



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 24 OF 2014

BETWEEN

ARTHUR MSHILA MANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 9th October 2013

in

H.C.C.R.A. No. 32 of 2012)

JUDGMENT OF THE COURT

The **appellant, Arthur Mshila Manga** was on 22nd February 2012 convicted by the Senior Resident Magistrate's Court at Wundanyi for the offence of defilement contrary **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act** and sentenced to imprisonment for 15 years. Aggrieved by the decision, he unsuccessfully appealed to the High Court at Mombasa. He now brings this second appeal before us premised on 5 grounds of appeal, which we shall consider later in this judgment.

Although the appellant was charged with defilement under the Sexual Offences Act, the particulars of the charge were stated as follows:

“Arthur Mshila Manga: on the 14th day of February 2010 at [particulars withheld] Wundanyo Location in Taita District within Coast Province had unlawful carnal knowledge of JM a girl aged 17 years”.

The appellant was also charged with an alternative count of “Indecent Assault” on a female contrary to section 11(1) of the Sexual Offence Act, whose particulars were given as follows:

“On the 14th day of February 2010 at [particulars withheld], Wundanyi Location in Taita District within Coast Province unlawfully and indecently assaulted JM by touching her private

part namely vagina.”

The substance of prosecution case was that on Valentines Day, 2010, at about 4.00 pm, **JS (PW2)** sent her daughter JM, a Form 2 girl aged 17 years as of that date, to collect a phone that was being charged at Wundanyi Market and to buy vegetables. On her way back home after running the errands, JM encountered the appellant at the entrance of [particulars withheld] . He requested her to accompany him to his house, which she acceded to and once there, they had sexual intercourse.

By the time JM got home, it was 9.30 pm. Confronted by her furious parents as to where she had been, she confessed to have met and had sexual intercourse with the appellant. JM’s father, who did not testify, reported the matter at Wundanyi Police Station and JM was issued with a P3 Form. Subsequently JM was asked to call the appellant, whose phone number she had, and request a meeting at a petrol station. The appellant was arrested when he turned up for the meeting and was subsequently charged as aforesaid.

Jenliza, a medical officer at Wundanyi Health Centre, examined JM on 15th February 2011. By the time the appellant was tried, the said Jenliza could not testify as she was away on study leave. Her colleague **David Gona (PW3)** who was conversant with her signature produced her report in evidence. We shall say more about that report later in this judgment. PW3 also produced in evidence a Child Welfare Card that indicated JM was born on 21st March 1993.

Besides JM and PW3, the only other witnesses who testified were PW2 and Stella Wanjiru (**PW4**), the investigating officer. PW2 confirmed having sent JM on the errands; her late arrival home; and confession that she had engaged in sexual intercourse with the appellant. She however told the court that she could not remember when JM was born. PW4’s evidence was formal and short confirming the report of the defilement at Wundanyi Police Station; the recording of statements; and charging of the appellant.

The trial of the appellant started before **F. Munyi**, Resident Magistrate who heard the evidence of JM and PW2. However for reasons that are not disclosed in the record, the trial started *de novo* on 16th May 2011 before **K. I. Orenge**, Resident Magistrate. Put on his defence, the appellant elected to make an unsworn statement and called no witnesses. His defence was that upon returning from Mwatate to Wundanyi on the material day, he had gone to pick up a passenger at a petrol station where he was arrested and charged with the offences, which he had not committed.

Before us, the appellant prosecuted his appeal in person and relied on his written submissions. Drawn by a layman, the appellant’s submission, understandably, lack focus and coherence. Indeed as pointed out by learned counsel for the respondent, most raised issues of fact. However, the appellant’s grounds of appeal and his written submissions do raise some pertinent issues, the substance of which we summarize as follows. Firstly that JM’s age was not proved beyond reasonable doubt as required on the authority of **KAINGU ELIAS KASOMO V. REPUBLIC, CR. APP. NO. 504 of 2010** and that he is entitled to the benefit of doubt regarding her age.

Secondly the appellant also contends that the medical evidence did not confirm that JM was defiled, because it merely noted the absence of hymen and an open vagina. Thirdly, it is submitted that the prosecution did not call important witnesses, particularly regarding the circumstances of his arrest. Fourthly the appellant argues that the prosecution did not prove its case beyond reasonable doubt, as there was no independent evidence to confirm that JM was ever in his house. Fifthly and lastly the appellant laments that both the trial and the first appellate courts erred in relying on the evidence of JM alone while it was plainly obvious that she was not a straightforward witness or a witness of truth.

The State opposed the appeal through **Mr. Kiprop**, learned Principal Prosecution Counsel. In his view, JM’s age of 17 years was sufficiently proved because it was disclosed in the charge sheet, JM herself testified that she was 17 years old and the Child Welfare Card, which was produced as an exhibit indicated her date of birth to be 21st March 1993, which translated to 17 years at the date of commission of the offence. Learned counsel concluded by submitting that both the evidence of JM and the medical evidence proved beyond reasonable doubt that JM had been defiled and further that the evidence of JM pointed to the appellant as the culprit. We were accordingly urged to find that the two courts below had

not erred in any manner and to dismiss the appeal as unmeritorious.

We have anxiously considered the record, the appellant's grounds of appeal, his written submission as well as the oral submissions on behalf of the respondent. As has been emphasized time without number, on a second appeal and by dint of section 361 of the Criminal Procedure Code, we limit ourselves to considerations of issues of law only and will be slow to interfere with the concurrent findings of the two courts below, unless we are satisfied that there was no evidence at all upon which the courts' findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it (**BONIFACE KAMANDE & 2 OTHERS V. REPUBLIC, CR APP NO. 166 of 2004**).

The appellant was entitled to expect the first appellate court to subject the evidence adduced before the trial court to a fresh and exhaustive examination and to that court's own decision on the evidence. The first appellate court was further obliged to weigh by itself conflicting evidence and draw its own conclusions, making allowance for the fact that the trial court had the distinct advantage of seeing and hearing the witnesses. (**OKENO V. REPUBLIC [1972] EA 32**).

Whether or not failure by the first appellate court to reappraise the evidence will result in the quashing of the conviction will depend on whether or not a failure of justice has been occasioned. (See **WANJIRU V. REPUBLIC [2008] 1 KLR (G&F) 1197**). Thus for example, in **MWAMUSI & ANOTHER V. REPUBLIC, CR. APP. NO. 226 OF 2002**, this Court, while allowing an appeal on account of the failure of the High Court to reappraise the evidence stated:

“In our view the omission by the High Court to reconsider the evidence, re-evaluate it and draw its own conclusion and the failure to give due consideration to each of the appellant's defences are fundamental errors. It is reasonably probable that the learned appellate judges would not have dismissed the appeals had they directed themselves appropriately.

Several issues of law have caused us considerable anxiety in this appeal, which the first appellate court ought to have noticed and addressed if indeed it subjected the evidence to fresh and exhaustive evaluation. The first relates to the charge upon which the appellant was convicted. The charge of defilement against the appellant was laid under section 8(1) as read with section 8 (4) of the Sexual Offences Act. Under those provisions, the offence is constituted by committing an act, which causes penetration with a child (a person under 18 years of age). The Act defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

In this case, instead of the particulars stating that the appellant had committed an act, which caused his genital organs to penetrate the genital organs of a child, JM, the particulars claimed that the appellant ***“had unlawful carnal knowledge of JM”***. There is no offence under the Sexual Offences constituted by having unlawful carnal knowledge whatever the phrase is now understood to mean. That terminology was previously employed in relation to some offences under ***Chapter XV*** of the ***Penal Code*** (offences against morality, such as rape and defilement), which were repealed by the Sexual Offences Act.

While we are aware that in **JOSEPHAT NJUE SOLOMON V. REPUBLIC (2010) EKLR** the High Court in Embu expressed the view that the use of the phrase ***“unlawful carnal knowledge”*** in the particulars of a charge of defilement under the Sexual Offences Act is an issue of semantics which did not prejudice the appellant, we respectfully think that the use of such archaic terminology in respect of an offence under the Sexual Offences Act does obfuscate the particulars of the offence to the prejudice of the appellant. In our view it does not fully and adequately convey the ingredients of the offence as defined in the Act. ***Section 137 (a) (iii)*** of the Criminal Procedure code requires that the particulars of the offence be set out in ordinary language, without use of technical terms. In this case, not only were the technical terms not drawn from the Sexual Offences Act, statute under which the appellant was charged, but were borrowed from a different statute.

The second issue relates to whether the prosecution proved beyond reasonable doubt that JM was indeed defiled by the appellant. As this Court stated in **JACOB ODHIAMBO OMUOMBO V. REPUBLIC, CR.**

APP. NO. 80 OF 2008 (KISUMU), penetration is a key ingredient of the offence of defilement and must therefore be satisfactorily proved. In concluding that the appellant had defiled JM, the trial court relied on the evidence of JM as the victim and the medical evidence adduced by PW3. In this regard the court stated:

“PW1 (JM) said she had sex with the accused. A P3 form was issued and it was established that she had been defiled.”

But did the medical evidence on record really establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3:

“No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the P3 form as PEX1.”

From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM herself.

It is trite that under the proviso to **section 124** of the **Evidence Act**, a trial court can convict on the evidence of the victim of a sexual offence alone. (See **MOHAMED V. REPUBLIC [2008] KLR (G&F), 1175** and **JACOB ODHIAMBO OMUOMBO V. REPUBLIC (supra)**). 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.

In accepting JM’s evidence that the appellant had defiled her, the trial court merely stated:

“The complaint gave very consistent evidence which was corroborated by other prosecution witnesses”.

Had the trial court taken time to consider the evidence on record closely, and had the first appellate court exhaustively reappraised the evidence, as it was its bounden duty to do, the two courts could easily have realized that JM’s evidence was not so consistent after all. In fact, her evidence was downright contradictory in material particulars. For example, when she testified under oath on 2nd September 2010, about 6 months after the alleged offence, her evidence was that she had met the appellant *for the very first time* the day he defiled her. In other words, a stranger defiled her.

But when she testified again under on 16th May 2011 some 15 months after the date of the offence, her story changed drastically when she claimed to have known the appellant before the commission of the offence and that indeed he was her boyfriend. We agree with the appellant that such fundamental disparities in the evidence of the JM regarding a material fact in the case, without any explanation, cast a reasonable doubt on the veracity of her evidence. In **NDUNGU KIMANI V. REPUBLIC [1979] KLR 282**, this Court aptly observed:

“The witness in a criminal case upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept the evidence.”

Another patently erroneous statement by the trial court, which the first appellate court ought not to have missed if it had indeed subjected the evidence to fresh and exhaustive examination, was the conclusion

that PW3 was the clinical officer who completed the P3 form that established that JM had been defiled. We have already stated that the P3 form had no such conclusion. But secondly it was not even filled by PW3 as the trial court claimed. Jenliza is the one who examined JM and filled the P3 form, with PW3 merely produced it in evidence in the absence, on study leave, of the maker whose signature he was conversant with.

From all the above unsatisfactory aspects of the trial of the appellant, and the manner in which the first appellate court reappraised the evidence, we are satisfied that this appeal has considerable merit. Accordingly we hereby allow it, quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully detained. It is so ordered.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR