



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 5 OF 2018

(From original conviction and sentence in Criminal Case No. 36 of 2016 of the Senior Resident Magistrate's Court at Baricho – before M. Kivuti – R.M).

JULIUS KAGWANJA MANYEKI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant Julius Kagwanja Manyeki was convicted of the offence of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act No. 3 of 2016** and sentenced to serve 20 years imprisonment by the Resident Magistrate at Baricho Law courts. It was alleged that on 15/12/16 at [Particulars Withheld] Village in Kirinyaga West Sub-County intentionally caused his penis to penetrate the vagina of MNK a child aged Twelve (12) years. He had pleaded not guilty.

2. The appellant was dissatisfied with both the conviction and sentence and filed this appeal which had raised Six grounds as follows:-

a) That the learned trial Magistrate erred in law and facts by not according the appellant a fair trial, by not complying with Section 211 of CPC and going against the rights of the appellant.

b) That the learned trial Magistrate erred in law and facts by convicting the appellant on insufficient scanty and contradictory evidence.

c) That the learned trial Magistrate erred in law and facts in returning a finding of culpability on the part of the appellant in a case wholly dependent on contradicting and un collaborative evidence.

d) That the learned trial Magistrate erred in law and facts by not considering that their existed a grudge between the family of the complainant and my family over payment of debt that resulted to fabrication of the case to settle scores.

e) That the learned trial Magistrate erred in law and facts by not considering that the ingredients of the offence were never proven.

f) That the learned trial Magistrate erred in law and facts by failing to consider that the appellant defence.

3. The appellant prays that the appeal be allowed, the conviction be quashed, sentence be set aside and be set at liberty.

4. The appeal proceed by way of written submissions. The appellant filed written submissions while Mr. Geoffrey Obiri – Assistant Director of Public Prosecution filed submissions on behalf of the respondent.

5. This is a 1st appeal and this court has the duty to consider the evidence tendered before trial Magistrate, evaluate it and come with its own independent finding. However, I have to leave room for the fact that I had no opportunity to see the witnesses when they testified and leave room for that. This court has jurisdiction to consider both facts and law when considering the appeal.

6. I have considered the submissions and the evidence tendered before the trial court. The brief facts of the case are that the complainant MNK was a girl aged Twelve years. A Birth certificate produced in court as Exhibit -1- shows that she was born on 16/11/2005. After a voir dire examination she gave evidence on oath. On 15/12/16 at about 5.00 Pm the appellant went to the complainant's home pushing a bicycle and he enticed her by telling her to accompany him to is home riding on the bicycle. The appellant carried her and her brother on the bicycle. On reaching his home the appellant told the complainant and her brother to assist him pick the rice which was kept outside to dry. They assisted him after which he offered them bananas and also made porridge for them.

7. The appellant then took the complainant to his bathroom which was outside the house. While inside the bathroom, the appellant told the complainant that he loved her and he removed her pant. The appellant then removed his trouser. The appellant defiled the complainant by inserting his penis in her vagina. The appellant had threatened to stab her with a knife if she screamed.

8. After she was released the complainant put on her pant and went home. She informed her mother as to what had happened. Her mother NWK informed the complainant's father. They went to Kagio with the complainant and reported the matter.

9. The complainant was referred to Sagana Hospital where she was treated where she was examined and later a P3 form was filled. The appellant was arrested and charged.

10. The Clinician who examined the complainant who is Nahashon Murimi (PW-3) testified that she had a whitish discharge from her vagina. The hymen was intact. She had lacerations around her vaginal orifice. He formed the impression that the complainant was defiled because of the presence of lacerations which was indicative of use of force. There was evidence of partial penetration. PW-3- filled a P3 form which he produced as exhibit -3-.

11. The appellant in his 1st ground of appeal raised the issue of violation of his right to fair trial as the trial Magistrate failed to comply with **Section 211 of the Criminal Procedure Code Cap 75 Laws of Kenya.**

12. The right to fair trial is one of the rights under the Constitution which cannot be limited. **Article 25(c) of the Constitution** provides:-

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial”.

The allegation of violation of the right to fair trial is no doubt a grave matter. I will therefore deal with this ground first.

13. I have perused. The proceeding of 11/9/17 before the trial Magistrate at page 19 of the record of appeal show that the prosecution closed its case and the trial Magistrate reserved the ruling for 19/9/17. On 19/9/17 the trial Magistrate delivered the ruling in the presence of the appellant. The trial Magistrate proceeded to state that **“Section 211 Criminal Procedure Code explained to the accused in Kiswahili”**. The appellant stated:-

“I will give unsworn evidence. I have two witnesses.”

14. The trial Magistrate then proceeded to give a date for defence hearing. The appellant testified and called one witness after which he closed the defence case.

15. There was no violation of the right to fair trial Magistrate complied with the laid down procedure. **Section 211 of the C.P.C** set down the procedure to be followed at the close the prosecution's case. When the court rules that the accused has a case to answer to the charge, ***“the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box and that if he does so, he will be liable to cross-examination or to make a statement not on oath from the dock and shall ask him whether he has any witnesses to call or other evidence to adduce in his defence and the court shall then hear the accused and his witnesses and other evidence of any.”***

16. The trial Magistrate did not indicate on the records the details of **Section 211** which I have quoted above but she indicated that she had complied with the Section and proceeded to record the response by the appellant. There is no requirement for the trial Magistrate to duplicate in the proceeds all the requirements under **Section 211**. It is sufficient for the trial Magistrate to indicate in the proceedings that she has complied with the section. What follows after the trial Magistrate will inform this court whether the procedure was followed. In this case after the trial Magistrate stated that she had complied, the accused proceeded to state that he would give his defence and call witnesses. This shows that the requirements were explained, the appellant understood made his choice of the mode of defence.

The Court of Appeal in the case of **Ukiru-v- Republic (2014) eKLR**. Held:-

“In our view the appellant is hanging on straws. He was represented by a counsel and unambiguously elected to give a sworn statement. ----- We do not think that failure to record the exact words of Section 211 of the Criminal Procedure Code in any way prejudice the appellant. There was in our view no failure of Justice and the appellants complaint in that regard lacks merits and we reject it.”

17. The appellant did not suffer any prejudice nor were his rights violated. The ground is without merits.

18. I will consider ground 2 & 3 as they raise the same issues, that the evidence was insufficient and marred contradictions. The purpose of the rules of evidence is to assist the court in establishing the truth. Contradictions in material particulars may lead the court to make an inference that the witnesses were not telling the truth. In criminal cases, the prosecution bears the burden to prove the allegations against the accused beyond any reasonable doubts. The prosecution must therefore present credible evidence before the Court to meet the threshold of beyond any reasonable doubts in order to obtain a conviction.

19. Where the evidence tendered is contradictory, has inconsistencies and discrepancies it is unreliable and must be resolved in favour of the accused.

20. On the other hand, where the evidence is so consistent, it may lead to a conclusion that the witnesses are coached. It is expected that there may be minor inconsistencies in the evidence. It is now a well settled principle of the law that it is not every inflicting contradiction or inconsistency in the evidence of the prosecution witnesses that will be fatal to the case. It is only where such inconsistencies or contradictions are substantial and material to the issues in question that are before court that they will be resolved in favour of the accused. This is where the contradiction will show that the witness was not telling the truth, casts doubts in the evidence adduced against the accused. The accused person does not bear a burden to prove his innocence as the burden of proof in criminal cases never shifts.

21. Having stated that I will not proceed to consider the alleged contradictions. The appellant submits that the complainant testified that the appellant inserted his penis in her vagina. He submits that this was full penetration. That this contradicts the evidence by the medical officer who found that there was partial penetration. The appellant submits that the court should not believe the evidence.

22. There was no contradiction on material particulars on the issue which was for determination before the court. The complainant alleged she was defiled. The medical evidence is very important in a case of defilement. It is expert evidence which is provided under **Section 48 of the Evidence Act**. It assists the court to form an opinion on the issues pending before it.

23. The evidence tendered by the medical practitioner, (PW-3-) corroborated the evidence of the complainant that there was penetration. Penetration is defined under the **Section 2 of the Sexual Offences Act** to mean –

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

24. One of the ingredients of the charge of defilement is penetration. The medical evidence proved that there was partial penetration. The evidence which was tendered was credible and proved the allegation against the appellant beyond any reasonable doubts. I find that the ground is without merits.

25. The appellants submits that the ingredients of the offence were not proved. **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.”

The ingredients of the offence are:-

1) The identity of perpetrators.

2) Age of the complainant.

3) Penetration.

26. Looking at the evidence which was tendered, the ingredients were proved. The appellant was well known to the complainant. This was not in dispute. This offence was committed in broad daylight. This rules out the possibility of mistake. The testimony of the complainant that the appellant carried them on his bicycle is corroborated by PW-2- who testified that he heard the appellant telling the children to board his bicycle – At Page 10 of the proceedings. There was no doubt that the appellant is the one who committed this offence.

27. On the issue of penetration, I have dealt with it earlier. Penetration was proved. On the age of the complainant, it was proved with the production of the birth certificate, exhibit -1-. The complainant was a minor aged Twelve years. The ingredients were proved beyond any reasonable doubts and the ground is a sham.

28. The appellant submits that the trial Magistrate erred by failing to consider that there existed a grudge. The trial Magistrate did consider this at page 35 line 12-22 of the record where it was stated:-

“Their point of departure is that while the complainant stated that the accused defiled her thereafter, the accused stated that the complainant stole his Kshs 70/- and left the house without telling him. He but he did not manage to inform her mother about the missing Kshs 70/- as she confronted him with the allegation that he had defiled the complainant. Notably, the issue of Kshs 70/- was not raised during cross-examination.

The evidence of the accused and DW2 with regard to the debt of Kshs 3,000/- is contradictory, starting from when the money was advanced to the complainant’s father, whether the accused was present or not and when the amount was supposed to be repaid. The credibility of their evidence is in question.

The issue of a perceived grudge between the complainant’s parents and the accused over a debt of Kshs 3,000/- is farfetched and has no nexus to the issue at hand.”

29. The trial Magistrate had the chance to see the witnesses and made a finding of fact that they were not credible. I find no reason to interfere with that finding. The allegation of grudge was considered at length and the court made a finding. The ground cannot stand.

30. Finally, the appellant submits that his defence was not considered. The appellant confirmed the testimony of the complainant that he

took her to his house on a bicycle in company of her brother. He denied defiling the complainant. This was a mere denial. The trial Magistrate found the defence unbelievable. Based on the evidence which was tendered, she cannot be failed for arriving at that finding. The ground is a sham.

In Conclusion:-

I find that the appeal lacks merits. I dismiss it.

Dated at Kerugoya this 28th day of November 2019

L. W. GITARI

JUDGE