



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 26 OF 2014

BETWEEN

JOHN NDEMI EMMANUEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 20th September 2013

in

H.C.C.R.A. No. 155 of 2012)

JUDGMENT OF THE COURT

When he rose to address the Court at the hearing of this appeal, **Mr. Yamina**, learned Principal Prosecution Counsel, conceded the same. The concession notwithstanding, we are obliged to consider the appeal and satisfy ourselves that the concession is well founded. As the Court stated in **Norman Ambich Miero & Another v. Republic, Cr. App. No. 279 of 2005 (Nyeri)**:

“We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants.”

(See also, **Godfrey Ngotho Mutiso v. Republic, Cr. App. No. 17 of 2008**).

On 19th July 2012, the Senior Resident Magistrate’s Court, Wundanyi, convicted **the appellant, John Ndemi Emmanuel** of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act (the Act)** and sentenced him to 20 years imprisonment. As the child he was alleged to have defiled was 3 years old, clearly that was an illegal sentence because the mandatory sentence prescribed by section 8(2) of the Act for defilement of a child of less than 11 years is life imprisonment. **Muya, J.** dismissed the appellant’s first appeal on 20th September 2013 and curiously upheld the sentence of 20 years as lawful. Being dissatisfied with the decision of the High Court, the appellant preferred the current appeal.

The particulars of the offence for which he was convicted stated that on December 2011, in **Taita-Taveta County**, the appellant caused his penis to penetrate the anus of **AN**, a boy aged 3 years. He was also charged with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the Act, but was acquitted of that offence. **CM**, the victim's 10-year-old sister, **AK**, his 12-year-old brother and **Restituta Mghoi (PW6)**, the clinical officer, adduced the critical evidence for the prosecution. The record indicates that the victim was not able to talk properly on account of his age and therefore did not testify. The sworn evidence of **CM**, given after a *voire dire*, was that on the material day at about 9.00 am, the victim went to the home of the appellant where he stayed for about two hours. When he came back, he had faeces and was bleeding from the anus.

Asked what had happened to him, he stated that the appellant had "pierced him", but did not state with what. **CM** then took the victim to the bathroom and washed him. Thereafter she called her mother, who was away, working.

The incident was reported to the police and the victim was taken to **Bura Dispensary**, where he was treated. The evidence of **AK** was on the same terms as that of **CM**.

PW6 testified that when she examined the victim after about 12 hours at **NMwatate Sub District Hospital**, he had a 0.5 cm tear in the anus, with a bloody discharge. She formed the opinion that a blunt object had inflicted the injury. She classified the injury as harm before filing the P3 form, which she produced as an exhibit.

Other than the evidence of **CM** and **AK** who were relating what the victim had told them, there was no evidence, assuming it was indeed the appellant who had "pierced" the victim in the anus, of what he had used for that purpose. The evidence that was led by the prosecution woefully fell short in that respect. Under the Act, defilement is defined as an act, which causes penetration with a child. A child is defined by reference to the Children's Act, which means a person below the age of 18 years, while penetration is defined to mean the partial or complete insertion of the **genital organs** of a person into the genital organs of another person. Lastly genital organs are defined to include the whole or part of male or female genital organs and for purposes of the Act, to include the anus.

To convict the appellant of the offence of defilement therefore, the prosecution was obliged to prove beyond reasonable doubt that the victim was under 18 years of age and that the appellant had penetrated the genital organs of the victim with his own genital organs. While there was sufficient evidence that the victim was less than 18 years old and that his genital organs had been penetrated, there was, with respect no credible evidence that the penetration was by the appellant and more importantly, that he had penetrated the victim with his genital organs. All that the witnesses stated was that the appellant had pierced the victim, but how or with what, they could not tell because they had not witnessed the incident.

In these circumstances, we are satisfied that the State was entitled to, and properly did concede the appeal as regards conviction of the appellant for the offence of defilement.

Mr. Yamina however urged us to invoke **section 179** of the **Criminal Procedure Code** and find, on the basis of the evidence on record, that the appellant was guilty of the offence of **sexual assault** contrary to **section 5** of the Act. The Act defines the offence of sexual assault in a rather inelegant and convoluted manner, but we think the offence is constituted by penetrating the genital organs of another person with any part of the body of the accused or of another person, or by an object manipulated by the accused or another person for that purpose, except for professional hygiene or medical purposes, or by manipulating any part of the body of the accused or of another person to cause penetration of the genital organs of the victim. The prescribed sentence for the offence of sexual assault is a term of imprisonment of not less than ten years, which may be enhanced to life imprisonment.

As regards the offence of sexual assault, this Court stated as follows in **John Irungu v. Republic, Cr App No 20 of 2016: Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against "any person". That offence or its punishment is not tied to the age of the victim.**

The offence is constituted by committing an act, which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.

In that case the Court accepted that the offence of sexual assault is a cognate and minor offence to the offence of defilement and convicted the appellant of sexual assault where he could not be convicted of the offence of defilement for failure to prove the age of the victim.

In this appeal, we are not persuaded that there is any evidence, which points exclusively to the appellant as the perpetrator of the injuries sustained by the victim. The evidence, which was adduced by the prosecution, was purely circumstantial. To be relied upon, such evidence must show that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis except that of guilt, and further that there are no other existing circumstances weakening the chain of circumstances relied upon. (See ***Dhalay Singh v. Republic, Cr. App. No. 10 of 1997*** and ***Sawe v. Republic [2003] KLR 364***).

In this case, beyond the evidence of CM and AK who stated that the victim had gone to the appellant's house, there is no evidence how far the appellant's house was from the victim's and where the offence was committed.

It cannot be ruled out that it was committed after the victim had left the appellant's home. The victim, who because of age could not speak properly, did not testify. Accordingly there was no possibility of the trial court relying on the proviso to **section 124** of the **Evidence Act**, which allows the court, in a case involving a sexual offence where the only evidence is that of the victim, to convict on that evidence alone, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. There are so many gaps in the prosecution evidence, which make it impossible to say that it points exclusively to the appellant as the perpetrator of the offence.

We note too that the trial magistrate did not, as he ought to have done in respect of a child below the age or apparent age of 14 years, conduct a *voire dire* examination before taking the evidence of AK, who was 12 years old. (See ***Samuel Wahini Ngigi v Republic, Cr App No. 218 of 2007*** and ***Patrick Kathurima v. Republic, Cr. App. No 131 of 2014 (Nyeri)***).

Ultimately we are not persuaded that there is any evidence upon which the appellant can be convicted of the offence of sexual assault by virtue of section 179 of the Criminal Procedure Code. In the result, we allow this appeal, quash the conviction and set aside the sentence. We direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully detained. It is so ordered.

Dated and delivered at Mombasa this 25th day of November, 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