



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 59 OF 2016

PETER KAMAU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Thika Chief Magistrate's Court Criminal Case No 4990 of 2010 (Hon. J.W. Onchuru Ag. Principal Magistrate) dated 7th October 2014)

JUDGMENT

1. The appellant, **Peter Kamau Njoroge**, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars of the offence are that on the 2nd day of December 2010 in Thika East District within Kiambu county committed an act which caused penetration with TW, a child aged 12 years. The appellant faced a second count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the 2nd day of December 2010 in Thika East District within Kiambu county committed an indecent act with TW by touching her private parts.
2. The appellant pleaded not guilty to the offence and was tried before the Chief Magistrate's Court in Thika. The matter was part heard by Hon. Ndeda, (PM) and was then taken over by Hon. Onchuru J.W on 28th March 2013 when the appellant elected to proceed from where the matter had reached and not to recall any witnesses. He was found guilty on the main count and sentenced to 20 years imprisonment in the judgment of the trial court dated 7th October 2014.
3. Aggrieved by both his conviction and sentence, the appellant filed the present appeal. In the Amended Supplementary Grounds of Appeal filed in court on 17th September 2018, he raises four grounds of appeal. He argues first that the charge sheet was defective and violated section 3(1)(a) of the Sexual Offence Act No. 3 of 2006. His second ground is that the burden of proof was not discharged as demanded by law and his conviction was therefore manifestly unsafe. In his third ground, he contends that the judgment was a nullity as the trial proceeded on a defective charge sheet. His final ground is that he was not accorded a fair trial as the trial commenced without the court first receiving a report as to his fitness to stand trial.
4. With respect to the defective charge sheet, the appellant notes that the charge sheet did not state the means of penetration and which part of the complainant's body the said penetration was occasioned. He relied on the decision of Achode J in **Tito Marshal Abony v Republic High Court Criminal Appeal No. 280 of 2010**. He urges the court to be guided by the decision and allow his appeal. He also relied on the decision in **Ramadhan Ahmed vs Republic (1955) EACA 22** to submit that he had discharged the burden of proving that the decision of the Magistrate's Court was unreasonable and could not be supported by the evidence.
5. In his submissions in reply, Learned Prosecution Counsel Mr. Ongira observed that the prosecution evidence was consistent and corroborative and supported the charge the appellant faced. The prosecution had been able to prove that penetration had occurred, the age of the child and the identity of the offender. The trial court had also noted the defence evidence in which PW2 had indicated that the appellant was epileptic.
6. Before embarking on a consideration of the substantive grounds raised in this appeal, I note that the appellant has raised in his fourth ground of appeal the issue of his mental state at the time of his trial. I propose to dispose of this ground first before considering the grounds of appeal with respect to the evidence adduced before the trial court.
7. The record of the trial court indicates that the prosecutor had noted on 9th December 2010 that he had been informed that the appellant was mentally disturbed. The trial court made an order that the appellant should be taken for psychiatric evaluation and treatment. The court record indicates in the proceedings for 7th February 2011 that the court noted that the psychiatric report had been noted and that it indicated that the appellant was epileptic. The charge was then read out to the accused and he took plea. I believe therefore that ground 4 of the supplementary grounds of appeal in which he complains that the trial court proceeded with the trial before receiving a report on his fitness to stand trial is without merit. The court duly noted the psychiatric report which showed that he was epileptic. I have not heard him to say that epilepsy rendered him unfit to stand trial.

8. Grounds 1 and 3 are to the effect that the charge sheet was defective. The appellant argues that the charge sheet does not indicate which part of his body was the means of penetration and the part of the complainant's body which was penetrated.
9. I have considered the evidence before the trial court with respect to this ground. The complainant (PW1) had been sent by her father to buy him matches and a cigarette. The appellant, a neighbour, also sent her to buy him cigarettes. She went with two friends and on return gave the appellant his cigarettes. He however pulled her into his house. He closed the door, undressed her and took off his own clothes. She described in detail how he had put his 'organ for urinating' in her 'organ for urinating' and she felt pain and shouted. He then threatened to tear her mouth if she shouted. Her father came and broke a window and entered the house and the appellant went under the bed from where he was pulled while naked.
10. The evidence of PW 1 was corroborated by that of PW2, LMN. Her daughter (S) had been with the complainant when she was held by the appellant. L had gone to the appellant's house and seen the appellant lying on the complainant, raping her. L had heard the appellant say, "Let me finish". People had entered the house through a window and had removed the appellant from the complainant. L had seen PW1's panties which were blood stained. She had also observed her private parts and noted that she was bleeding.
11. PW4, EMK, was the father of the complainant. He had been informed about his daughter being in the appellant's house and had found her locked inside the house. He had called her name and she had screamed asking him to go and assist her. He had locked the door from outside then broken the window and seen the appellant raping his daughter on the bed. Both the appellant and the complainant were naked. A mob had entered the house, and the appellant had started fighting with everyone, saying he needed to finish his mission. His mother (DW2) had thrown a stone at him. He had taken the complainant to Kaguku dispensary while the appellant, who had been saved from being lynched by a mob, was taken to the police.
12. James Gachigi (PW6) and PW3 (SW) corroborated the complainant's evidence that she had been sent to the shop by her father, then the appellant had also sent her for cigarettes. He had pulled her into his house and they had heard her screaming. They had reported to S's mother (LM PW2) who had gone to the appellant's house and seen him defiling the complainant.
13. PW8 Dr Clifford Chacha Mwita of Thika level 5 Hospital produced the P3 form on the complainant which was filed by Dr Magutu. He also had his clinic notes. The medical examination showed that the complainant's under pants were torn and full of blood. She had pain and lacerations on her vagina. A high vaginal swab showed spermatozoa. The doctor concluded that she had been defiled.
14. The crux of the appellant's case is that the charge sheet was defective as it did not indicate what part of his body penetrated what part of the body of the complainant. I have considered the decisions of Achode J, that he relies on. I note however that the appellant in this case was caught red handed in the act of defiling the complainant. He had removed his clothes and hers. He even had the effrontery to ask to be allowed to "finish" his act of defilement. His mother in her defence evidence confirmed that he was in the house with the complainant; she had seen the complainant's father with a panga and had told a boy to remove the complainant from the room.
15. Having considered the very elaborate and consistent prosecution evidence and noted that the defence witness essentially supported the prosecution case, I am unable to see how the failure of the police to appropriately record the charge sheet can detract from the clear evidence in this case. I am not satisfied that the appellant was left in any doubt as to the charge he was facing. In this regard and on the facts of this case, I am unable to agree with the decision of my sister, Hon. Justice Achode, in **Tito Marshal Abony v R** (supra) relied on by the appellant.
16. The upshot of my findings above is that the present appeal is without merit. It is hereby dismissed, and both the conviction and sentence upheld.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this 30th day of May, 2019

C. MEOLI

JUDGE