



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 13 OF 2015

(From original conviction and sentence in Criminal Case No. 5 of 2014 of the Principal Magistrate's Court at Gichugu).

MATHEW MUCHIRI GATUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Mathew Muchiri Gatumbi was charged before the principal Magistrate's Court at Wang'uru with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act. After a full trial the appellant was sentenced to serve 20 years imprisonment.

2. The appellant was dissatisfied with both the conviction and sentence and lodged this appeal. He filed amended grounds and raised various issues.

3. The appeal proceeded by way of written submissions.

4. This being a first appeal, the duty of this court is to consider the evidence which was tendered before the trial court, evaluate it and come up with a finding. This in line with the holding in **Okeno -v- R (1972)E.A 32**. This court must leave room for the fact it did not have an opportunity to see the witnesses and assess their demeanor.

5. The facts of the case are that on 11/7/14 the complainant who was a minor aged fourteen(14) years was left at home by her parents who had gone to attend a graduation ceremony. At around 5.00 Pm she went to check on the house of Mama Felista's who had accompanied her parents. She then passed the house of another neighbor Mama Karimi. As she was on a path the appellant emerged from behind and led her to Muthoni's kitchen. The appellant led her to the kitchen where there was a bed. The appellant placed her on a bed and removed her pant. The appellant removed his trouser and pant. The appellant mounted on her and then caused his penis to penetrate into her vagina and started having sexual intercourse with her. The complainant felt pain and started screaming. Susan Muthoni (PW-2-) heard and responded to the screams. The appellant realized there was someone coming. He quickly rose, dressed up, picked an axe and left. PW-1- informed PW-2- what had happened. PW-2- asked appellant why he committed the offence. The appellant demanded that the minor removes her clothes and they check if she was defiled. PW-2- refused to subject the minor to humiliation and decided to report to the police. The matter was reported at Kimunye Police Patrol Base. The complainant was issued with a P3 form. She was treated at Kerugoya County Hospital. The Clinical Officer who confirmed that the complainant was defiled as they hymen was broken, virginal swab revealed there were spermatozoa and she had two cuts on her genitalia. There was evidence of penetration. The appellant was then charged.

6. I have considered the evidence tendered before the trial court. I find that the complainants evidence was corroborated by PW-2- and the medical evidence tendered by PW-3-. The evidence is consistent, well corroborated and cogent.

7. The appellant raised the following grounds:-

1. Contradictions

The appellant alleges the following contradictions;

i) PW 1 and PW 2's evidence

However, evidence of PW-1- as corroborated by the evidence of PW-2-. The evidence of the two witnesses is devoid of contradictions. For the court to interfere with a conviction, the contradictions must be so grave and more so on material particulars such that they raise doubts on the evidence and the credibility of witnesses. This is not the case. The evidence by PW-1- & 2 is credible and reliable.

ii) Where appellant was examined

Investigating officer took appellant to Kerugoya hospital while PW 3 stated examination took place at Kabare hospital. There was no contradiction. The evidence was clear. PW-4- first took appellant to hospital at Kerugoya. The P3 form was filled by PW-3- on 12/7/14 at Kabare Health Centre. There was no material contradiction.

8. It was confirmed that the appellant was examined at Kabare health centre but his P3 form was filled at Kerugoya hospital. There was no contradiction. The evidence was clear. PW-3- who filled the P3 forms which we produced in court gave evidence. The appellant did cross-examine him and PW-3- set the record straight.

iii) O.B report

O.B report was made on 07/06/2014 and alleged incident occurred on 11/07/2014.

9. The charge sheet indicates OB 13/07/06/2014 while the P3 form indicates OB 9/11/07/2014 and the treatment notes are dated 11/07/2014. All the prosecution witnesses confirm the date as 11/07/2014 It is therefore clear that, the same seems to be typographical error. There was no miscarriage of justice and no prejudice was occasioned.

10. The said discrepancy is minor and they do not affect the main substance of the prosecution's case that PW 1 was defiled by the appellant. **Section 382 of Criminal Procedure Code** provides:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

2. Medical evidence

That PW 1 was used to sexual act and spermatozoa was not tested to prove its relationship with the appellant. In addition, appellant was examined and the report was that he had not committed the offence. The appellant was examined the following day and the Doctor found that there was nothing significant. This does not exonerate him. The prosecution was supposed to prove three ingredients of the charge which are penetration, the perpetrator and the age. It is the evidence of the complainant which identified the perpetrator. PW-1- identified the perpetrator and her testimony was corroborated by PW-2-. Medical evidence also proved that she was defiled. Medical examination of the appellant was to check if there was something to connect him to the offence but there was also direct evidence from PW-1- & 2 which implicated him.

11. PW 3 testified that he filled P3 form for PW 1 and the appellant. That PW 1 was examined at Kerugoya hospital and her genitalia had a small tear at 12 o'clock and 6 o'clock, the hymen was broken and there was bloody/discharge on the vaginal canal. That this was evidence of penetration.

12. He also testified that the appellant had been examined at Kabare health center and there was nothing of significance noted. The medical evidence was cogent. It sufficiently proved that there was penetration. Penetration is defined under the **Sexual Offence Act** as:-

“Means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

Penetration was proved by the medical evidence. **Section 8(1)(3) of the Sexual Offences Act** provides:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The ingredients of the charge were proved beyond any reasonable doubt. The evidence was weighty and cogent.

3. P3 form

The appellant alleged that the P3 form had no hospital stamp to certify its origin and genuinity

13. The Clinical Officer, PW3 who failed to cause the P3 form to be stamped stated that he personally examined PW 1. He was the maker of the document. evidence was direct evidence of what he perceived with his eyes. Furthermore the witness confirmed that the document was authentic and was documented at the said hospital as it was bearing the medical Officers ref No. 38671 which is also on the treatment notes. The treatment notes bear printed names of Kerugoya County Hospital which is the same on the lab request forms. There was no miscarriage of justice. PW-3- gave best evidence as it was direct. Section 382 of the Criminal Procedure Core cited **supra** applies.

14. Vital witnesses were not called.

It is the preserve of the prosecution to determine the witnesses it wishes to call in support of their case. The Evidence Act provides that no particular number of witnesses are required to prove a fact. **Section 143 of the Evidence Act** provides:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

15. It is not clear what the probative value of the stated witness Mama Wambui would be. The court can only speculate. Failure to call a witness would be fatal to the prosecution case where they have a weak case. This is not the case here. As submitted, traditionally a person who may seem to be a witness may not be considered as one of the prosecution witness because their testimony may lack intrinsic value to the case, or may not have been available in time to testify without unreasonably delaying the case. The evidence tendered by the prosecution was sufficient to prove the case.

4. Whether the prosecution proved its case beyond reasonable doubt

Upon considering the evidence in its entirety, 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. PW 2 who heard PW 1 scream saw the appellant with an axe and on questioning PW 1 who came out, she was informed she had been defiled. 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 the guilt of the appellant.

The appeal is without merits and is dismissed.

Dated at Kerugoya this 23rd day of May 2019.

L. W. GITARI

JUDGE