



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 28 OF 2017

EVANS MUTALI MARANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment dated 27th November 2014 by Hon S Muchungi, RM, in CMCR Case No. 736 of 2014, Naivasha,)

JUDGMENT

1. The accused was charged and convicted with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act No. 3 of 2016**. The particulars of the offence were that the accused on the 10th day of April 2014 at Sipemba area, Maai Mahiu Township, Naivasha District in Nakuru County, intentionally and unlawfully caused his genital organ to penetrate the genital organ namely of TWW a girl aged 16 years. He was sentenced to serve fifteen years' imprisonment.

2. Dissatisfied with the lower court's judgment, the accused appealed to this court by way of a petition of appeal filed on 15th June 2017. He subsequently filed amended grounds of appeal on which he submitted. The grounds argued are as follows:

1. *That the learned trial Magistrate erred in law and in fact by convicting the appellant yet failed to appreciate that the forms were defective.*
2. *That the learned trial Magistrate erred in law and in fact by convicting the appellant based on evidence which was otherwise contradictory and collaborated (sic).*
3. *That the learned trial Magistrate erred in law and in fact by convicting the appellant yet failed to appreciate that the medical evidence did not connect the appellant to the offence as he was not tested himself to ascertain whether or not he actually committed the offence.*
4. *That the learned trial magistrate erred in law and in fact by convicting the appellant yet a crucial witness was not brought before the court who informed the minor's mother.*
5. *That the learned trial Magistrate erred in law and in fact by convicting the appellant yet some crucial exhibits were not produced before the court.*

3. The brief facts are that on 10th April 2014, at about 6.00 pm, the complainant was at home when her teacher, the accused, passed by and told her that her marks were low, and that she should go to his house to collect books and past papers for revision. She obliged and went with him to his single roomed house. When they reached there, he removed the books and placed them on the floor, then locked the door. He overpowered her, removed her bikers and his trousers and pants and raped her. This took about ten minutes and she was in great pain and bled.

4. On returning home, she found that her mother had gone to look for her, having been informed by one of the complainant's siblings that the complainant had gone with a teacher. Her mother returned later with the school's director, to whom the siblings described the teacher. She told her mum what had happened. The director was able to match the description to the teacher, and when the teacher was called on the phone he said he was at church. They went to the church but did not find him. Her mother and the director took the complainant to hospital at about 9.00pm that night after reporting to the police.

Ground 1

5. On the 1st ground the appellant submitted the time indicated of the alleged incident in the charge was 5.30 pm yet all the witnesses indicated that occurred around 7.30 pm on 10th April 2014. In particular, the appellant contends that PW5, the arresting officer, contradicted the evidence of time as she indicated in the PRC form but all the witnesses indicated a different time. Appellant f complained that PW5 testified that the appellant was arrested on a Friday and taken to court on a Monday, whilst the charge sheet indicates that the appellant was arrested on 10th April 2014 which was a Thursday, and the alleged arrest on the Friday indicated by PW5 was 11th April 2014.

6. I have perused the evidence on record, in particular evidence of PW1, PW2 and PW4. It shows that PW1 left the house within a time frame from around 6pm and returned home around 7.30 pm. I do not consider 5.30 pm to be too far removed from the timeframe indicated by the witnesses, as no witness stated they were looking at their watches and the incident is not a time responsive event. Thus slight differences in estimation of time for different people giving evidence is not in the category of critical inconsistencies for determination herein.

7. Regarding the complaint on the date of arrest, PW5 stated that the appellant was brought to the station on the same date of the incident, but that the appellant was arrested on the Friday. She asserted that she recorded witness statements first and then later arrested the accused. There is no contradiction in the evidence here.

Ground 2

8. The appellant submitted on the 2nd ground that the evidence was marred with contradictions therefore making his conviction unsafe. The contradictions highlighted were: that PW1 said she went home with the books but the books were not presented in court; that PW1 stated that she was bleeding after being defiled yet her blood stained clothes but she washed them; that PW5 stated and that her clothes were blood stained and yet they were not brought to court; that the PRC and P3 form indicated contradictory information in that the P3 stated no injuries occurred whilst the PRC does not indicate hymen was broken. That it is not clear whether there was grievous harm or just injuries.

9. I have reviewed the evidence on record. PW1 testified that after she was defiled she saw blood from her vagina, but admitted that the blood stained clothes were not in court. PW2, her mother, testified that the clothes were not in court, but that her daughter had gone with them to hospital; PW5 said that she told the mother to take the clothes to the doctor, and they took them; that she saw the complainant's underpants but they were not brought to court. In my view, whether or not a particular item is brought as an exhibit is neither here nor there. It is for the prosecution to determine whether or not to bring an exhibit, but more so, it is the prosecution's responsibility to prove the case beyond reasonable doubt.

10. With regard to contradictions as to injuries, PW3, the Clinical Officer, clearly explained that there were no physical injuries on the other parts of the body except the vagina which had a broken hymen, infections, and lacerations on the labia. These she categorized as grievous harm. The P3 form shows that there was a healing laceration at right labia minora, and the doctor's remarks were that the *"Physical and lab findings are highly consistent with recent sexual act"*. The PRC form also indicates that the hymen was broken, but did not note the injuries on the labia.

11. Looked at as a whole, I do not consider that there are contradictions of any major concern. Where there are contradictions, they are of a minor nature that does not warrant any interference with the lower court's judgment. This is in line with **Section 382** of the **Criminal Procedure Code** which provides that:

"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."

12. The courts have routinely expressed themselves on minor contradictions following the statutory guideline. In **Jackson Mwanzia Musembi v Republic [2017] eKLR**, for example, the court relied on the Uganda Court of Appeal case of **Twehangane Alfred v Uganda-Criminal Appeal No 139 of 2001, [2003] UGCA, 6**, in which it was noted that it is not every contradiction that warrants rejection of evidence. The court expressed this well in the following words:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

Grounds 3, 4 and 5

13. Finally the appellant submitted in grounds 3, 4 and 5 that the medical evidence did not connect appellant to the offence; that the prosecution did not call crucial witnesses; and that crucial exhibits were not produced. In this regard, the appellant submitted that he was not tested to ascertain whether or not he was the one who committed the offence; that the complainant's sibling who reported to the mother that the complainant had gone with the accused was not called as a witness; and that crucial exhibits like the stained clothes, past papers and revision books were not presented in court to prove that he committed the offense or was linked to the offence.

14. In the case of **George Kioji v R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) the court held that even the absence of medical evidence in defilement would not necessarily cause the case to collapse. The court stated:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

15. In other words, the court was confirming that the evidence of a single witness – the victim in this case - is sufficient for conviction of a perpetrator if the evidence by the victim is highly believable. It might be important but not mandatory for other forms of evidence to be adduced in court in support of the prosecution case. On that front, the appeal fails in my opinion. All the prosecution witnesses as I have looked in the proceedings gave a similar chronology of events that added up even though there was a little fluctuation on the exact hour, but it was not sufficient to shake or cause any doubt on the credibility of the witnesses and strength of the prosecution evidence.

16. Taking all the issues and the evidence into account, I am satisfied that the prosecution case was proved beyond reasonable doubt, and am not persuaded that there is a proper basis for interfering with the lower court’s judgment.

17. Accordingly, the appeal is hereby dismissed.

18. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of July, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Evans Mutali Maranda - Appellant in person
2. Ms Abuga for the State
3. Court Clerk - Quinter Ogutu