A.M.A was a reliable witness and we see no reason to interfere with the same. She gave a detailed description of the events and she was able to recognize the appellant as the perpetrator. The fact that she was blind folded when the incident occurred did not negate her evidence. For the simple reason that it was only the appellant and herself who were in the cave. She even repeated the ordeal to U who together with A testified that the material time she was with the appellant. Similarly, the fact that none of these witnesses mentioned the appellant by name when giving their respective testimonies and referred to 'mganga' did not negate the identification of the appellant. These witnesses were clear that 'mganga' referred to none other than the appellant.

22. It is not in doubt that the age of the victim is also 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. See **Kaingu Elias Kasomo vs. Republic- Criminal Appeal No. 504 of 2010 (unreported)**. This Court appreciated in **Tumaini Maasai Mwanya vs. Republic- Criminal Appeal No. 364 of 2010 (unreported)** that the proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of meting out appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.

23. A.M.A testified that when the incident occurred she was 17 years and the P3 corroborated as much. In our view, this clearly indicates that at the time of the incident she was below 18 years of age which is sufficient to establish the offence of defilement.

24. We cannot help but note that A.M.A's actual age was not established by any documentary evidence. 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. Republic [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.”

Taking into account the foregoing, we see no reason to interfere with the concurrent findings of fact by the two courts below that A.M.A's apparent age at the time of the incident was 17 years.

25. Despite the fact that there was no medical evidence linking the appellant to the offence, the same did not weaken the prosecution's case. In finding so, we are guided by **Matano Ngao Nzuma vs. Republic – Criminal Appeal No. 31 of 2010 (unreported)** wherein while considering **Section 36(1)** of the **Sexual Offences Act** which provides as follows:

“Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

this Court in its own words expressed;

“Our reading of the above section reveals that there is no mandatory requirement that an accused person charged with a sexual offence must be subjected to a DNA sampling unless the court believed it was a necessary step to take.”

26. In the end, the prosecution's evidence dislodged the appellant's defence of alibi and placed him at the scene. In *Victor Mwendwa Mulinge vs. Republic [2014] eKLR* this Court held,

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

27. The upshot of the foregoing is that we find no basis for us to interfere with the concurrent findings of the two courts below. We find the conviction and sentence against the appellant well founded in law, and consequently dismiss this appeal and uphold the conviction and sentence of the trial court.

Dated and delivered at Mombasa this 12th day of October, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR