



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.102 OF 2016

(Appeal Originating from Eldoret CM's Court Cr.No.2236 of 2015 by: Hon. H. Barasa – .P.M.)

ADENAS JOEL MURUMBA.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

J U D G M E N T

Adenas Joel Murumba was convicted by Hon. Barasa (P.M.) on 24/8/2016 for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 2/5/2015 and 4/5/2015 in Eldoret West, intentionally and willingly caused his genital organ (penis) to penetrate the genital organ of LB. a girl aged 16 years.

In the alternative, he faces a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

Upon conviction on the principal charge, the appellant was sentenced to serve 15 years imprisonment. No finding was made on the alternative charge.

The appellant is dissatisfied with the conviction and sentence. He filed this appeal citing the following grounds of appeal:

- 1) *That the magistrate convicted him based on defective charge;*
- 2) *That the evidence of the witnesses was contradictory;*
- 3) *That there was no medical evidence to link him to the offence;*
- 4) *That the court shifted the burden of proof to the appellant;*
- 5) *That the charge of defilement was not proved to the required standards.*

The appellant filed written submissions in support of the said grounds and prayed that the conviction be quashed and sentence be set aside.

This being the first appeal, it is required of this court to re-assess, re-evaluate and re-analyze all the evidence tendered before the trial court and come to its own conclusions. The court has to however make an allowance for the fact that it is the trial court that saw and heard the witnesses testifying, while this court did not have that opportunity. I am guided by the decision in *Kiilu and another v Republic (2005)1KLR 174*.

The prosecutor called a total of six witnesses in support of their case.

PW1, who was aged 16 years testified that on 2/5/2015 about 4.00 p.m. the appellant who lived in the same plot and whom she knew as Deno called her to his house and she went. On entering the house, he removed her clothes, her pant. He also removed his trouser and underwear, made her to lie on a mattress on the floor and inserted his genital organ into hers and she felt pain. He warned her not to tell anyone and she did not tell anyone. The next day at 8.00 p.m., her father, PW2, JB told her that the wife of the appellant had complained that she was destroying her marriage and when PW2 wanted to beat her, she ran away to Quarry area but returned about 10.00 p.m. The appellant saw her outside and pushed her to his house again where he had another sexual encounter with her; that on the next day, the appellant locked her in the house and left; that PW4, Pastor Wanyonyi found the appellant outside the house and asked him to open, found

PW1 lying on the mattress and both were taken to the Administration Police Camp and later to Moi Referral Hospital where she was examined.

PW2 told the court that PW1 was born on 23/12/1999 and produced the birth certificate. He recalled that on 3/5/2015, when on his way to work, Philipine Nakumicha, the appellant's wife complained to him that PW1 was having an affair with the appellant. When PW2 confronted PW1 at 8.00 p.m. she ran away and next day, Philipine called to tell her that appellant and PW1 were planning to escape. Since he was far, he asked PW4 to go to the appellant's house and he called to inform PW2 that he had found PW1 in the appellant's house and PW4 to the Police Station.

PW3 Dr. Jane Yatich of Moi Teaching and Referral Hospital examined the complainant on 5/5/2015 and found that she had an old healed tear to the hymen; that another tear was still in the leading process and she concluded that she had taken part in a sexual intercourse.

PW4 Jotham Wanyonyi confirmed that PW2 asked him to go to the appellant's house to check if PW1 was there. He found the appellant's house locked but the appellant was outside, PW4 asked him to open his door. He found somebody covered in a blanket behind the curtain that separated the house and on uncovering the person, found it was PW1; that PW1 and accused told him that they had decided to live as a couple, that is, married; that Robinson of Child Welfare, (PW5) was there and asked them to accompany him to his office – child welfare.

PW5 Robinson Ouma Kanega who has a CBO called Subira at Maili Nne and a voluntary children's officer was asked by PW2 to proceed to the appellant's house where his daughter was locked up. He went and found PW4 already at the house. They asked the appellant to open his door and found PW1 in the house and together, took both PW1 and appellant to the plaintiff.

PW6 PC (w) Prisca Jepkoech of Baharini Police Post received the complainant and appellant at the Police Station. PW6 issued them with a P3 form and referred them to Moi Referral Hospital. PW6 later arrested the appellant and charged him.

When called upon to defend himself, the appellant made an unsworn statement, that he was going to work on 8/5/2015 when he was stopped by Police Officers from Baharini Police Station. They did not tell him why he was under arrest. He was charged with an offence he did not commit or know about.

In his written submissions, ground one was to the effect that the charge sheet was defective because the OB number on the charge sheet did not match that on the P3 form; that though PW3 said that PW1 said that she had had sexual intercourse with the appellant before, the charge only indicates 'diverse dates between 2/5/2015 and 4/5/2015'; that the charge was defective because the appellant was named as Adenas Joel Murumba whereas the witnesses referred to him as Deno.

The appellant also submitted that there were many contradictions in the prosecution case for example, PW3 claimed that when PW2 sent him to the appellant's house, he said he found it locked and its questioned how he managed to get in; that the other contradiction is as regards whether PW4 and 5 took PW1 and appellant to the Chief's Camp; that PW5 told the court that PW2 was with her daughter in Webuye yet she was found in the house; that if the complainant had had sex with the appellant before 2/5/2015, then he did not indicate why he was charged with defilement, between 2/5/2015 and 4/5/2015. The appellant further alleged that the offence was not proved to the required standard and some relevant witnesses like Deno's wife and the chief were not called as witnesses.

Mr. Onkoba, learned State Counsel opposed the appeal. He submitted that a different O.B. number on the charge sheet and P3 form does not make the charge defective and there was not violation of Sections 134, 135 and 136 of Criminal Procedure Code; that the appellant was charged on the basis of the defilement that occurred between 2/5/2015 and 4/5/2015; that all witnesses identified the appellant and evidence of Pw1 was corroborated by that of PW2, 3 & 4; that PW1's age was proved to be 16 years; that PW4 and 5 found PW1 in the appellant's house, lying on a mattress, that proof was beyond reasonable doubt and the burden of proof never shifted to accused at any stage; that there was no evidence that any grudge existed between the appellant and the witnesses.

On failure to call witnesses, counsel submitted that the appellant's wife was not a compellable witness. The appellant being his spouse, the appellant should have consented to her testifying and in any event, she did not witness the incident.

I have duly considered all the evidence on record, the grounds of appeal and all the submissions.

The appellant faced a charge of defilement and it was the duty of the prosecution to prove that the following ingredients exist:

- 1) *That the complainant is a minor;*
- 2) *That there was penetration;*
- 3) *Proof of identity of the perpetrator.*

Whether the complainant's age was proved:

There is overwhelming evidence on record that at the time the offence was allegedly committed, the complainant was 16 years old, having been born on 23/12/1999. PW1 and PW2, evidence was confirmed by the birth certificate produced in evidence. PW1 was by then 16 years and hence, a minor.

Whether penetration was proved:

Penetration is defined in Section 2 of the Sexual Offences Act as “-the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

PW1 gave a detailed account of what occurred on 2/5/2015 when the appellant called her to his house; that he removed her clothing including the pant. He also undressed, made her to lie on the mattress and inserted his genital organ into hers; that he repeated the same on the night of 3/5/2019 after she had ran away but the appellant found her outside the house and took her into his house again.

The Doctor, PW3 found an old tear of the hymen and a healing tear which was evidence of a recent sexual activity. In addition, PW4 and PW5 found PW1 lying on a mattress in the appellant’s house, on 4/5/2015. PW1 corroborated PW4 and 5’s evidence that indeed they found PW1 in the said house and the appellant had locked her up. PW4 and PW5 said that both PW1 and the appellant claimed to be married.

I have no doubt that these witnesses were truthful. The trial court believed them and the court has no reason to doubt them. There was overwhelming evidence of penetration and PW1 and appellant were found hiding in the appellant’s house.

On the allegation that there were contradictions in the prosecution evidence, this court did not find any. What the appellant claims to be contradictions were minor differences in the evidence that really of no consequence. No two witnesses will testify exactly, to the facts even as regards the same event or transaction.

On contradictions, the court in *Philip Nzaka Watu v Republic (2016) KLR* stated as follows:

“The first question in this appeal is whether the prosecution case was meddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt, beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eye witness to another, cannot give the essence that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail.

Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized, in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

In *Twehangene Alfred v Uganda Cr.App.No.139/2001*; the court said:

“With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained, will usually, but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

This court will therefore ignore the contradictions because they are not material to the case.

The appellant’s other complaint is that there was no medical evidence linking him to the offence because he was not taken for medical examination. The legal position is that an offence of defilement or rape is not necessarily proved by way of medical evidence.

The same can be proved by oral or circumstantial evidence. There is now a wealth of authority supporting this proposition. In *AML v Republic (2012) eKLR*, the court held as follows:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

The court adopted the same view in *Kassim v Republic Cr.App.84/2005(MSA)*

Under Section 124 of the Evidence Act, the court can rely on the evidence of the victim of defilement without necessarily looking for corroboration, provided that the court has given reasons for believing the victim. In this case, PW1’s evidence was cogent and credible and was corroborated by PW4 and PW5’s evidence.

Was the charge defective?

The answer is in the negative. An O.B. number appearing on the charge differing from that on the P3 form cannot possibly be such a defect as to vitiate the conviction. The contents of a charge are clearly spelt out in Section 134 of the Criminal Procedure Code. Section 134 Criminal Procedure Code reads as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The essential ingredients of the charge were properly outlined and the charge was proper. An O.B. number is not one of the essentials.

As regards the use of the name 'Deno', it is true that the name of Deno does not appear, in the charge sheet. The appellant is named as Adenas Joel Murumba. PW1, 2, 4 all knew the appellant as 'Deno'. They identified him as such in court. They lived in the same plot.

Besides PW4 & 5 testified to having found DW1 in the appellant's house. The appellant was not a stranger to PW1 and 4. He was properly identified. It is not uncommon for people to have an official name and another that is used by people close to him as an alias or mere nick name. In this case, it seems 'Deno' was a short form of Adenas. The police who prepared the charge sheet should have included the alias name of 'Deno'. I find that 'Deno' is the same person as Adenas Joel Murumba, the appellant.

In his submissions, the appellant alleged that the prosecution failed to call material witness like the chief and Philippine, his wife.

It is the prosecution who decide which witnesses they will call in support of their case. It is a discretion which has to be exercised judiciously so that witnesses are not left out for an oblique motive. In the case of *Mwangi v Republic (1984) KLR 595*, the court said:

"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

A spouse cannot be called as a witness without the consent of the accused. In this case, the appellant's wife was not a compellable witness. See *Section 127 Evidence Act which provides as follows:*

"Section 127

(1) In civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that:-

(i) the person charged shall not be called as a witness except upon his own application;

(ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;

(iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution;

(3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged:-

(a) with the offence of bigamy; or

(b) with offences under the Sexual Offences Act ([No. 3 of 2006](#));

(c) In respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.

(4) In this section "husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom."

In any event, there is no evidence that the said Philippine witnessed the offence. As for the chief, he did not play any significant role in the case. In my view, the prosecution called relevant and sufficient witnesses whose evidence was of material importance for the just determination of this case.

Whether the onus of the proof was shifted to the defence, I find nowhere in the trial court's judgment that the onus of proof was shifted to the appellant.

In the end, I find no merit in any of the grounds of appeal. The conviction is sound and I confirm it.

As for the sentence, the appellant was sentenced to serve 15 years imprisonment which was a lawful sentence under section 8(4) the Act. The section provides for a minimum sentence of 15 years imprisonment. The appellant was treated as a first offender. In mitigation, he said that all his family depended on him. In exercise of this court's discretion, I hereby set aside sentence of 15 years. Instead, the appellant is sentenced to 10 years imprisonment which will commence from the date he was sentenced, by the trial court on 24/8/2016. The appeal succeeds to that extent.

Dated and Signed at NYAHURURU this 20th day of December, 2019.

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R.P.V. Wendoh

JUDGE

Delivered by Justice H. Omondi (Mrs) at Eldoret this 22nd day of January, 2020.

PRESENT:

Busienei – prosecution counsel

Ngalomoi – court assistant

Appellant - present