



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 88 OF 2018

BETWEEN

PATRICK CAEBON MEMUSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in SO Criminal Case Number 02 OF 2016 in the Principal Magistrate's Court at Sirisia by Hon. L.N.Kiniale (SRM) on 06.04.17)

JUDGMENT

The Trial

1. **PATRICK CAEBON MEMUSI (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of attempted defilement of a girl contrary to section 9(1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006.

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. **PW1 N.N B** the complainant stated that she was born on 06.05.99. She recalled that on 04.07.16 she was sleeping with her sister **S.B** when the Appellant who was a neighbor broke into their house and defiled her. She stated that her sister put on a solar lamp and she managed to recognize the Appellant whom she also referred to as Katundu. **PW2 S.B** the complainant's sister recalled that she was sleeping with complainant on the material night when the appellant when the Appellant broke into their house and defiled the complainant. She told court that she lit a lamp and recognized the Appellant who was a neighbor. **PW3 MN** the complainant's mother recalled that she was woken up from screams from where her daughters were sleeping and PW2 informed her that the Appellant who was their neighbor had strangled the complainant. **PW4 SNR SGT SELINA AYABEI** the investigating officer received complainant's report on 04.07.16 and after investigations caused eth Appellant to be charged. She produced the complainant's tom panty as **PEXH 1** and age assessment report which shows that she was 17 years old as **PEXH. 3. PW5 ASCAR ROTICH**, a clinical officer examined complainant N.N aged 17 eras on 04.07.16 and found that her hymen was absent for which he concluded that she had been defiled. He also found that complainant had bruises on her neck. He produced complainant's P3 form as **PEXH. 4**

THE DEFENCE CASE

3. When the appellant was put on his defence, he conceded that he was complainant's neighbor but denied the offence.

4. The learned trial magistrate considered the evidence and finding the main count not proved found the Appellant guilty of the charge of attempted defilement and sentenced him to 10 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal. From the 5 grounds of Appeal and written submissions filed on 24th July, 2019, the Appellant states identification was not satisfactory.

6. When the appeal came up for hearing on 07th August, 2019, Appellant submitted that he was wholly relying on the written submissions. Mr. Akello, learned Counsel for the state stated that the complainant's hymen was not freshly torn and that's why the Appellant was convicted for attempted defilement after he broke into the room where complainant and her sister were sleeping and for injuring complainant while attempting to defile her.

7. The gravamen of this appeal really turns on the issue of identification and or recognition of the appellant by the complainant and her sister. The offence was committed in the middle of the night and hence the means by which the Appellant was identified becomes critical.

8. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of Maitanyi –vs- Republic (1986) KLR 198, the Court of Appeal held:-

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

9. In the recent case of John Muriithi Nyagah v Republic [2014] eKLR, the Court of Appeal held: -

“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

10. According to the complainant her sister put on a solar light during the incident the light of which enabled them to recognize the Appellant. I however note that the court record shows that the learned trial Magistrate did not make an inquiry of the relevant circumstances such as the strength of the light, its size and its position relative to the Appellant that may have assisted the complainant and her sister to identify the Appellant especially considering that they have stated that the assailant grabbed the lamp as soon as it was lit and ran away with it.

11. In Wamunga v Republic [1989] KLR 424 the Court of Appeal held that: -

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

12. The English case of RV Turnbull [1977] QB 224 is also useful in this regard;

“If the quality [of the identification evidence] is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [.....]

When in the judgement of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification”.

13. From the foregoing analysis, I am persuaded that the circumstances under which the Appellant was alleged identified were not free from error and he ought to have been given the benefit of doubt.

14. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

DATED AND DELIVERED IN BUNGOMA THIS 09th DAY August 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brenda

Appellant - Present

For the State - Mr. Akello