



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL CASE NO.26 OF 2017

MWAMBIA ABIANO.....APPELLANT

VS

REPUBLICRESPONDENT

JUDGMENT

The appellant Mwambia Abiano was convicted in Maua CMC CR C No. 2844 of 2014 for the offence of defilement contrary to section 8(1) as read with Section 8(3) of Sexual Offences Act No. 3 of 2006 on 8th December 2016 and sentenced to serve 20 years imprisonment.

Particulars of the charge was that the appellant on the 6th day of July 2014 within Meru County intentionally caused his penis to penetrate the vagina of B.G. a minor aged 15 years.

Being aggrieved with the conviction and sentence he filed petition of Appeal herein on 27th February 2017 on the ground that:

1. The Learned trial magistrate erred in law and in fact by not observing in respect of Justice there was need of DNA test to ascertain the truth.
2. That the Learned trial magistrate faulted in matters of law and fact by not observing that the girl reached adolescence stage and may cohabit with men so the hymen can break in the course of cohabitation or over sports games.
3. That the Learned trial magistrate faulted in matters of law by not observing that the prosecution case was not proved beyond all reasonable doubt as investigations was shoddy.
4. That the Learned trial magistrate faulted in matters of law and fact by not observing that the inner wear which was brought to court was not well classified as there was no presence of blood and yet the expert claims that there was forceful penetration.
5. That the learned trial magistrate faulted in matters of fact and law by relying with the evidence of witness yet none among them witnessed the ordeal all what they were telling the court was hearsay.
6. That the Learned trial magistrate faulted in matters of law and fact by not observing the evidence tendered by the prosecution was inconsistency and uncollaborating.
7. That the Learned trial magistrate erred in law and fact by rejecting appellants defence without giving any cogent reason and yet it was comprehensively on how the appellant was not involved in

the ordeal.

8. That the court to assign a lawyer by the state expense as its seen in Article 520(h) of the new constitution of Kenya.

9. That since I cannot recall all that transpired during the trial and wish to be availed with trial proceedings and judgment to draft more cogent grounds.

Reasons whereof he prayed that appeal be allowed, sentence set aside and he be set at liberty.

The appeal was canvassed by way of written submissions filed by appellant and by way of oral submissions from Respondent/states counsel.

In the written submission the appellant questioned why there was no independent witness and yet the offence occurred along a busy road and according to the complainant she screamed and members of public came.

He concluded that it was not possible to get the said members of the public come to testify because the charge was a frame up. He submitted that there was no clear evidence to show there was defilement or even attempted defilement such as dusty or muddy clothes, injuries on the victim due to struggle etc. He said the only evidence shown were worn out panties and biker.

He said one of the members of public who escorted complainant home was familiar to her namely Karoki and it not clear why he didn't testify. He claimed the biker and panties were torn intentionally to tighten prosecution case.

Appellant also submitted that he could not have tore complainants biker from the back if it is true he wrestled her down and she fell on her back.

The appellant claimed there was land dispute between his family and that of the complainant which the trial court did not establish. He urged the court to make its own evaluation and determination against the planted case against him.

Regarding whether or not it was established that complainant was defiled, appellant argued that the only evidence was her hymen was broken and that her panties were torn. He said Medical examination didn't reveal any bruises on her genitalia, there was no spermatozoa and that her urine was normal. He said it was not safe to convict him because of broken hymen and it was not necessarily due to sexual activity.

The prosecution on the other hand made oral submissions and said that the age of complainant was estimated at 13 years by the medical doctor and PW3 estimated at 15 years this giving a benefit to the accused person. Mrs Mwathi also submitted that the 2nd ingredient of the offence of defilement i.e penetration was proved and referred to complainants testimony my where she said she screamed and members of the public cause. She said this fact was confirmed by medical practitioners PW4 at page 4 3 of the proceedings.

It was submitted the appellant was known to complainant and there was no mistaken identity and offence happened at 4.00 pm during daylight. It was further submitted that it was not necessary to conduct DNA test as was held in the court of Appeal case No 99 of 2011, Jackson Mwanzia Musembi vs Republic . It was further argued that S.124 of the evidence Act exempts Sexual Offences from corroboration of evidence by independent witnesses provided the court is convinced that the complainant's evidence is credible.

Ms Mwathi said Appellant's evidence at trial was considered at pages 23-24 of the judgment and it is not true it was disregarded. She urged the court to uphold the trial courts determination that appellant was properly convicted and that both conviction and sentence should be upheld.

I have considered the appellants grounds of appeal and written submissions and the rival oral submissions by Respondents counsel and the proceedings from whence the appeal arises and trial courts judgment.

In consideration of the principles set out in **Okeno vs Republic [1972] E A 32 Pandya vs Republic [1957] EA 336, Shantilal M Ruwala vs Republic(1957) EA 570 and Mark Oiruri Mose vs Republic [2013]eKLR** that this court being a 1st appellate court has the duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come up with its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

This court is to determine that the prosecution proved the key ingredients of the offence of defilement which include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.

In summary the prosecution case in the lower court was that the complainant BG who said she was 13 years at the time of her testifying was going to watch football on 6th July 2014 at 4.00 PM. That in the way she met the appellant herein who followed her and grabbed her by the hand and fell her down and lay on top of her and raped her.

That he removed her biker and panty. She said he tore her biker with a knife which he had. That subsequently he tore her panty and then started raping her. She said appellant also undressed.

That he forced her legs apart and inserted his penis into her vagina. That she screamed and members of public came. That when the appellant saw the members of public he ran away. She said one of the people who came to her rescue who was known to her was Koroki. She didn't know the rest. The complainant was escorted home where she reported to her father what happened and she was taken to Maua Police station and to hospital. The complainant said she bled after being sexually assaulted and bled. The appellant was arrested and he handed over the knife he used to tore the complainant biker. Complainant said she had known appellant for over 3 years as he is from same village where she stays. She identified the biker torn by the appellant, she also identified the long knife she said appellant used to tear her biker.

PW2 complainants father testified on how one got his daughter crying and she told him appellant had tore her biker and panty and defiled her.

That by then accused was nearby but when he called her he refused to come later he sent for him to be arrested by administration police officers and he was escorted to Maua Police Station where as the complainant was taken to Nyambene District Hospital where she was examined, treated and P3 filled.

PW3 PC Edna Mubuti investigated case. She said appellant was arrested by members of the public who recovered panga he used to tore complainants biker and handed over to the police EX2.

According to PW3 complainant told her she was 15 years. Pw 4 the Clinical officer Bernice Mutile Maingi examined complainant and filled P3 form – EX P3. She said upon examination of the complainant her external genitalia was normal; she had no bruises or wounds; the hymen was broken; Lab tests showed she was HIV negative; pregnancy test was also negative, urinalysis was normal and no spermatozoa was observed in high vaginal swab.

The clinical officer said she was producing P3 on behalf of her colleague Jackson Muchubu with whom she had worked and was familiar with his handwriting and signature form the P3 it is indicated the complainant was 13 years. She said appellant was not taken to hospital.

Before the close of prosecution case the prosecutor sought opt amend the charge sheet and was given time to do so but on 26th September 2016 the amended charge sheet had not been availed. A further mention was given for 28th September 2016 when it was read over to appellant and he pleaded not guilty. The amendment introduced separated the offence and the penalty section only.

When placed on defence, appellant gave unsworn stamen and said the charge against him is lies. He said that there is a shamba he is fighting over with complainant's father and that is why he was fabricated. He said sometimes back he was fought with the father of the complainant who cut his head. He said complainants witness didn't come.

I do find the appellants grounds of appeal filed on 27th February 2017 and the amended supplementary grounds to more or less the same and what this court is to look into is whether prosecution proved the ingredients of the offence of defilement.

To start with the age of complainant, the complainant said she was 13 years in her evidence in chief although she didn't have any documentary exhibit to that effect. Both the initial charge sheet lodged on 9th July 2014 and the amended charge sheet filed on 28th July 2016 indicate the age of the complainant as 15 years. The appellant was charged under S.8 (1) and (3) of the Sexual Offences Act No. 3 of 2006.

PW2 didn't give the age of his daughter. The investigating officer PW3 said PW1 told her she was 15 years old. The P3 form shows complainant age as juvenile but at part C as 13 years.

The treatment card from Nyambene District Hospital 81No 057221 dated 6.7.2014 at 11.57 pm indicates the complainant as 13 years old.

So when the trial magistrate settled on age of the complainant as 15 years was it consistent with Section 8(1) and (3) of Act No. 3 of 2006? Was this choice prejudicial or in favour of the appellant?

Section 8(3) of the Sexual Offences Act provides

“A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term not less than 20 years.”

Therefore, the determination by the magistrate that the age of the complainant is 15 years is of no consequence as far as the penalty is concerned. The P3 form and the medical Report indicate and confirm what the complainant said that she was 13 years and it is not understood where the Investigating Officer PW3 got the information of the age of complainant as 15 years.

This would have been fatal mistake if charge brought under any other subsection of section 8 of the Sexual offences Act other than S 8(3) which puts the age of 12 to 15 in same bracket for purposes of punishment.

I do find therefore the complainants age is that in the P3 form and the treatment notes from Nyambene District Hospital i.e 13 years as was held in the authority of **Stephen Nguli Mulili vs Republic [2014]eKLR by Justice E.M. Githinji** I do find that there was sufficient evidence to establish that the age of the complainant was 13 years and therefore charge properly brought under section 8(1) and (3) of Act No. 3 of 2006. Further the defence never controverted the fact that complainant was 13 years. I do however find fault in the trial magistrates finding that he determined age of complainant as 5 years without a basis and without calling for age assessment which he and the Investigation Officer had all the time to do so from 2014 to 2016 so that he doesn't rely on guess work.

The second question is whether the complainant was defiled. PW1 said she was on her way to watch football when she met appellant who was known to her for over 3 years and who lived in same village as her and who grabbed her and forcefully defiled her in the bush.

That she raised alarm and members of public including one Koroki who was known to her came to her rescue and the appellant escaped from scene but was later arrested and the long knife he had recovered and produce as exhibit together with the biker he tore using the knife.

From the Medical evidence complainants hymen was broken. The complainant said appellant inserted his penis into her vagina after tearing her biker and her panty and forcing her legs apart and defiled her

severally. It was at 4.00 P.M and in his judgment Hon Wanganga RM in finding it was appellant who defiled the complainant. He said at pages 55 to 56 that her complainants' hymen was broken as per evidence of PW1 and PW4 and pursuant to Section 124 of the Evidence Act he believed the complainants evidence that is supported by medical evidence.

He said appellant ignored when PW2 called him after receiving report of his daughter's defilement and walked away. The Trial Magistrate observed that the panga used by appellant to tear the complainants biker and the torn biker were recovered and produced as exhibit. The Trial Magistrate said he had no reason to doubt the evidence adduced by prosecution witnesses.

The appellant statement in defence was considered and found to be an afterthought as he didn't raise issue of land dispute with PW1 or even PW2 while cross examining them. I would add that he didn't give particulars of land for which he alleged there was a dispute between him and PW2 to justify that PW2 fabricated him.

Having considered the proceedings of the lower court, the grounds of appeal and the submissions by both the Appellant and the Respondent counsel, I'm of the view that this appeal can't succeed. The same is dismissed.

The conviction and sentence upheld. The Appellant has 14 days to appeal to the court of Appeal in matters of law.

HON. A.ONG'INJO

JUDGE

Ruling Delivered, Dated and Signed in court on 11th day of January 2018

In the presence of:

C/A: Penina

Appellant: Present in Person

Respondent: Mr Kinyua for state

HON. A.ONG'INJO

JUDGE