



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 41 OF 2015

BETWEEN

MWANGUO GWEDE MWARUA..... APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero J.) dated 16th June, 2010 in H.C.C.R.A. No. 223 of 2007)

JUDGMENT OF THE COURT

At the hearing of this appeal on 29th October 2015, the State through **Mr. Monda**, learned Assistant Director of Public Prosecutions readily conceded the appeal on three grounds. First, that no cogent evidence on the age of the complainant was led at the trial because the only evidence was a bare statement by the complainant during *voire dire* examination that she was 12 years old and that the age indicated in the P3 Form was a mere estimate by the police officer who prepared the P3 Form. Secondly, he submitted, there was evidence that the complainant had bathed before she went to hospital for examination and, as a result vital evidence was lost. For that reason the doctor who examined the complainant was unable to determine whether or not she had been defiled. The P3 Form tendered in evidence was silent regarding the doctor's opinion as to whether the complainant had been defiled or not. In Mr. Monda's view, the evidence as presented before the trial court and the findings of the 1st appellate court did not support the offence of defilement as laid against the appellant. Thirdly and at the prompting of the Court, counsel conceded that the charge as framed was defective in that the particulars in support thereof were not in the format prescribed under the Sexual Offences Act. Rather they were the ones required under the Penal Code before the Sexual Offences Act came into force, which alleged that the appellant had unlawfully had carnal knowledge of the complainant. To counsel, therefore, one could not tell whether the appellant was charged with the offence of rape or defilement.

For his part, the appellant was happy to leave the matter to the Court after the concession by the State.

The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited. (See **NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR. APP. NO. 279 OF 2005 (NYERI)**).

So what is the story behind the arrest and subsequent arraignment of the appellant in the Senior Resident Magistrate's Court at Kwale on the charges behind this appeal? On 21st January 2007 at about 8 a.m. **M J L**, "the complainant", was on her way home from the shops. She had been sent by her father **J L (PW 2)** to buy sugar when she met the appellant who emerged from the bush and asked her whether she had seen his lost goat. She answered in the negative and proceeded on her way. The appellant however pursued her, grabbed her left hand, pulled her into the bush and threw her on the ground. He then forcibly removed her underpants and his as well and sexually assaulted her. When she attempted to scream, he ordered her to keep quiet. When done, he let her to go. The complainant went home and reported to **PW 2** who subsequently took her to Kinango Police Station and lodged a complaint. **P.C. Sudi Mohamed (PW 5)** received them, took the complaint's statement, prepared and issued her with a P3 Form and escorted her to Kinango District Hospital for medical examination.

At the hospital, **Erick Chiwaya**, a clinical officer examined her and noted tenderness around the neck as well as scratch marks and laceration of the labia majora and minora. Laboratory tests revealed sperm. He assessed the injuries sustained as harm. He however never expressed any opinion whether or not the complainant had been defiled. **Cornelius Mochage (PW 4)**, a colleague of Chiwaya, produced the P3 Form in evidence because the latter was on leave by the time the case was heard.

About four months after the alleged defilement, the complainant was going to fetch water when she encountered the appellant. She informed **PW 2** who ran to the Assistant Chief and alerted him. The Assistant Chief dispatched **Juma Rika Mwarika, (PW 3)**, a local vigilante to accompany **PW 2** and arrest the appellant. The following day in the company of the vigilante, they proceeded to the appellant's home from where they arrested him and, took him to Kinango Police Station and surrendered him to **PW 5** who re-arrested him and subsequently charged him with the offence of defilement of a girl contrary to section 8(1) and (3) of the Sexual Offences Act. The particulars were that on 21st January 2007 at about 8 a.m. at Kifyonzo village within Kinango District of the then Coast province, the appellant unlawfully had carnal knowledge of **MJL**, a girl aged 12 years.

In his unsworn defence, the appellant stated that on 2nd May 2007, at about 7 a.m., he was arrested by **PW 3** who took him to Kinango Police station only for him to be charged with an offence he knew nothing about. He claimed that the charge was fabricated out of a grudge over a boundary dispute involving his parents and parents of the complainant. He further claimed that because of the dispute, **PW 2** had threatened to hurt him.

The trial court was not convinced by the defence put forth by the appellant and was persuaded by the evidence led by the prosecution that indeed the appellant had defiled the complainant and convicted him of the offence.

Following the conviction, the appellant was sentenced to fifteen (15) years imprisonment, a sentence which the High Court subsequently found to have been illegal and enhanced it to twenty years imprisonment.

The appellant was aggrieved and preferred an appeal in the High Court at Mombasa. **Odero, J.** heard the appeal and in a judgment delivered on 16th June 2010, dismissed it in its entirety and enhanced the sentence as aforesaid.

Aggrieved further by the decision of the High Court, the appellant preferred this second and perhaps last appeal, which as we have already stated, was conceded to by the State.

We have duly considered the evidence on record and the grounds upon which the State conceded this appeal. As the sentence for the offence of defilement under the Sexual Offences Act is dependent on the age of the complainant, the age of the complainant must be proved by credible evidence. As has been stated severally, the age may be proved by various means, among them, birth certificate, age assessment or evidence of parents of the complainant. (See ***FRANCIS OMURONI V. UGANDA, CRIMINAL APPEAL NO. 2 OF 2000***).

In the circumstances of this case no credible evidence of the complainant's age was adduced save the bare statement during the *voire dire* examination. Although her father testified, he did not testify to the complainant's age at all. Her age as indicated in the P3 Form was mere estimate by the police officer who filled that form. PW5's evidence did not help matters as he estimated the complainant's age to be between 10 to 14 years thus straddling two age brackets under **Section 8(2) and (3)** of the Sexual Offences Act.

We agree that on the whole, the evidence regarding the age of the complainant left a lot to be desired. We are also concerned by the particulars of the offence in the charge sheet, which stated that the appellant had unlawful carnal knowledge of the complainant and thus related to the offence of rape under the provisions of the Penal Code that were repealed by the Sexual Offences Act. Indeed the judgment of the trial court is replete with statements that the complainant was "raped", raising further questions on the age of the complainant. On page 3 of the judgment, for example, the learned trial magistrate stated thus:

"There is no doubt in my mind that complainant was raped."

Later on the same page, the court repeated:

"...I am convinced that complainant was indeed raped"...

That the trial court itself found that the complainant was raped raises serious doubts whether the appellant was not indeed prejudiced regarding the great discrepancy in the statement of offence and the particulars of the offence. To find that the offence of rape was committed must suggest that the applicant was at least 18 years old!

In the peculiar circumstances of this case, we are satisfied that this appeal has merit and that the State is justified in conceding the same. The appeal is accordingly allowed, conviction quashed and sentence imposed set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 11th day of December, 2015

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