



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 48 OF 2017

N M M..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 290 of 2014 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 8th January 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, N M M was charged with the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. The particulars of this charge were that on diverse dates between 1st August 2014 and 15th April 2014 at [particulars withheld] Village in Mwakitau Location within Taita Taveta County, being a male person caused his penis to penetrate the vagina of G W M M (hereinafter referred to as "PW 1"), a child aged twelve (12) years who to his knowledge was his daughter.
2. He had also been charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this charge were that on the aforesaid dates and place, he unlawfully and intentionally touched PW 1's vagina, a child aged twelve (12) years.
3. The Learned Trial Magistrate, Hon G.M. Gitonga (RM), convicted him on the main charge and sentenced him to thirty (30) years imprisonment.
4. Being dissatisfied with the said judgment, on 29th June 2017, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal.
5. Subsequently on 17th October 2017, he filed Amended Grounds of Appeal and Written Submissions. He also relied on five (5) Amended Grounds of Appeal. The State's Written Submissions were dated and filed on 8th November 2017. He informed this court that he did not wish to respond to the said State's Written Submissions.
6. When the matter came up on 9th November 2017, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written

Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

8. After carefully looking at the Amended Grounds of Appeal and Written Submissions by both parties, it appeared to this court that the only issue that had been placed before it for determination was really whether or not the Prosecution proved its case against the Appellant, beyond reasonable doubt. However, as there were sub-issues that had been raised therein, this court found it prudent to address the said issues under different distinct heads.

A. PROOF OF THE PROSECUTION’S CASE

A. CRUCIAL WITNESSES

9. Amended Ground of Appeal No (4) was dealt with under this head.

10. According to the Appellant, crucial witnesses were not called to testify thereby contravening the provisions of Section 144(1) as read with Section 150 of the Criminal Procedure Code which confers power on a court to summon crucial witnesses to testify in a matter before it.

11. It was his contention that PW 1’s mother and grandmother ought to have been called as witnesses as PW 1 said she reported the incidents of defilement by him to them. He added that the Simon who PW 1 said he tore her clothes and ran away also ought to have been called as a witness to shed light on what really transpired.

12. In this regard, he placed reliance on the case of **Bukenya vs Uganda 1972** (sic) where it was held that the prosecution is duty bound to make available all witnesses necessary to establish the truth because failure to do so would lead a court to infer negative adverse inference as to why they were not called as witnesses.

13. On its part, the State submitted that no useful evidence would have been adduced if Simon was called as a witness because he did not witness the Appellant entering PW 1’s room and defiling her. It added that PW 1’s brothers, J M and H M did not also witness the defilement and consequently, they were not crucial witnesses. It was therefore its submission that all relevant witnesses in the matter herein had been called as witnesses.

14. According to PW 1, the Appellant first defiled her on 1st August 2013 at about 10.00pm and she informed her mother who had gone to purchase clothes for sale. Her mother told her that the issue would be sorted out. She did not clarify whether it was her biological mother or her step mother, M N M (hereinafter referred to as “DW 2”) who was the Appellant’s wife whom she said that she told about the incident. She said that he went into her room after her brothers J M and H M aged eleven (11) and nine (9) years respectively went to their room to sleep.

15. She added that on the second occasion, the Appellant followed her to his shop, bolted the door and he defiled her. She again told her mother who told her that the issue would be sorted out. She stated that she informed PW 2 of this second incident. The date of this second incident was not given.

16. She reported the third incident to her grandmother, B, who in turn informed PW 3 of the said defilement who took up the matter and took her to hospital and to the police station. On her part, PW 3 said that she was informed of the defilement by PW 2. She made no reference to B or of her having informed her of PW1's defilement .

17. It was evident that this was a case of a single witness that needed to be corroborated either by other material oral and/or documentary evidence. Left as it was, it remained PW 1's word against that of the Appellant. This court therefore disagreed with the position that was taken by the State and found that PW 1's biological mother and her grandmother were crucial witnesses as they would have corroborated her evidence that she really reported the incidents of her defilement by the Appellant to them.

18. In the premises foregoing, this court found that the Appellant's Amended Ground of Appeal No (4) was merited and the same is hereby upheld.

B. EVIDENCE OF THE PROSECUTION WITNESSES

19. Although the Appellant's Petition of Appeal would have been successful on account of Amended Ground of Appeal No (4), this court nonetheless analysed the remaining Grounds of Appeal for completeness of record. It therefore dealt with Amended Grounds of Appeal Nos (2), (3) and (5) under this head.

20. The Appellant further stated that the Prosecution witnesses who testified contradicted themselves and that the Learned Trial Magistrate therefore proceeded on the wrong principles by relying on evidence of the three (3) key witnesses who contradicted themselves to convict him.

21. He pointed out that PW 3 told the Trial Court that she was informed by PW 2 that he defiled, PW 1, his daughter, but that PW 2 stated that she heard noises from the Appellant's house and that she was not aware of the incident of 15th April 2014 and had last met PW 1 on August 2013. He said that PW 1 never went back to PW 2 after their meeting on 1st August 2013 despite PW 2 having told her to go back to her in the event he defiled her again. He therefore asked this court to consider the integrity of the witnesses as they were not credible. He referred this court to the case of **Augustino Njoroge vs Republic Appeal No 99 of 98** where the court therein held that contradicted evidence was unreliable.

22. The State argued that PW 1 clearly stated the number of times the Appellant defiled her and how she informed her mother of the incidents but she took no action. It was categorical that when PW 3 was informed of the defilement by PW 2, she took up the matter and took PW 1 to hospital and to the police station to record her statement whereupon No 63884 Sergeant Joshua Kimeu (hereinafter referred to as "PW 5") commenced investigations and subsequently charged him with the offence of committing incest.

23. This court noted that contrary to the State's assertions, there were notable contradictions in PW 1's, PW 2's and PW3' evidence that it could not ignore. Notably, PW 3 stated that PW 2 informed her of PW 1's defilement by the Appellant herein on 19th April 2014 at about 8.00 pm and she took up the case. PW 2 did not mention ever having reported the matter to PW 3. PW 1 stated that the defilement was reported to PW 3 by her grandmother, B.

24. This court also noted that PW 2 was emphatic that she was not aware of the incident of 15th April 2014 and had only been aware of the incident of 1st August 2013 as she had testified. Her evidence was that on 15th April 2014, she heard "quarrelling" in the Appellant's house and when Emmanuel Msafari, a Village Elder she had called to check on the "quarrels" went there, he found the Appellant and one Mkamba holding knives. In her Cross-examination, she denied knowledge of a defilement incident having occurred on 15th April 2014.

25. If PW 2 did not know of this defilement incident, this court was puzzled why PW 3 would say that it was PW 2 who informed her about the defilement. Notably, PW1 was clear in her evidence that she informed PW 2 of the second incident, which could not have been on 1st August 2013 as PW 2 contended

because according to PW 1, the first incident was on 1st August 2013. The second incident was therefore between 1st August 2013 and 15th April 2014.

26. This court also carefully considered the Appellant's contentions that the Learned Trial Magistrate erred in law and fact for failing to consider his defence and believe that there existed a grudge between him on one hand and D W S (hereinafter referred to as "PW 2") and E M M (hereinafter referred to as "PW 3) over his first wife. In this regard he had relied on the case of Essantale vs Uganda 1968 EA (sic) where it was held that where an accused person adduces alibi defence, the prosecution was obligated to adduce credible and admissible evidence to displace the alibi defence.

27. Although the State argued that the Appellant's assertions of an existing grudge between PW 1's mother and his in-laws on one side and him on the other, this court found and held that the Prosecution did not prove its case to the required standard for him to have been called upon to displace its case. Indeed, he had a constitutional right to remain silent and leave the Prosecution to prove its case. In fact, the Prosecution did not displace the sworn evidence that was adduced by DW 2 that she never left home as had been contended by PW 1 and that if the Appellant defiled PW 1, she would have known. In her Cross-examination, PW 1 confirmed that her mother did not go to Taveta from January to April 2014.

28. Further, it was not lost to this court that during her Cross-examination, PW 1 stated on 15th April 2014, they went to the Assistant Chief Godoma area and that when he asked her and her mother where they were going, her mother said that they were going to Mrugha and that they stayed there for three (3) days. The question that arose in the mind of this court was when did the alleged defilement take place if PW 1 and her mother were away on 15th April 2014 and they came back after three (3) days.

29. In this particular case, there were inconsistencies and contradictions between the testimony of PW 1, PW 2 and PW 3 explaining how PW 3 took up the matter. Indeed, the fact of the person who reported the matter to her that led her to become involved in this matter was not an issue that should not have caused such confusion.

30. It was the view of this court that these were not inconsistencies it could ignore. PW 1's, PW 2's and PW 3's evidence really went to their integrity. Their evidence alone would not have been sufficient for this court to have upheld the Appellant's conviction as the same was not consistent, cogent but was full of contradictions and gaps.

31. Appreciably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

32. Having considered the evidence that was adduced, this court came to the conclusion that Amended Ground of Appeal Nos (2), (3) and (5) were merited and the same are hereby upheld.

C. MEDICAL EVIDENCE

33. Amended Ground of Appeal No (1) was dealt with under this head.

According to the Appellant, from the evidence of Charo Zachariah (hereinafter referred to as "PW 4") and the P3 Form, there was no evidence that would have warranted his conviction. He submitted that his samples ought to have been analysed as provided for in Section 36 of the Sexual Offences Act because PW 4 testified that a vaginal swab did not show presence of spermatozoa but showed pus cells which were indicative of existence of venereal disease. He was adamant that the evidence in the P3 Form did not link him to the offence.

35. On its part, the State argued that the fact that the Appellant was not tested to confirm if he was

infected with the venereal diseases did not take away the medical evidence that was retrieved from PW 1's medical examination and the fact that she was emphatic that it was the Appellant who had defiled her several times.

36. Nothing could have been further from the truth. There was no hurry to prosecute the Appellant herein without obtaining all the evidence against him. Since PW 1 was infected with a venereal disease and the Appellant was said to have defiled her a few days before he was arraigned in court, nothing would have been easier than for him to have been subjected to medical examination to confirm if he had a venereal disease.

37. The fact that PW 1 was contending that she was infected and she was adamant that she was defiled by the Appellant were not sufficient proof that it was the Appellant who infected her with the said venereal disease or broke her hymen. The omission to adduce evidence to link the Appellant to the offence herein dealt the Prosecution's case a fatal blow.

38. Indeed, in view of the seriousness of the sentences imposed on those convicted of having committed defilement cases and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.

39. Unfortunately, the proof that was adduced in the trial court was not to the standard required which in criminal cases, has to be beyond reasonable doubt. To this court, it did appear that the case against the Appellant herein in the Trial Court was determined on a balance of probability.

40. Doubts were raised in the mind of this court as to the person who broke PW 1's hymen. Indeed as has been stated hereinabove the fact that PW1's hymen was broken did not mean that it was broken by the Appellant herein. Once doubt has been cast in the mind of the appellate court, it would be unsafe to uphold his sentence. Indeed, great injustice will be occasioned to him if this court were to uphold the conviction and sentence that was meted upon him based on the evidence that was presented before the trial court.

41. In the premises foregoing, this court came to the firm conclusion that Amended Ground of Appeal No (1) was merited and the same is hereby upheld.

CONCLUSION

42. Accordingly, having analysed the evidence that was adduced in the Trial Court and the Written Submissions, this court found and held that the Prosecution did not prove its case against the Appellant to the required standard in criminal cases, being, proof beyond reasonable doubt.

43. In conclusion, as an obiter, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

44. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 29th June 2017 was merited and the same is hereby allowed.

45. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

46. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23rd** day of **January** 2018

J. KAMAU

JUDGE

In the presence of:-

Nicholas Mwacheri Mkindi - Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk