



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.

CRIMINAL APPEAL NO. 109 OF 2014

BETWEEN

WILLIAMSON SOWA MBWANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Mombasa, (Muya, J.) dated 4th March 2014

in

H.C.CR.A. NO. 213 OF 2012)

JUDGMENT OF THE COURT

The appellant, *Williamson Sowa Mbwanga* was convicted on 28th March 2012 by the Senior Principal Magistrate's Court, Voi, for the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act, No. 3 of 2006** and sentenced to 15 years imprisonment. The High Court at Mombasa (*Muya, J.*) dismissed his first appeal on 4th March 2014, prompting him to institute the second appeal now before us.

The particulars of the offence facing the appellant were that between the months of July and October 2010, at *[particulars withheld]* Village in Taita Taveta County, he unlawfully caused his genital organ to penetrate the genitalia of **PM**, a girl aged 17 years old. He also faced a second count, which is of no moment in this appeal, of committing an indecent act with a child contrary to **section 11(1)** of the same Act.

The evidence adduced by the prosecution was rather straightforward. **PM** was at the material time aged 17 years old and a primary school pupil at *[particulars withheld]* Primary School. Her age was proved by her birth certificate S/NO. A *[particulars withheld]* (Exb 2), which showed that she, was born on 3rd May 1993. **PM**'s evidence was that between July and October 2010, the appellant, a 30-year-old *matatu* driver operating between Ghazi and Voi sneaked into her father's home and ultimately into her bedroom (through the window) on three different nights and had sex with her. As a result, **PM** conceived and gave

birth to a baby boy a few months after the appellant was charged.

When PM's parents, **PMM (PW3)** and **JM (PW4)**, learnt of her pregnancy, they reported the matter to the Chief, Ghazi Location, the District Children's Officer, Voi and **PC (W) Bridgit Asanta (PW 5)** of the Children and Gender Desk at Voi Police Station. **Dr. Charo Wilson (PW1)** of Moi District Hospital, Voi examined PM and found that she was expectant with a gestation period of about 35 to 40 weeks and a foetus of height corresponding to 36 weeks. The witness concluded that PM had an underage pregnancy.

Put on his defence, the appellant elected to give sworn evidence. The essence of his defence was that he was married with two children and that he had been forced to admit that he was responsible for PM's pregnancy because he had learnt that her father was very harsh and could even cut him with a machete. He requested for DNA test to determine the paternity of PM's child.

The trial court held that at the material time PM was 17 years old and therefore a child within the meaning of the Sexual Offences Act. The Court also believed PM's evidence that she had sex on three times with the appellant, who was responsible for her pregnancy.

Upon dismissal of his first appeal, the appellant filed this second appeal impugning the judgment of the High Court for its:

- i. failure to hold that the trial court did not comply with section 36(1) of the Sexual Offences Act;*
- ii. failure to hold that he was not accorded a fair trial because he was not given witness statements contrary to Article 50 (2) (j) of the Constitution; and*
- iii. failure to consider his defence.*

At the hearing of the appeal, the appellant elected to rely on his written submissions in which he argued all the grounds of appeal globally. It was the appellant's contention that whilst there was no doubt PM was defiled and impregnated; there was no cogent evidence on who was responsible for her defilement and pregnancy. In that case, he submitted, it was essential for the trial court to invoke section 36(1) of the Sexual Offences Act and order that the appellant be subjected to DNA testing to put the matter beyond reasonable doubt.

Advancing that argument, the appellant drew attention to the record of the trial court, which shows that he had requested for DNA testing to determine the paternity of PM's child. He also referred to the evidence of PW1 who told the court that he had recommended DNA testing, after the birth of the child, to determine its paternity. He posed the question why DNA testing was not conducted while the medical doctor himself had recommended it.

Next the appellant submitted that he was not given witness statements during his trial although he had asked for them. Accordingly, he contended, he was denied an opportunity to prepare his defence. Lastly the appellant argued that the trial and the first appellate courts had failed to consider his sworn defence, which he described as unshaken or watered down by the prosecution. He accordingly asked us to allow his appeal on the basis of the above grounds.

Mr. Peter Kiprop, Principal Prosecution Counsel opposed the appeal contending that the appellant was properly convicted on the basis of cogent evidence. Counsel submitted that DNA testing under section 36(1) of the Sexual Offences Act was discretionary and that even in the absence of DNA testing, there was cogent evidence on oath by PM, which the two courts below believed, upon which the appellant was convicted for defilement. Mr. Kiprop further argued that the appellant was focusing on the issue of paternity rather than defilement, which was the charge facing him.

Regarding witness statements, counsel submitted that the issue was not raised before the trial court and that on several occasions the appellant had indicated to the court that he was ready to proceed with the hearing and duly cross-examined the prosecution witnesses. We were urged to find that the appellant

understood perfectly the charge and the proceedings and actively participated in the trial and that he was occasioned no prejudice.

As regards consideration of the appellant's defence, counsel submitted that the same was duly considered by the two courts below and found incapable of displacing the prosecution case. The first appellate court, it was argued had properly considered the appellant's defence and found that he was only raising the issue of paternity. Learned counsel urged us to find that the appeal has no merit and to dismiss the same in its entirety.

This is a second appeal, which by dint of **section 361** of the **Criminal Procedure Code** is limited to consideration of issues of law only. Consequently the Court will not interfere with the concurrent findings of fact by the trial court and the first appellate court unless it is demonstrated that those two courts considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. (See **KARANI V. REPUBLIC (2010) 1 KLR 73**).

As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See **TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001**).

It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing,. In **ROBERT MUTUNGI MUMBI V. REPUBLIC, CR. APP. NO. 5 OF 2013 (Malindi)**, this Court stated thus regarding section 36(1) of the Act:

“Section 36(1) of the (Sexual Offences) Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

The import of the proviso to **section 124** of the **Evidence Act** is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in **GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 of 2012 (Nyeri)**:

“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.”

In this case, the trial court carefully analyzed the evidence of PM and was satisfied that taken together

with the rest of the prosecution case, it was consistent and coherent that the appellant had an affair of a sexual nature with PM. Indeed the court also noted that the appellant had not in his cross-examination of PM and in his defence denied having had sexual relations with PM, his denial being only restricted to responsibility for the pregnancy. We are accordingly satisfied that there was sufficient evidence on the basis of which the two courts below found the appellant guilty of defilement, even in the absence of DNA testing.

We agree with counsel for the respondent that the issue of witness statements was not raised in the two courts below and is being raised for the first time in this appeal. It would have been preferable if the issue was raised in the courts below to give us the benefit of the considered view of the trial court and the first appellate court. Be that as it may, it cannot be gainsaid that the appellant has a constitutional right under **Article 50 (2) (j)** to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. That right must be respected and upheld at all times.

From the record, we are however unable to conclude that the appellant was denied access to the witness statements because he did not raise the issue at all. During his trial the appellant routinely indicated that he was ready to proceed with the hearing, without indicating, as may be expected, any handicap arising from denial of access to witness statements. Several times he applied for adjournment, not because of lack of access to prosecution witnesses statements, but to call his own witnesses, which applications were granted. We have absolutely nothing on record upon which we can find violation of the appellant's fair trial rights.

The last issue in this appeal is the alleged failure by the two courts below to consider the appellant's defence. This compliant is, again, not borne out by the record. In its judgment the trial court first set out the defence advanced by the appellant as follows:

“The accused in his defence denied that he was responsible for the pregnancy but did not categorically deny that he had an affair with the complainant. He testified that he had admitted responsibility because he had been threatened that if he does not admit, the complainant's (sic) would harm him.”

The court considered that defence and concluded that all the appellant was denying was being responsible for PM's pregnancy. Considering the case in its entirety, the court concluded that the appellant's defence could not stand in light of the evidence adduced by the prosecution.

The first appellate court also carefully considered the defence advanced by the appellant and concluded that he did not seriously challenge the fact that he had sexual intercourse with the complainant, but was only challenging the paternity of PM's child. We are satisfied that the two courts below did in fact consider the appellant's defence and found it unbelievable in light of the prosecution evidence. Contrary to what the appellant would have us believe, the defence was not ignored offhand, but was duly considered and found to have no merit.

Taking all the foregoing into account, we are satisfied that the appellant was properly convicted of the offence of defilement and there is no basis for interfering with the concurrent findings of the two courts below. Accordingly, this appeal fails and is hereby dismissed.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR