



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 46 OF 2017

(From original conviction and sentence in Criminal Case No. 17 of 2016 of the

Senior Principal Magistrate's court at Baricho)

BERNARD MACHARIA KINYUA.....APPELLANT

V E R S U S

REPUBLICPROSECUTOR

JUDGMENT

1. The appellant was convicted of defilement of a girl aged 16 years on the night of 19th and 20th June 2016 and sentenced to 15 years imprisonment contrary to **Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006**. He lodged an appeal on 12/07/2017 and later amended the grounds raising six grounds;-

a. That the trial Magistrate erred in law and in facts, not finding the prosecution could not finding the prosecution could not prove in their evidence whether the crime allegedly committed at [particulars withheld] at the same time of the day by the appellant at a different place raising doubt in fact, appellant had an opportunity to have committed through memory upon the following grounds.

b. That, the trial Magistrate erred in law and in facts not finding on consideration, the failure to put circumstantial question to pass or prosecution witness to establish the truth was fatal to their case whether PWI and complainant had indeed met to commit the act.

c. That the trial Magistrate erred in law and in facts not finding that it was insufficient to say the culprit was known, without giving reasons why the names of the assailant could not be given immediately as soon as possible and practicable which is not the case in this case more particularly failure to report that the appellant had seduced not once PWI earlier to one in authority and caution made, leaving that allegation of no probative value.

d. That the trial Magistrate erred in law and in fact not considering and find that crime alleged committed at 6.30 Pm and later changed to be at 8.00 P.m, was to long the believe the testimony as durations gap could not be substituted to be a memory failure but reasonable benefit to defense that PWI and prosecutors couldn't shate will precision, it was appellant who committed the crime.

e. That the trial court failure to consider the circumstances surrounding the attack it was at night and no possible light could be presumed and if it was at night and no possible light could be presumed, what was the intensity, source, distance positional etc. and that though it was alleged recognized the voice, this fact only erupted in re-examination hence defense could not be given a chance to XXD PWI on the new issue that defense had not knowledge would crop or existent.

f. That the trial court failure to consider the fact, hymen broke evidence of penetration did not prove beyond doubt what was used to distinguish that Sec 5(1) Sexual Offences Act and that of 8(1) Sexual Offences Act and whether was by the time in question to have a displaced the appellant's defense for a conviction and subsequent sentence.

2. The appeal proceeded by way of written submissions. The appellant filed amended grounds of appeal and submissions.

3. The State opposed the appeal and filed written submissions. It is submitted that the prosecution proved the complainant was penetrated, the perpetrator was identified and the age of the complainant was proved. That the defence was a mere general denial.

4. I have considered the evidence which was tendered before the trial court. This is a first appeal and this court has a duty to re-evaluate the evidence and consider it and come up with its own finding. However the court has to keep in mind that it did not have a chance to see the witnesses and assess their demeanor and leave room for that. This was stated in *Okeno -v- R (1972) E. A 32*. The Court of Appeal has re-affirmed this in *Joseph Njuguna Mwaura -v- R(2013) eKLR* where it stated:-

“Its common place that the 1st appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses before making a determination of its own”.

5. The first duty of the 1st appellate court is to re-evaluate the evidence, consider it and come up with its own finding.

6. I have considered the evidence which was tendered before the trial court. The evidence tendered was cogent, well corroborated and consistent. The evidence left no doubt as to who the perpetrator was. The allegation of defilement was corroborated by the medical evidence. The age of the complainant was also proved. The defence of the appellant was a mere denial which was disapproved by the prosecution witnesses. There was sufficient evidence to base a conviction.

7. Be thus as it may the appellant relied on six grounds in his amended grounds of appeal and raised the following issues:-

1. Where the crime was committed and time

Appellant claims the prosecution could not prove whether the incident was committed at *[particulars withheld]* where he resides. In addition, it was stated it occurred at 6:30 p.m and later changed to 8:00 p.m

8. PW 1 in her evidence confirmed at the time of the incident she stated her aunt and grandmother which was confirmed by both PW 5 and PW 4 who stated she stays at *[particulars withheld]*. The charge sheet indicates the offence occurred at *[particulars withheld]*. This issues is explained by PW 3 in her cross-examination where states that she resides in *[particulars withheld]* and PW 1 was defiled on her way to *[particulars withheld]*.

9. On the issue of time; PW 1 stated it was 6:30pm when the appellant who had previously wanted to be her lover pulled her to the coffee plantation. During cross-examination she stated it was at 8:00 p.m but during re-examination clarified that she was sent at 6:30 p.m and she was attacked as she was going back home at 8:00pm.

There was no doubt as to where the offence was committed.

2. Identification/recognition

Appellant claims that the trial magistrate relied on wrong identification produced contrary to **Section 46 of the CPC**. That the incident occurred at night and no evidence of the light used was adduced. That it was only in re-examination that PW 1 stated she recognized the voice of the appellant.

10. PW 1 confirmed in her evidence that the appellant who wanted to be her lover grabbed her by the collar of her dress and pulled her towards the coffee plantation. During cross-examination she stated that she saw his face when he grabbed her and even recognized his red cap. At 6.30 Pm there is sufficient light. Appellant was known to PW-1-. It is trite that recognition is better than identification. Circumstances favoured positive recognition. **Section 46 Criminal Procedure Code** has no relevancy and was not relied on.

3. Contradictions and inconsistencies

11. The appellant alleges there was contradiction on where PW 1 resided. PW 1 stated she stayed at *[particulars withheld]* with PW 3 her mother who sent her for paraffin. PW 5 on the hand confirmed she stays with PW 1 at *[particulars withheld]* together with PW 2 and PW 4.

12. PW 1 in her evidence stated she stays at *[particulars withheld]* with her mother PW 5 and that her grandmother was the one who sent her to the shop to buy paraffin. PW 5 stated she stays at *[particulars withheld]* with PW 1 but that PW 1 used to stay with her aunt and grandmother. PW 4 the aunt of PW 1 confirms she stays at *[particulars withheld]* and on the said date she passed by her mother-in-law's house who told her to give PW 1 money to buy paraffin.

13. There is therefore no discrepancy since at the time of the incident, PW 1 was staying with her aunt and grandmother who sent her to buy the paraffin. This was confirmed by PW 4. There are no discrepancies and even where they exist, the court will ignore minor discrepancies which do not affect the credibility of the witnesses.

4. Medical evidence

The appellant claims, there being no evidence of the hymen being freshly broken who therefore would suggest penetration was by penis.

14. PW 6 confirmed the age of injuries as 2 days, that her hymen was missing, she had bruises on the perinal and there was a foul smelling discharge which revealed a diagnosis of defilement. PW-1- proved that the appellant penetrated her with his penis when he defiled her. The prosecution proved that penetration was by a male genital organ in the process of defilement.

5. Whether the prosecution prove its case beyond reasonable doubt

15. Having considered the entire evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW 1 was able to narrate the occurrence of the incident and what the appellant did to her which was corroborated by the medical evidence. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion, that of guilt of the appellant.

16. In Conclusion:-

I find that this appeal is without merits and is dismissed.

Dated at Kerugoya this 21st day of February 2019.

L. W. GITARI

JUDGE