



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 26 OF 2016

BETWEEN

SAFARI CHARO KOYO APPELLANT

AND

REPUBLIC RESPONDENT

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

At Malindi (Meoli, J.) dated 25th November, 2013

in

H. C. Cr. A No. 66 of 2010)

JUDGMENT OF THE COURT

1. On 13th October, 2006 at around 1:00 p.m. while PK (PW1) a minor was on her way home from school she ran into a man who she identified as **Safari Charo Koyo**, the appellant. The appellant grabbed her by the throat and carried her into a nearby bush. He placed her on a tree stump and brandished a knife ordering her not to scream. He tore her shirt, skirt and panties using the knife. He then removed his trousers, covered her mouth with his hand and proceeded to defile her. When he was done, he stabbed PK on both her legs with the knife and left.

2. Fortunately, PK mustered the strength she had and dragged herself home where she found her mother, A D K (PW2). A noticed that her daughter was struggling to walk and upon close examination observed that she was bleeding from her legs and vagina. PK informed her about what had transpired. A together with her husband, D K (PW3), reported the incident to the area sub-chief and thereafter at Malindi police station. PK was taken to hospital where she was examined and received treatment.

3. Subsequently, the appellant was arrested and charged before the Chief Magistrate's Court at Malindi with two counts. The first was for the offence of defilement contrary to **section 8 (3)** of the Sexual Offences Act. The particulars of which were that on 13th October, 2006 at Ganda Location in Malindi District within the then Coast province, the appellant committed defilement by causing penetration with a child namely PK of 13 years.

The second count was for the offence of induced indecent act contrary to **section 6 (a)** of the Sexual Offences Act. As rightly observed by the learned Judge the charge ought to have been preferred in the alternative. However, nothing much turns on it as the appellant was convicted of the main charge. The particulars were that on the above mentioned date and place, the appellant intentionally and unlawfully compelled or induced or caused PK to engage in an indecent act with him.

4. The appellant denied the charges against him and gave a sworn statement. He testified that on the material day he was at a building site at Mayungu where he was working as a mason. On the day of his arrest, he had answered summons from sub-chief to appear in his office. He denied committing the offence before the sub-chief and was later taken to Malindi police station and charged. He claimed to have been framed by the minor's mother, A, who bore a grudge against him for separating with her sister. He called Ziro Nyanje (DW2) as a witness. Ziro testified that on the material day he was with the appellant at a building site from 8:00 a.m. until 4:00 p.m. when they left.

5. The trial court weighed the evidence before it and found that the prosecution had proved its case against the appellant. The trial court convicted the appellant for the offence of defilement and sentenced him to 20 years imprisonment. Aggrieved with both his conviction and sentence, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 25th November, 2013. It is that decision that is the subject of the second appeal before us. The appeal is predicated on the grounds that the learned Judge erred by:

a) Finding that the evidence of recognition was satisfactory.

b) Finding that the offence of defilement had been proved to the required standard against the appellant.

c) Failing to appreciate that the prosecution had failed to call crucial witnesses and the learned Judge ought to have drawn an adverse inference.

d) Failing to consider the appellant's defence.

6. At the hearing of the appeal the appellant appeared in person while Mr. Monda, Senior Assistant Director of Public Prosecution, appeared for the state.

7. The appellant relied on his written submissions through which he contended the evidence of recognition was not sufficient to justify his conviction. According to him, PK's evidence was full of contradictions. At one point she testified that she knew the appellant prior to the incident and recognized him. Later in her evidence she stated that she did not know the appellant's name but that it was one Katana who told her his name. The same created an impression that she really did not know the appellant as she claimed. Besides, Katana was never called as a witness to verify her testimony.

8. Relying on the case of ***Kaingu Elias Kasomo vs R - Criminal Appeal No. 504 of 2010 (unreported)***, he argued that proof of PK's age was crucial to establishing the offence and justifying his conviction. As far as he was concerned the prosecution had not established her age. On one hand, PK and her mother testified that she was 16 years. On the other hand, D, PK's father, testified that she was 14 years and P3 form indicated she was 13 years old. Documentary evidence in the form of a birth certificate ought to have been produced.

9. In addition, the medical evidence was not conclusive on whether PK had been defiled or not. Dr. Ali Hussein (PW4) testified that it was not clear from the P3 form whether PK's hymen had been broken. All in all the prosecution had failed to prove its case to the required standard.

10. Mr. Monda, on his part, conceded the appeal on the ground that PK's age had not been proved. He asked us to substitute the charge of defilement with that of indecent assault and convict the appellant of the same.

11. We have considered the record, submissions by counsel and the appellant as well as the law. The fact that Mr. Monda conceded the appeal does not render the same an open and shut appeal. We still have to exercise our jurisdiction as the second appellate court. 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***.

12. **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.”

Penetration is an essential ingredient and ought to be established in respect of any charge of defilement. In this case the P3 form indicated that PK’s hymen was rugged. Dr. Ali who produced the P3 form was unable to tell whether PK’s hymen was broken or not since it was Dr. Tunge who had examined her and filled in the P3 form.

13. **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;...

14. It follows that proof of partial penetration suffices to establish the offence of defilement. In our considered view the term ‘rugged’ which was used to describe the observation made by Dr. Tunge on PK’s hymen, clearly suggested that there was some interference with the same. In our opinion that sufficed as partial penetration within the Sexual Offences Act.

15. As to the identity of the perpetrator, the only available evidence was that of PK. 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 PK 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 who was known to her. She even gave details of what he had worn on the material day. In our opinion, the fact that she did not know the appellant’s name does not suggest that she was not familiar with the appellant. It is quite possible for a person to be familiar with a person without knowing his/her name. From the record, it is clear that PK described him to her mother and the sub-chief as the perpetrator.

16. Equally, the fact that she was told the appellant’s name by one Katana did not in any way water down the evidence of recognition. We find that the failure to call the said Katana as a witness did not prejudice the appellant or the prosecution’s case. It has been said time without number that proof of a fact is not dependent on the number of the witnesses called but rather on the weight and cogency of the evidence adduced (no matter the number of witnesses). It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to draw an adverse inference that if certain relevant evidence which should have been tendered was not tendered or is withheld, then such evidence if tendered would have been adverse to the party who should have otherwise tendered it, in this case, the prosecution. See ***Bukenya & Others vs Uganda [1972] E. A. 549***.

In the circumstances of this case, we cannot discern such an impropriety.

17. 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. See ***Kaingu Elias Kasomo vs Republic (supra)***. This Court appreciated in ***Tumaini Maasai Mwanja vs R, Mombasa Cr. A. 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.

18. PK and her mother testified that at the time their evidence was being taken by the trial court on 21st May, 2008 PK was 16 years old which would mean that at the time of the offence on 13th October, 2006 she would have been between 13 years and 14 years old depending on the month she was born. On the other hand, D, PK's father maintained that PK was 14 years old while the P3 form indicated her estimated age was 13 years old. This clearly indicates that at the time of the incident PK was below 18 years of age which is sufficient to establish the offence of defilement.

19. We cannot help but note that PK's actual age was not established. 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.”

Taking into account the foregoing, we see no reason to interfere with the concurrent finding of fact by the two courts below that PK's apparent age at the time of the incident was 13 years.

20. In the end, the prosecution's evidence dislodged the defendant's defence of alibi and placed him at the scene. In that regard, we draw guidance from the sentiments of this Court in Victor Mwendwa Mulinge vs R, [2014] eKLR;

“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 v. 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.”

21. The upshot of the foregoing is that we find that the conviction and sentence of the appellant is well founded in law. We hereby dismiss the appeal.

Dated and delivered at Malindi this 5th day of October, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR