REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 5 OF 2017

(From original conviction and sentence in Criminal Case No. 114 of 2017 of the Resident Magistrate's Court at Wangu'ru).

SIMON WACHIRA CHOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Daniel Muriithi Muthike was charged with defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act in Sexual Offence** case No. 12/2016 at the Principal Magistrate's Court at Baricho. After a full trial he was convicted and sentenced to 20 years imprisonment.

2. He was dissatisfied with the conviction and the sentence and lodged this appeal. In his amended grounds of appeal, he raises the following seven grounds:-

a) That the learned trial Magistrate erred in both law and facts when he denied a chance to cross-examine the complainant.

b) That the learned trial Magistrate erred in both law and facts when he admitted a doubt-ridden evidence of PW-1- (clinical Officer) who had not attained the required threshold.

c) That the learned trial Magistrate erred in both law and facts when he failed to consider that penetration was not proved to threshold.

d) That the learned trial Magistrate erred in both law and facts when he failed to call a crucial witness (the complainant father) to shed light to court whether he was together with the accused in a night club when the incident occurred.

e) That the learned trial Magistrate erred in both law and facts when he failed to consider that the perpetrator was not positively identified.

f) That the learned trial Magistrate erred in both law and facts when he admitted the Investigating Officer's evidence which was not adequate to liarrant the changes.

g) That the learned trial Magistrate erred in both law and facts when he failed to give my defense enough consideration.

3. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

4. The appeal was opposed by the respondent who submits that the appeal is without merits and urged the court to dismiss it.

5. The court gave directions that the appeal be disposed off by way of written submissions. The appellant filed submissions with amended grounds of appeal. For the State, submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecutions.

6. I have considered the submissions and the proceedings before the learned trial Magistrate. This being the first appellate court, this court has a duty to consider the evidence, analyse it and evaluate it then come up with its own finding. This court must however bear in mind that it did not have a chance to see the witnesses when they testified and leave room for that. This was the holding in the case of **Okeno –v- R 1972 E. A 32**

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination

(padya –v- Republic) the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala –v- Republic EA 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. Only then can it decide whether the Magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness -----"

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

7. The brief facts of the case are that the complainant ANM (PW2) was a girl aged 14 years at the time the offence was committed as per birth certificate which was produced. On 1/5/16 at about 6.30 Pm she left her home and went to her Aunts home at [Particulars Withheld] village. On the way the appellant who was at a butchery at Ngothi Shopping Centre. When she went there, the appellant held her and covered her mouth with a piece of cloth then led her to his house. The room was behind the butchery. While in the room the appellant removed her clothes then placed her on the bed. The appellant then inserted his penis into her vagina and defiled her. She bled from her genitalia. She went home and reported to her grandmother who in turn reported to her father. She was escorted to Sagana Police Station where the matter was reported. The complainant was referred to Sagana Sub-County Hospital where she was examined by a Clinical Officer Nahashon Murimi Muiruri (PW-2-).

8. On examination , PW-2- found that she had normal labia Majora and Labia Minora. She had blood discharge on vaginal opening. The hymen was broken and freshly so. High Vaginal swab revealed red blood cells and pus cells. No spermatozoa was seen. He concluded that there was evidence of defilement. He filled the P.3 form exhibit-1.

9. The appellant was arrested and charged. The appellant has raised various issues in his appeal and submissions.

He was denied a chance to cross-examine PW-2-.

He submits that he was denied a chance to cross-examine the examine the complainant. I have perused the record and noted that the appellant was given an opportunity to cross-examine the witness at Page -8- of the record at line 23 the appellant stated:

"I have no questions"

Section 146(1) of the Evidence Act provides:-

"Witnesses shall first be examined-in-chief then if the party calling them so desires, re-examined."

10. The section is clear that it is for the adverse party to opt or to choose to cross-examine the witness. The court only facilitates by giving the accused an opportunity to cross-examine the witness. In this case the appellant was given the opportunity to cross-examine but chose not to cross-examine. It was within his right to cross-examine or not to cross-examine. He chose not to cross-examine. There was no prejudice or miscarriage of justice as it is the appellant who chose not to exercise his right to examine the witness. The ground is a sham.

11. The appellant submits that the trial Magistrate erred when she ordered the complainant to be remanded for seven days at Murang'a children's remand home for failing to give false testimony or narrate on what she had not reported to the police. He submits that the witness was not refractory as she had not refused to be sworn and if she agrees to be sworn, refuses to answer any question put to him or her or refuse to produce any document.

12. I have considered the submissions. **Section 152 of the Criminal Procedure Code** provides:-

"Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence –"

13. I have looked at the record from page 6-7. What transpired is that after the PW-2- was affirmed and she gave evidence, at some point she could not talk. The court ordered that she be remanded for seven days. Later the court was informed that she was embarrassed to say what happened. At Page 8 line 9 of the record the witness stated:

"I testified in the morning. I was embarrassed of describing what happened to me. I was scared. Am sorry. I now wish to proceed with my evidence."

14. When the prosecution applied to have the PW-2- recalled, the appellant did not object. After she gave evidence the appellant did not challenge her evidence. The complainant was giving evidence in a case of defilement. The experience is no doubt traumatizing. It is not unusual for victims of sexual assault to be shy when testifying as to what happened to them. Some are not able to describe the act. It is most likely that this is what happened to the complainant when she testified. She explained to learned Magistrate why she was unable to talk. This was not challenged. The PW-2- was not refractory. Had the trial Magistrate been sensitive to the witness and given her time she would have realized why the witness was hesitant. The prosecution did not apply to declare the witness a hostile witness and the Magistrate erred by ordering her to be remanded. The evidence was satisfactory and reliable. The appellant has submitted that the witness was not refractory.

15. The testimony of a refractory witness depending on the circumstances of the case may require corroboration. In this case the testimony of the complainant was corroborated by PW-3- to whom she reported immediately and PW-1- who confirmed that the complainant was defiled. It was therefore safe to rely on her testimony. The trial was fair.

The appellant faulted the court for admitting doubt-ridden evidence of PW-1-

He submits that the appellant was an expert witness who was supposed to prove his skills in his science or art. That he instructs the court on his criteria of his science or art so that the court may test the accuracy of his opinion. To give evidence on the facts that that maybe ascertained. He relies on the case of **Mutengi-v- Republic (1982) eKLR** and submits that the PW-1- did not do what he was supposed to do.

16. I have considered the evidence of the Clinical Officer. He testified that he is a Clinical Officer at Sagana Sub-County Hospital. His qualifications were not challenged. **Section 48 & 49 of the Evidence Act.** Provides:

> ***"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons especially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.***
>
> ***(2) Such persons are called experts.***
>
> ***49. Facts bearing upon opinions of experts Facts not otherwise admissible are admissible if they support or are inconsistent with the opinions of experts, when such opinions are admissible."***

The expert is supposed to assist the court to form an opinion based on the facts presented before it. In this case the court was supposed to determine whether the allegation of defilement was proved. The PW-1- testified that he was a Clinical Officer and he examined the complainant and formed an opinion that she was defiled. There is nothing to cast doubt on his testimony that he was a qualified Clinical Officer. The ground is without merits.

3. Penetration was not proved.

The appellant submits that there was no penetration as the genitalia was normal. He submits that the Clinical Officer did not establish the cause of the breakage of the hymen. I have considered the submission. **Section -2- of the Sexual Offences Act** defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another person. Penetration is a key ingredient of the charge of defilement which must be proved beyond any reasonable doubts.

17. From the evidence tendered PW-2- as submitted by the respondent, was explicit that she was sexually penetrated by the appellant. She clearly stated that, at Page 8 line 11 & 12 ***"He inserted his penis into my vagina and defiled me."*** PW-1- the Clinical Officer stated that:-

- **There was blood discharge from PW-2-'s vaginal opening.**

- **The hymen was broken and pus cells on the birth carnal.**

- **There was evidence of defilement**.

Section 8 of the Sexual Offences Act No. 3 of 2006 states;

> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(3) 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.*

18. The evidence by PW-2- is that the appellant used his penis to penetrate her and as a result her hymen was broken and she was bleeding. I find that the fact of penetration was proved with cogent evidence and was proved beyond any reasonable doubts.

1. Failing to call crucial witness

PW 2's father was not called to shed light whether he was together with PW 2 in a night club when the incident occurred.

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

> **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.**

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.**

19. The proviso to **Section 124 of the Evidence Act** therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact.

Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

20. In addition, the above witness was not an eye witness and he only took PW 2 to the police station after the incident. Therefore, failure to call him does not have a great impact on the evidence adduced.

2. <u>Perpetrator was not positively identified</u>

It was doubtful that PW 2 can be grabbed and taken to a room during darkness and identify the assailant.

21. According to PW2, she knew the appellant who works at a butchery. That on the incident day, he called her and upon reaching the butchery around 6:30 P.m, he held her and covered her mouth with a piece of cloth then took her to his house which was behind the butchery.

22. PW 2 therefore recognized the appellant whom she knew prior to the incident.

3. <u>Whether the prosecution prove its case beyond reasonable doubt</u>

Looking at the whole evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW 2 was able to narrate the occurrence of the incident and what the appellant did to her. The medical evidence also corroborated the evidence that PW 2 had been defiled and her hymen was freshly broken.

23. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 2 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. The appeal is without merits and is dismissed.

Dated at Kerugoya this 27th day of June 2019.

L. W. GITARI

<u>JUDGE</u>