



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 46 OF 2016

EMA.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 14th day of July 2016 in the Original Keroka Principal Magistrate’s Court Criminal Case No. 1090 of 2014}

JUDGEMENT

The appellant was sentenced to serve twenty years’ imprisonment for defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the charge were that on 22nd October 2014 within Nyamira County he intentionally and unlawfully caused his penis to penetrate the vagina of RNS a girl aged 14 years. He pleaded not guilty to the charge and the prosecution called four witnesses to prove its case.

The appellant also gave evidence on oath and after evaluating the evidence the court came to the conclusion that the charge had been proved beyond reasonable doubt, convicted the accused and sentenced him in accordance with Section 8 (3) of the Sexual Offences Act. Being aggrieved, the appellant preferred this appeal against both the conviction and the sentence.

The petition of appeal was initially drawn by B. N. Ogari & Co. Advocates and contained ten grounds. These were: -

- “1. THAT the Learned Trial Magistrate erred in law and facts in convicting the appellant on a defective charge sheet.**
- 2. THAT the trial magistrate erred in law and fact by failing to afford the applicant a fair trial by importing her own imaginations and drawing assumptions to the prejudice of the appellant.**
- 3. THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant on the basis of insufficient evidence**
- 4. THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant when circumstances obtained at the time of commission of the offence were not conducive for a positive identification and one free from error.**
- 5. THAT the Learned Trial Magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt.**
- 6. THAT the learned trial magistrate erred in law and fact by failing to consider the defence by the appellant and failing to give reason for doing so.**
- 7. THAT the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.**
- 8. THAT the learned trial magistrate erred in law and fact in convicting the appellant without warning herself on the dangers of convicting the appellant on the basis of a single witness.**
- 9. THAT the learned trial magistrate erred in law and fact in taking the evidence of the victim without warning herself whether she possessed the ability to understand the solemnity of the oath and failing to record the same.**
- 10. THAT learned trial magistrate failed to appreciate that the prosecution case was riddled with contradictions.**

The Firm of B. N. Ogari & Co. Advocates also filed written submissions. However, the appellant also sought leave and this court allowed

him to file his own grounds and to file his own submissions. His supplementary grounds of appeal are that: -

“GROUND ONE

That my lord the trial learned magistrate faulted both in law and fact when maliciously insinuated that the appellant was over 18 and Pw1 who was under 18 yet these were presumption and misapprehend from poor investigation by the prosecution both Pw1 and 4 the appellant they were minor of under 18 but its only the appellant who ended up being discriminated by the trial magistrate in convicting the appellant.

GROUND TWO:

That my lord the trial learned magistrate faulted both in law and fact when seemingly based the conviction flawed accounts demonstrated in court by Pw1 & Pw2 without circumspect that their accounts were not proved beyond all reasonable doubts as required by the law both Pw1 and the appellant they were minor aged 14 years and there was no age assessment medical report which was conducted to confirm the age of the minors.

GROUND THREE:

That my lord the trial learned magistrate further faulted both in law and fact when erroneously contravened article 49 (I) 53 (1) (d) (f) of the constitution the appellant who was a minor but he was treated as an adult he was not treated as a minor and be given the rights are guaranteed by e law hence the court end up misdirected itself in committing the appellant in oppressively.

GROUND FOUR:

That my lord the trial magistrate similarly faulted both in law and when miserably overlooked and objected the appellants defence without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution.”

He also filed written submissions. The appeal was opposed and so written submissions were also received from prosecution counsel.

As an appellate court, I am not confined to the submissions of the parties. My duty is to reconsider and re-evaluate the evidence before the trial court while making provision for the fact that I did not hear or see the witnesses give evidence (**Okeno Vs. Republic [1972] EA 772**).

The complainant in this case testified that she was home alone when the accused who was her aunt’s herdsman went and gave her 100/= before pulling her into a maize field where after removing her under pant and unzipping his trousers he knocked her to the ground, lay on her and inserted his penis into her vagina and proceeded to defile her. She stated that she had been sent home from school for school fees and her mother had gone to work and her father was also away. The only other person at home was her baby brother and he was asleep in the house. It was her evidence that the incident occurred at 11am. This was in broad daylight.

In his defence, the appellant admitted that he used to be a herdsman for the complainant’s aunt. He however stated that he was framed because he had refused to ditch his employer for the complainant’s father. He stated that the complainant’s father had tried to entice him even with money but he had declined to leave his (complainant’s father) sister to go and work for him. he denied that he defiled the complainant.

However, this court is satisfied that there is evidence that he defiled the complainant. Although there was no need for corroboration there was more than enough corroboration in this case. Pw2 – the mother of the complainant confirmed to have seen 100/= in the complainant’s jumper. She stated that when she asked the complainant where she got the money the complainant told her it was from the appellant and that he had given it to her in order to obtain a sexual favour. Pw4 – the clinical officer – testified that he examined the complainant on 24th October 2014 – about 2 days after the incident. He stated that there was evidence that she had been defiled because although no lacerations or bruises were noted in her genitalia her labia and clitoris were inflamed. He revealed that although the appellant was also examined there were no noteworthy findings. The investigating officer (Pw3) confirmed that the complainant, her mother and the appellant went to the police station on 23rd October 2014 and he issued her with a P3 Form and then escorted them to Kijauri Sub-District Hospital. The complainant’s evidence was therefore corroborated in all material particulars. I am satisfied that she was a truthful witness and that it could not be true that the appellant was framed for refusing to leave her aunt’s employment to work for her father. The age of the complainant was proved through a birth certificate. The same showed she was born on 8th December 1999 which means that as at the date the offence was committed, she was just short of her 15th birthday, she was therefore still a child and could not have consented to a sexual act. Contrary to Mr. Ogari’s submission, the evidence was consistent and unwavering.

The complainant and her mother were put to vigorous cross examination by the appellant but their testimonies remained unshaken. The complainant readily told her mother what the appellant had done to her unlike in the case of **Paul Gitari Vs. Republic (citation not given)** cited by Counsel for the appellant. There was no violation of the appellant’s right to a fair trial. The proceedings show that the trial was conducted in a language which he understood otherwise he would not have been that robust in cross examining the witnesses. It is not clear why on 18th May 2015 the trial court made an order for the complainant to be recalled for further cross examination yet the appellant had not made an application to that effect. The appellant had completed his cross examination and she had been re-examined. In my view, it would have been a travesty of justice to recall her without an application from the defence. His complaint that she was not recalled has no basis. The charge against the accused was proved beyond reasonable doubt and it is my finding that the appeal on conviction has no merit. It is dismissed.

As for the sentence, the trial magistrate imposed the minimum sentence provided by the law in regard to children aged between twelve and fifteen years. The complainant was yet to attain the age of 15 years. The sentence imposed was therefore lawful and it is affirmed.

Dated, signed and delivered at Nyamira this 31st day of January 2019.

E. N. MAINA

JUDGE