



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 39 OF 2016

(From original conviction and sentence in criminal case No. 227 of 2016 of the Principal Magistrate's Court at Karaba).

REPUBLIC.....PROSECUTOR

V E R S U S

ELIUD MUNYI CINI.....RESPONDENT

JUDGMENT

1. The appellant Eliud Munyi Cini (to be referred to as the appellant) was convicted of the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act** and sentenced to life imprisonment. He was charged before Wang'uru Principal Magistrate's Court Cr. Case No. 277/2016 and pleaded not guilty.

2. The appellant was dissatisfied with both conviction and sentence and filed this appeal which raised four grounds. He however filed amended grounds which raises the following grounds:

a) That the trial Magistrate erred in law and fact while convicting the appellant in reliance with the complainant's evidence without considering the same was riddled with contradictions and inconsistencies which was never supported by the Clinical Officer's evidence.

b) That the trial Magistrate further lost direction after being influenced with the evidence of the whole set of prosecution witnesses and failed to consider none of them ever witnessed the ordeal while further the mode of appellant's arrest was been left in doubt.

c) That the trial Magistrate erred in law while rejecting the appellant's defence without considering the same was not displaced by the prosecution side as per Section 212 of C.P.C Cap 75 Laws of Kenya.

3. The appellant prays that the appeal succeed and the conviction and sentence be set aside.

4. The respondent opposed the appeal and prayed that it be dismissed.

5. The appeal proceeded by way of written submissions. The appellant filed submissions. For the respondent, submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecutions.

6. I have considered the grounds of appeal, the submissions and the proceeding before the trial court. This being a first appeal, the court has a duty to consider the evidence, evaluate it and come up with its own independent finding but keep in mind that it did not see the witnesses when they testified and leave room for that. This is in line with the holding in **Okeno -v- R(1972) E. A 32** where the court stated that an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination.

7. The brief facts of the case are that the complainant CW was aged Eleven years at the time she testified and was a pupil in class 4 at [Particulars Withheld] Primary School. She was born on 16/2/2005. On 29/3/16 at about 5.00 Pm she was coming from school and wanted to go to the home of Mama N to play with her daughter N. At the same time the appellant who was known to the complainant as **Eliud Munyi Cini** was heading towards the shop. The appellant called the complainant. When she went, the appellant asked her what she wanted and she said 'Ngumu' (a kind of cake). The appellant then sent the complainant to go and buy cigarettes and a match box. She bought the items and took him to the house of the appellant. The appellant asked her if she wanted Ngumu and she said yes. The appellant then told her to remove her clothes and wanted to do bad things to her. He covered her mouth then removed her clothes which were a skirt, a blouse and a biker. The appellant then pushed her on the bed and inserted his penis in her vagina. Before the complainant could leave the house her cousin V came to the house with her child. She left her there. She went and informed Mama Shiko what had happened. The complainant was taken home by Mama Shiko and she told her father and mother what happened. The matter was then reported at Wang'uru Police Station. She was then escorted to hospital and P.3 form was filled. The complainant was born on 16/2/2005 as shown by her birth certificate

which was produced as exhibit -1.

8. PW-4- Sylvester Wanga a Clinician who filled the P3 form found that the external genitalia was intact. The hymen was broken with no laceration. There was no presence of blood or discharge on the genitalia. The lab tests did not show anything of relevance. He concluded that there was attempt to penetrate but did not do so fully. That is why the hymen was partially broken. He filled the P3 form exhibit 2. The appellant was then charged.

9. The issue for determination is whether the charge was proved beyond any reasonable doubts.

10. I will first consider the grounds of appeal. The appellant raised the following grounds:

1. Contradictions and inconsistencies

The appellant alleges that PW 1 stated when she went to his house there were other people in the compound but during cross-examination she stated there were no people outside. In addition, she stated the appellant lives in a single room but later stated he has 2 rooms, sitting area and bedroom.

11. The said discrepancies are minor and they do not affect the main substance of the prosecution's case that PW 1 was defiled by the appellant. The discrepancies are not on material particulars and should be ignored where they do not cast doubts on the prosecution case.

2. Proof of penetration.

The appellant alleges that the medical evidence produced did not show there was penetration and PW 4 stated the hymen was partially broken.

12. The penetration can be complete or partial insertion of the genital organ of a person into the genital organs of another person unlawfully or without the consent of that person.

13. PW 4 stated that upon examining PW 1 he noted there was partially broken hymen with no laceration. He formed the opinion that the appellant tried to penetrate but did not do so fully and that is why the hymen was partially broken.

Penetration is defined in **Section 2 of the Sexual Offences Act** as:

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

Section 8(1)(2) of the Sexual Offences Act provides:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

14. The evidence of the complainant is that the appellant penetrated her. Medical evidence corroborates the evidence of the complainant that there was partial penetration.

15. Penetration has been proved in this case beyond any reasonable doubts.

16. PW-1- stated that the appellant has had sexual intercourse with her severally before. This was confirmed by PW-2- who in her evidence stated that PW-1- had prior to that date told her that the appellant had tried to defile her but was not successful.

17. PW-1- stated that it was not the 1st time she had gone to the house of appellant she stated that she had gone there on many occasions and it was not the 1st time they had sex. This was confirmed by PW-2- who testified that prior to that day PW-1- had told her that accused had tried to defile her but was not successful.

18. Penetration is one of the key ingredients in a charge of defilement. The prosecution adduced sufficient evidence which proved that there was penetration in the genital organs of the complainant by the appellant. Prove of penetration is prove that the complainant was defiled.

3. Appellant's arrest

The appellant alleges that the offence was committed on 29/03/2016 and PW 1 informed PW 2 later that day. PW 2 confronted the appellant then went to report to the police. PW 3 also stated that on 29/03/2016 he asked the people not to lynch the appellant but take him to the police station. However, the charge sheet indicates date of arrest as 14/04/2016 and then he was apprehended in court on 15/04/2016.

19. PW 5 did not confirm the date that the appellant was arrested. She however confirmed that she arrested the appellant. The charge sheet, the O.B No. is 2/14/04/016 and the date of arrest is indicated as 14/04/2016. The reference given on the P.3 form exhibit -2- is 59/29/3/16. The date and time the report was made to the police was 29/3/16 and that was also the date of the alleged offence.

20. The charge sheet confirms that the appellant was arrested. The trial Magistrate at Page 8 of the record stated that, *“the defence of appellant was that he was arrested on 5/4/16. However the charge sheet states accused was arrested on 14/4/2016. That whether this was the date he was confronted by PW-1- and members of Community Policing is not the issue.”*

21. What emerges from the charge sheet the evidence of PW-5- and the defence of appellant is that he was indeed arrested. There is no prejudice as the appellant admits that he was arrested by members of the public. There was no miscarriage of justice. It has been proved that the appellant was arrested for this offence and the fact is admitted. There is evidence by PW1 & 2 which is well corroborated that appellant was the suspect and was arrested for the offence. The ground is without merits.

4. Rejecting appellant’s defence.

His defence was considered in the judgment at page 29 and 31 of the record of appeal. The submission that his defence was not considered is a sham.

5. Whether the prosecution prove its case beyond reasonable doubt.

From the evidence adduced, PW 1 stated how the appellant called her to his house and upon entering removed her clothes and his clothes. He did bad things to her (pointed to her vagina) and she felt pain. She reported to Mama Shiko and she took her home.

22. PW 2 stated how PW 1 reported what the appellant had done to her. She checked her vagina and confirmed some whitish discharge and went to confront the appellant who denied. She later reported to the police and took PW 1 to hospital.

23. PW 3 heard a scream and found PW 1, PW 2 and other villagers. She was informed the appellant had defiled PW 1 and she urged the people not to lynch him but take him to the police.

24. PW 4 upon examining PW 1 noted there was broken hymen with no laceration but speculum examination could not be done since hymen was partially broken. He formed the opinion that there was an attempt to penetrate but it was not done fully.

25. PW 5 confirmed that PW 1 and PW 2 came to report the incident. She issued P3 form and escorted them to Kimbimbi where PW 1 was treated. She arrested the appellant and charged him.

26. The appellant stated that he left work as boda boda rider at 7 a.m and came back at 8 p.m. He found people at his house and PW 1 claimed he had defiled her. He was arrested.

27. Having considered the entire evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW 1 was able to narrate in detail the occurrence of the incident and what the appellant did to her. The medical evidence also showed her hymen was partially broken. 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.

28. The appeal is without merits. I dismiss the appeal.

Dated at Kerugoya this 27th Day of June 2019.

L. W. GITARI

JUDGE