



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL 7 OF 2017

JIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Malindi Chief C. M. Cr. Case No. 73 of 2014 by Hon. Dr. Julie Oseko, C. M. dated 7/3/2017)

JUDGMENT

1. The Appellant, JIR, was charged, tried, convicted and sentenced to serve ten (10) years imprisonment in respect of the main count of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006. The particulars being that on 30th August, 2014 within Kilifi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of MAB a girl aged 16 years.
2. The Appellant has through amended grounds of appeal filed on 14th May, 2019 faulted the trial Court for convicting him against the weight of the evidence adduced in support of the charge and failing to consider his defence.
3. This being a first appeal, this Court has a duty to look at the evidence afresh in order to arrive at its independent decision on the same. In doing so, the Court must give allowance to the fact that, unlike the trial Court, it did not have the opportunity to observe the demeanor of the witnesses as they testified.
4. The appeal, by consent of the parties, proceeded through written submissions.
5. Through submissions filed on 23rd October, 2018, the Appellant highlighted three issues. The first issue being that there was no prove of penetration. In support of this argument, he contends that although the evidence adduced by the prosecution indicated that the complainant was H.I.V. positive, several tests carried out on him established that he is H.I.V. negative. He urged the Court to conclude, based on the discordant H.I.V test results, that he did not penetrate the complainant.
6. Secondly, the Appellant submitted that although the trial Court had, after subjecting the complainant to *voir dire* examination, formed the opinion that the complainant had sufficient intelligence to tell the truth, the trial magistrate had nevertheless allowed the complainant to give unsworn testimony without indicating on record the reasons for her decision. For this reason, the Appellant, relying on the decision of the Court of Appeal in the case of **Samuel Warui Karimi v Republic [2014] eKLR** urged this Court to find the complainant's evidence unsafe and quash his conviction.
7. Finally, the Appellant asserted that Section 200(3) of the Criminal Procedure Code was not complied with after a new magistrate took over his trial. His view is that failure to comply with the said provision renders his trial and conviction a nullity.
8. In submissions filed on 6th March, 2018, counsel for the Respondent urged this Court to uphold the conviction and sentence stating that all the ingredients for the offence of defilement had been proved.
9. Counsel for the Respondent submitted that the Appellant had not been charged for transmitting H.I.V. to the complainant and the Appellant's H.I.V. status was therefore irrelevant in the trial.
10. I will start by considering the issues raised by the Appellant about the legality of the trial. On the question of *voir dire* examination, the record as captured by the Court on 29th January, 2015 is as follows:

“PW1 VOIRE DIRE.

How old are you? I am 16 years old. I go to school at [particulars withheld] Primary School in class 7. I know I am in Court for the hearing of my case. I do not understand what an oath is. I do not go to church but I know telling lies is wrong. I will tell the truth.

Court: Voire Dire conducted. The witness understands the need to tell the truth. She will give an unsworn statement.”

11. The record clearly shows that the trial Court conducted *voir dire* examination and came to the conclusion that although the witness appreciated the importance of telling the truth, and could give testimony, the witness did not understand the meaning of an oath. The trial magistrate was therefore correct in directing the complainant to give unsworn testimony. The Appellant was given an opportunity to cross-examine the witness. From the record, I find that the trial magistrate proceeded in the manner required by the law.

12. The other issue touching on the legality of the trial was the alleged non-compliance with the requirements of Section 200(3) of the Criminal Procedure Code. The record of the proceedings on 28th September, 2016 confirms compliance with Section 200(3) of the Criminal Procedure Code. The Appellant indicated that he wanted the matter to proceed from where it was left by the previous magistrate. He also indicated that there was no need to recall any of the witnesses who had testified. This ground of appeal also fails.

13. The remaining question is whether the prosecution, as legally required of it, proved the case against the Appellant beyond reasonable doubt.

14. In his judgment the trial magistrate concluded that the medical reports and the evidence of the complainant's mother corroborated the case.

15. What was the evidence laid before the trial Court? The complainant who testified as PW1 told the Court that the Appellant who was the husband of her deceased aunt seduced her by buying her clothes and other items. She eventually gave in and they started having sex in the forest.

16. Her parents noticed that there was something wrong with her and started investigations. At one time, her father found her with the Appellant behind the house. Eventually a family meeting was held and the complainant interrogated. She revealed details of her affair with the Appellant. The matter was reported to the police and the Appellant was arrested and charged.

17. NFY., the mother of the complainant, testified as PW2. She told the trial Court that sometimes in September, 2014 the Appellant approached her and offered to buy a bag, socks, shoes and a watch for the complainant. Not suspecting that he had bad intentions she allowed him to purchase the items for her daughter. After a while she noticed that her daughter had changed. She was rude and disobedient. She would also spend time eating in hotels although she had not given her money. She made a decision with her husband to investigate their daughter and that is when it came to light that the Appellant was having an affair with her. She told the Appellant to keep off her daughter.

18. Upon interrogating her child she disclosed to her that she had been having sex with the Appellant in the forest. She reported matter to the police. When the complainant was examined she was found to have been defiled. She was tested for H.I.V. and she turned out to be positive.

19. PW3 Ibrahim Abdullahi stated that upon examination of the complainant her hymen was broken. A pregnancy test carried out was negative. The H.I.V. test was however positive. He made the conclusion of penetration and H.I.V. transmission to the complainant.

20. PW4 Corporal Benard Ogaye restated what Corporal Magaret Terenoi, the Investigating Officer recorded in her statement.

21. In his defence, the Appellant who testified as DW1 denied committing the offence. He, however, admitted purchasing some items for the complainant. He also testified that the complainant had given birth and was even living with the father of her child at the time of his testimony.

22. DW2 James Genga gave evidence to the effect that the Appellant was arrested and charged because the mother of the complainant became jealous of the items the Appellant was purchasing for the complainant.

23. From a distance, this case looks like a straight forward case of defilement. An interrogation of the evidence will however disclose some disturbing facts. The Appellant insisted that he was H.I.V. negative. PW1 and PW2 told the Court that the Appellant's wife had been killed by AIDS about two years prior to the affair between the complainant and the Appellant.

24. The H.I.V. question was addressed in the judgment of the trial Court as follows:-

“The issue in dispute to be determined by this Court is whether the complainant was defiled by the accused person. There is of course the issue of H.I.V. infection but that is not very relevant though notable in this case since the accused person has not been charged with knowingly infecting the complainant with the virus or any H.I.V. related aspect.

In addition, it must be noted that the H.I.V. status of the accused is unknown or unconfirmed since he was not tested on the same.”

25. The said finding is not consistent with the evidence on record. When the complainant was cross-examined, she insisted that the Appellant infected her with H.I.V. and his wife had died of H.I.V./AIDS. During re-examination she testified that:

“The accused gave me money secretly. My parents were not aware he was giving me money. He seduced me. He had carnal knowledge of me. The accused person is the only man I have ever had sex with. I contracted HIV/AIDS from having unprotected sex with the accused person. His wife died from HIV/AIDS complications. I do not know if the accused was tested for HIV”.

26. In her testimony the mother of the complainant stated that:

“My daughter was found to be HIV+. I asked my daughter how many men she was sleeping with. She told me it was only the accused. She is now on ARVS treatment. I do not know if the accused has HIV.... I am HIV negative. M.’s father is HIV negative.”

27. It is apparent that the H.I.V. status of the Appellant was a central issue in the trial. This may explain the proceedings of 29th January, 2015 which were captured by the trial Court as follows:

“Prosecutor: I request for an adjournment. I will call other witnesses. We seek to amend the charge sheet. I apply for the accused to present himself before the investigation officer for blood samples to be taken for analysis to check his status. He claims he is negative.

Accused: I have no objection. I was taken to hospital by the investigation officer when I was arrested. I was taken to Gede Dispensary

Court: Summons to investigation officer to explain where the accused medical records are as he claims. Mention on 2/2/2015 for the investigation officer to attend Court.”

28. On 2nd February, 2015 the investigating officer Corporal Margaret Turanoi appeared in Court and confirmed that she had indeed taken the Appellant to Gede Health Centre on 17th October, 2014. She stated that she had the treatment notes. The magistrate directed that the treatment notes be kept in the police file.

29. On 11th June, 2015 the prosecutor addressed the Court thus:

“I have spoken to the investigation officer. She says that the charge sheet was to be amended if the accused Person’s HIV test was found to be positive. The tests were done. We may take another date.”

30. The impression one gets is that the Appellant’s H.I.V. test was negative. This is strengthened by the fact that the charge sheet was never amended. When PW4 testified he stated that he did not know if the Appellant had been tested for H.I.V. He also did not know if he is the one who transmitted H.I.V. to the complainant.

31. If the Appellant was indeed H.I.V. negative as can be deduced from the record then who infected the complainant with the virus? This question becomes crucial considering that the complainant testified that it is the Appellant who deflowered her and he was the only man she was sexually involved with. This is also what she told her mother.

32. It is possible that the Appellant was on H.I.V. treatment and the virus had been suppressed beyond detection. If this was so, the prosecution had a duty to establish this fact. It did not do so. In such circumstances the Appellant’s claim that the complainant was living with another man receives some credence.

33. The only conclusion is that the complainant was an untruthful witness. There was therefore no basis for convicting the Appellant based on the proviso to Section 124 of the Evidence Act as a conviction under the said proviso can only arise where the court is satisfied that the victim of a sexual assault is telling the truth. In this case, the victim was not truthful and the Appellant ought to have been given the benefit of doubt. For the said reasons, I find the Appellant’s appeal merited. The same is allowed.

34. The conviction is quashed and the sentence is set aside. The Appellant is set free unless otherwise lawfully held.

Dated and Signed at Nairobi this 8th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Delivered and Signed at Malindi this 28th day of May 2019

R Nyakundi,

Judge of the High Court