



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**H.C CRIMINAL APPEAL NO. 33 OF 2016**

*(From original conviction and sentence in Criminal Case No. 134 of 2014 of the Principal Magistrate's court at Wang'uru)*

**JOHN MAINA KAMAU.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant John Maina Kamau was convicted of defilement of a girl aged 16 years on 25/05/2014 and sentenced to 15 years imprisonment. He was charged under **Section 8(1)** as read with **Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. He has lodged an appeal claiming that the learned magistrate erred in law and fact by;

***a) The arresting officer didn't appear for hearing.***

***b) Time frame when complainant was examined not considered.***

***c) Lack of evidence.***

***d) Appellant's wife's testimony ignored.***

***e) Failing to consider victim's age and was highly influenced by mother.***

2. It was alleged that on 25/5/2014 at [Particulars withheld] Market, the appellant intentionally caused his penis to penetrate the vagina of EW a child aged 16 years at [Particular withheld] Bar and Lodging.

3. When the appeal came for directions, the appellant opted to proceed by way of written submissions.

4. The State opposed the appeal and filed submissions which were in response to those by the appellant. The prosecution counsel Mr. Obiri prayed that the appeal be dismissed.

5. On his part the appellant prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

6. Brief facts of the case are that the complainant in this case EW is a girl who was aged 16 years at the time of this offence and was a student in Form 2 at [Particulars withheld] Secondary School. On 25/2/14 she went to the stage at Makutano on her way home and met the appellant who had a motor bike. She asked him to take her home. The appellant charged her Kshs 50/-. The complainant sat on the motor bike. The appellant did not take her to her destination. Instead he sped off at a high speed unto Ngurubani Town.

7. The appellant led her to a pub and then to a room where there was a bed. The appellant threatened to kill her if she screamed. The appellant had sex with her the whole night. The next day the appellant took her to Makutano and dropped her at the stage. The complainant informed her friend L who called the complainants mother.

8. In the meantime the mother had reported to the police at Makutano that she was missing. The complainant then went and reported at Makutano police Station. She was referred to hospital and a P.3 form was filled by Wilson Mbugua Gikonyo (PW-3-) of Mutithi Health Centre who on examining her found that the genitalia was normal with no bruises or lacerations. There was a whitish discharge. He testified that it was not clear whether the complainant was defiled. No spermatozoa was seen. The hymen was not intact. The P3 is exhibit - 1. PW3 saw the patient five days after the alleged assault. The appellant was then charged.

9. This is a first appeal. This court has a duty to analyse the evidence, evaluate it and come up with its own finding. However the court has to consider that it did not have an opportunity to see the witnesses and leave room for that. This was so stated in the case of **Okeno –v- R. (1972) E.A 32.**

10. I have considered the evidence tendered. The complainant testified that she was defiled on 25/5/2014. The statement to the police which was read in court shows that it was recorded on 28/5/14. She did not scream and she did not report to the police immediately. PW-2- RNG who is the complainant's mother is the one who reported to the police. She testified that the accused returned home on Monday but the complainant returned on Wednesday morning. She said she did not know where the complainant was on the days she was missing. The evidence of PW-2- was hearsay as she relied on what she was told. The evidence of the complainant was not corroborated. It is only the word of the complainant against that of the accused that she was with accused from Sunday upto Wednesday.

11. The prosecution called PW-3- Wilson Mbugua Gikonyo a clinical Officer. His testimony was that he filled the P3 form for EW aged 16 years. The P3 form was filled on 30/5/14 when the complainant went to Mutithi Health Centre. On examination on allegation of defilement he found that:-

- ***Genitalia was normal.***
- ***There were no bruises.***
- ***There were lacerations.***
- ***There was whitish discharge.***
- ***No sperms found on the victims private parts.***

12. In conclusion he stated it was not clear whether the victim was defiled. He further testified that the complainant was not a virgin as the hymen was not intact.

13. In cross-examination, the witness testified that the patient had no treatment card and he had to rely on the information from the patient. The P3 form had no out patient reference number.

14. The evidence of the complainant was not corroborated by any eye witness. Though the court can rely on the uncorroborated evidence of the complainant in a sexual offence, the testimony must be corroborated by medical evidence. The absence of hymen does not prove defilement, PW3 told the court the broken hymen was an indication that she had engaged in sex before – page 28 line 4. At page 29 – PW-3- stated that ***“if it was the first time for complainant to have sex, he could have noted blood,”*** line 6-7. This evidence does not support the allegation of defilement.

15. PW-4- P.C. Joakim Owiti testified that the offence was reported on 26/6/14 after she was defiled on 25/6/15. That he visited the scene with complainant on 3/6/14. This was not in the testimony of the complainant. PW-4- contradicts the complainant on the dated offence was reported and by who.

16. Looking at the evidence tendered, the evidence of the complainant was not corroborated. No evidence was called to prove that she was carried by the appellant on his motor bike on the material day. No witness confirmed that the accused was at Mwea Bar with the complainant. The evidence of PW4 that the two were there is hearsay which is not corroborated. The accused testified that she was framed and no eye witness saw him carrying the complainant. The evidence tendered by the prosecution is not weighty and does not prove the charge against the accused beyond any reasonable doubts.

17. The appellant submits the evidence was not sufficient to sustain a conviction. He submits no explanation was given as to why he was not arrested immediately. The manner in which the accused was arrested raises doubts as to whether he had committed the offence. PW4 said he was summoned to the scene. He was not arrested. He was then summoned to the police station on 3<sup>rd</sup> June and charged. It raises doubts as to whether the appellant had committed such a serious crime.

18. The prosecution failed to call key witnesses like L the complainant's friend where she went after the incident, Mukenya and witnesses at the alleged Bar and Lodging where offence was committed. This in my view were crucial witnesses to corroborate the complainant's evidence.

19. The Court of Appeal held in the case of **Erick Onyango Ondeng' v Republic [2014] eKLR** as follows;

***In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;.....***

***While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well Section 143 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.***

20. The court stated that the prosecution had a duty to call witnesses when the evidence is barely enough. In this case the evidence of the complainant was barely enough for want on corroboration by witnesses and by medical evidence. In this case the prosecution had a duty to

call. The witnesses failure to call the witnesses was fatal as the evidence by the complainant was barely enough. Under **Section 124 of the Evidence Act**, the proviso thereto the court can rely on the testimony of the complainant in a sexual offence if the court is satisfied that the complainant is telling the truth. In this case the testimony of the complainant was not reliable as it was not corroborated by medical evidence or eye witness to confirm she was carried on a motor bike by the accused. The prosecution had the burden to prove the case beyond any reasonable doubts. It had a duty to call all crucial witness. Failure to call the witnesses was fatal as the evidence was barely adequate. Failure to call the witnesses left the defence of appellant intact. The appellant had no burden of proof even to prove his innocence. It is a cardinal principle in criminal cases that the burden to prove the guilt of accused lies with the prosecution.

21. The trial Magistrate shifted the burden by stating that the accused failed to call the care taker at the lodging. The trial Magistrate stated –

***“ However the accused never called the caretaker as a defence (sic) for him to corroborate his testimony”*** page 56 line 11-13.

22. From the record, it was the prosecution who wanted to call the care taker to be a prosecution witness but he had not recorded a statement. He was not called by the prosecution. The trial Magistrate erred by shifting the burden to the appellant. This was a violation of the right of the appellant under **Article 50 of the Constitution** which provides that the accused person has a right to be presumed innocent until proved guilty. **Article 50(2)(a)** provides:

***“Every accused person has a right to a fair trial which includes the right –***

***To be presumed innocent until the contrary is proved”.*** Under **Article 25 of the Constitution**, the right to fair trial is one of the rights which cannot be united. The burden of proof in Criminal cases never shifts. Where there are gaps in the prosecution case, an accused person cannot be called upon to fill them, such gaps must be viewed as raising doubts in the prosecution which must go to the benefit of the accused.

23. The trial Magistrate erred by stating that the appellant did not call any witness. It must be noted that the case depended on the word of the PW-1- against that of the appellant. The Magistrate did not consider the defence of the accused. My view is that the evidence of the complainant PW-1- was not sufficient as it was not corroborated especially with regard to areas where witnesses were available and not called and a conviction on charge of defilement must be corroborated by medical evidence which was not the case. The trial Magistrate did not give reasons for believing the complainant as required under **Section 124 of the Evidence Act**. The Sections provides:-

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

24. For the trial Magistrate to rely on the evidence he must record the reason upon which he was satisfied that the complainant was telling the truth, short of that corroboration is required on material particulars. Penetration which is the key ingredient must be confirmed by medical evidence.

25. I find that the prosecution did not prove the charge against the accused beyond any reasonable doubts. There were doubts in the prosecution case which should have been given to the appellant. I find that the appeal has merits. I allow the appeal. I order that the conviction be quashed, the sentence be set aside. The appellant be set at liberty unless otherwise lawfully held.

**Dated at Kerugoya this 21<sup>st</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**