REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal No. 116 Of 2014

SAID CHARO MZEE …….....APPELLANT

Versus

REPUBLIC……..……..……..……..RESPONDENT

(Being an appeal from the original conviction and sentence by Honourable S. Wewa, (PM) Principal Magistrate in Kaloleni court in Criminal Case No. 319 of 2013 delivered on 23rd August 2013).

JUDGMENT

SAID CHARO MZEE, the appellant herein, was tried on a charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No 3 of 2006.

At the end of the trial, he was convicted and sentenced to serve 20 years imprisonment.

Being aggrieved with the said conviction and sentence, the appellant preferred this appeal.

On appeal the appellant put forward the following grounds in his petition of appeal.

1. That the learned trial magistrate erred in law and fact by not considering that the charge drafted against him was null and void to be admitted in a court of law hence the sentence was unsustainable.

2. That the trial magistrate erred in law and fact in finding of conviction and sentence without seeing that Section 38 of the Sexual Offences Act was not complied with hence the same was a made up case.

3. That the learned Hon. Trial magistrate did not consider that s Section 34 of the Sexual Offences ct No 3 of 2006 was not adhered thus the sentence of 20 years was unlawful.

4. That the learned trial magistrate failed to see that section 36 of the Sexual offences Act No 3 of 2006 was not complied with hence the charge of defilement was unproved.

5. That the learned trial magistrate failed to see that the defence he gave was reliable hence the benefit of doubt ought to have been awarded to the appellant.

When the appeal case came up for hearing, the appellant indicated to court that he was relying on the arguments in the written submissions he had filed, while, Mr Masila, learned counsel for the state conceded to the appeal on the ground that the offence against the accused person was not proved beyond reasonable doubt.

I wish to set out in brief the case that was before the trial court before considering the substance of the appeal.

The prosecution called a total of six(6) witnesses.

Pw1 J A , who is the complainant in this case was said to be fifteen (15) years old and so was examined by the court which established that she was a competent witness who understood the meaning of an oath. She was duly sworn.

According to pw1, she was 15 years old and a standard 8 student [Particulars Withheld] primary school. She told court that on 31st April 2012, at 8.00pm. she went to Said, the appellant's house after he asked her to go there and she slept there till morning, during that time they has sexual intercourse. Pw1 said that she went back home the following day and on being asked where she had gone, said that she had gone to her friends.

Pw1 said that the appellant was unwell and so she went to check on him. The parents looked for and found her at the appellant's place from where she was arrested and taken to the police station. She told court that she was still going to school but the appellant did not know. She also said that she did not tell the appellant how old she was as he did not ask her about it. She identified a birth certificate showing she was born on 12.2.1997.

When cross examined, Pw1 reiterated that she slept at the appellant's on 31st April, 2012.

Pw2 M A N told court that in the 2nd week of March, 2012, her daughter, Pw1 disappeared from home. That the father was not at home and so she called him to explain. Pw2 also said that 31st she was not at home and she did not know where she had gone. That she was at home on 1st and the father asked her although she (pw2) was not there. Pw2 said that in the month of March Pw1 disappeared and the father investigated and searched for her. That he found her but she (Pw2) did not know from where she had been brought.

In cross examination Pw2 said that the complainant had missed to be home for 2 days and would sleep and returned home but would not answer whenever she asked her. This is when she called her father.

Pw3, D O testified that on 26.3.2012 at 8.00pm, he was at home. He went to look for J (Pw1) and found her in the house of a boy whose name he did not know. He was assisted by his in law and police came and took them to the police station. He indicated to court that he had forgotten the date but when he refreshed his memory, he indicated that it was on 4.4.2012 at 8.00am. He said he recorded his statement on that day. He confirmed to court that Pw1's father had called to inform him that she had not slept at home. On 26.3.2012 on 31.3.2012. He said that at first the girl said she had gone for tuition but later said she had been with the appellant who she had slept with.

Pw3 also identified a birth certificate showing that Pw1 was born on 12.2.1997. He confirmed that she was a student and was 15 years old. He said that she was taken to St Lukes Hospital where she was examined and then a p3 form issued, filled

Pw4, No 69963 Pc Mesisi Ikingo of Kaloleni police station told court that on 5.4.2012 he was on patrol when at 8.00pm he received a call from Pw3 that there was a girl who had got lost and had been found. He and a colleague proceeded to Baba Dogo where they found the girl, boy and her father. They took them to the police station where a report was lodged after interrogating both girl and boy. He told court that he was just an arresting officer and that he handed over the case to the investigating officer.

Pw5 No. 92503 P.C Woman Carolyne Kangongo of Kaloleni police station testified that on 5.4.2012, she was in her house at 8.00pm when one P.C Ikwebe called her over a defilement case. She went and found the appellant and complainant in the cells. She investigated and booked the matter in OB. She said that she investigated the matter and the complainant told her that she had visited the boyfriend on 21.3.2012 where she spent the night till 1.4.2012 when she went back home. She also said that the two had been lovers for some time. She also said that the complainant went to the appellants on 8th and was arrested. She was issued with a p3 form which was filled by Mr Wekesa after examining and confirming that she was not a virgin since her hymen had been broke. Pw5 indentified the birth certificate which was handed over to her by the complainant's parents showing that she had been born on 27.7.1994,hence was 15 years old. Then she also said that in the cause of her interrogations she had established that the complainant and appellant were neighbours she further said that she interrogated the appellant but he did not give an account of what had happened. She then charged him.

Pw 6, Jack Nyongesa Wekesa a Senior Consultant at St Lukes Hospital, having qualified with a Higher Diploma from Kenyatta in Nairobi, told court that on 7.4.2012, one JA went to the said Hospital complaining that she had been defiled on 31.3.2912 by someone known to her at 7.00pm. He found no injuries on her body as she had completed 8 days. On 9.4.2012 he filled the P3 form which was after she had been treated at St Lukes on 7.4.2012. He produced the treatment notes and P3 form as exhibits P2 and 3 respectively.

The accused person was placed on defence after a prima facie case was found to have been established against him by the prosecution. He opted to give a sworn statement .

The accused, Saidi Charo told court that on 5.4.2012 he was at his house at about 8.00pm when the complainant's father went there and asked about the complainant. Pw 3 closed the door and came back with the police officer. They searched but did not get the complainant. They went and came back with the complainant to the house and he was arrested.

In cross examination ,he denied knowing the complainant or having ever met her. He said he heard that she says she is his girlfriend.

APPELLANT'S SUBMISSIONS

The appellant, who is unrepresented indicated to court that he wished to rely on his written submissions filed in court.

Upon reading through these submissions, I find that in a nut-shell, the appellant has submitted that the appellant has submitted that the prosecution failed to prove their case beyond any reasonable, hence creating the benefit of doubt which would have been granted to him.

Mr Masila learned counsel for the state conceded to the appeal and pointed out that the appellant having been charged with defilement only two ingredients needed to be proved, that is

(a) age of complainant

(b) penetration.

And the need for corroboration. He then submitted that although the complainant told court that she and the appellant had sex, the medical examination conducted on her at St Lukes Hospital by pw3 and recorded in the P3 form (Exhibit P3) indicated that no visible injuries were observed on her. In essence Pw1's evidence was not corroborated by the P3 form at all.

I have analysed and evaluated the evidence which was adduced before the trial court afresh in line with the celebrated case of **OKENO VS REPUBLIC, (1972) E A 32,** which set out the duty of the first appeal court. And in so doing, I am well aware that I did not have the benefit of seeing the witnesses when they testified as the trial court did, so as to tell their demeanor.

On the issue of whether the prosecution discharged its burden of proof or not, I wish to reiterate that it is a cardinal practice of law that in several cases, the legal onus is always on the prosecution to prove the guilt of the accused, and the standard of proof, is beyond reasonable doubt. (see Festus Mukali Murwa vs Republic (2013) e KLR)

It is also provided for under section 107, 108 and 109 of the Evidence Act.

In a case of defilement under section 8 (1) of the Sexual offences Act, as put by Mr Masila, learned counsel for the state and the appellant in their submissions, and so rightly the victim's age is one of the most critical ingredients that must be proved.

In the case of **ALFAYO GOMBE OKELLO VS REPUBLICE (2010)** e KLR, the court of appeal in commending on this aspect of the age of the victim of Sexual assault had this to say:

"in its wisdom, parliament chose to categorize the gravity of the offence on the basis of the age of the victim and consequently the age of the victim being a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1)…In this case, the age of the child was never medically assessed."

In the instant case, the complainant told court that she was 15 years old and identified a birth certificate (exhibit P1) showing she was born on 12.2.1997. He noted (Pw2) did not indicate the complainant's age when she testified. Pw 3, the father said that the complainant was born on 12.2.1997 and identified the birth certificate(exhibit P1) to court to confirm the birth certificate(Exhibit P1) was handed over to Pw5 who produced it in court as an exhibit.

In his submissions, the appellant submitted that he doubted that the said birth certificate (exhibit P1) belonged to the complainant.

He singled out that while in the birth certificate and proceedings, the complainant was referred to one JA, in the charge sheet her name was given as JAO.

He also pointed out that in the birth certificate (Exhibit P1) the complainant's father was indicted as POK and her mother as HAA. In the proceedings at page 4 line 16 the father introduced himself as "Am DOO…" While the mother on page 3 line 20 of the proceedings introduced herself as "Am MAN".

There is clearly a glaring in consistency in the names of the complainant parents in the proceedings (Pw2 and 3) and the ones indicated in the birth certificate. In this case, there is a doubt created as to

whether the birth certificate so identified, really belong to the complainant, in which case, a doubt is cast on whether the age of the compliant has been proved.

As for the contradiction in the evidence of the investigating officer, Pw 5 with regard to the complainant's age I find it could happen especially since the birth certificate was only handed over to her and she may not have refreshed herself to her evidence before beginning to testify.

The other ingredient that requires to be proved in a case of defilement is penetration.

Penetration is defined under of the sexual Offences Act as:

"Partial or complete insertion of the genital organ of a person into the genital organ of another person……"

According to the complainant (Pw1) on 31.4.2912, she spent a night at the appellant's house and they had sexual intercourse.

The complainant was taken to St Lukes hospital for medical examination and treated and Mr Wekesa (Pw6) who examined her, indicated in the p3 form (Exhibit P1) and evidence that he observed no injuries on the body or genitalia. He also did not observe any discharge, blood or venereal infection on the genitalia or body externally. He also indicated this in the treatment notes (Exhibit P2). This contradicts the evidence of Pw 5, the investigating officer who testified that the complainant was examined by Mr. Wekesa and found to have a swollen hymen.

From this evidence, one clearly sees that there was no evidence of penetration having been observed on the compliant. Penetration in a case of defilement is a special component and forms part of the charge that must be proved in the same way as the case of rape.

In my view, reasonable doubt as to whether the appellant defiled the complainant had been created and the onus to clear the same was on the prosecution. The prosecution failed to do so and the benefit thereof goes to the appellant.

Though not raised in the memorandum of appeal, there were the inconsistencies in the evidence of the prosecution witnesses. I went through the entire evidence of the prosecution witnesses and found that where the complainant told court that she went to the appellants home on 30.4.2012, the other witnesses, move so , Pw2 and 3 (her mother and father) were not sure when it is that the complainant disappeared from home. Clearly, these cast aspersions on the credibility of the evidence by the prosecution witnesses.

After evaluating the evidence that was adduced before the trial court, I am satisfied that the prosecution, a part from failing to prove the element of the offence of defilement, their evidence was also riddled with inconsistency.

I ,accordingly find that appeal of the appellant has merit and allow the same.

I proceed to quash the conviction and set aside the sentence against the appellant.

The appellant is hereby ordered released, unless lawfully held.

Judgment delivered, dated and signed this 29th December 2015.

D. CHEPKWONY

(JUDGE)

In the presence of:

M/s Ocholla for state

Appellant

C/assistance – Kiarie