



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 24 OF 2016

CEASAR NJERU NJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal case No.924 of 2014 of the Chief Magistrate's Court at Embu)

JUDGEMENT

The appellant was charged with the offence of defilement of a child Contrary to section 8(1) as read with Section 8(3) of the Sexual offences Act No.3 of 2006. The particulars of the offence were that the appellant, on the 30th day of April, 2014 at [particulars withheld] village, Gatunduri sub-location within Embu County, unlawfully and intentionally caused his genital organ, penis, to penetrate the genital organ, vagina, of SHM a girl aged 14 years.

The appellant was also charge with an alternative count of indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the charge are similar as in the main count and that the appellant on the same day caused his penis to touch the vagina of SHM.

The trial court convicted the appellant on the main count of defilement and sentenced him to serve 20 years imprisonment. The grounds of appeal are that:

- 1. That the appellant pleaded not guilty the charge.***
- 2. That the learned trial Magistrate erred in law and facts when he relied on uncorroborated evidence of PW1 who is the complainant herein.***
- 3. That the learned trial Magistrate erred in law and facts when he relied on single evidence where by no single independent witness was included in this case.***
- 4. That the learned trial Magistrate erred in law and facts when he failed to consider that there was a land dispute between PW1 family and the family of the appellant that led to PW1 framing the appellant and this facts were brought out by PW1 in his first sworn evidence.***
- 5. That the learned trial Magistrate erred in law and facts when he failed to consider that the arrest was an afterthought as it took a whole month.***
- 6. That the learned trial Magistrate erred in law and facts when he rejected the appellant's defence yet the same was supported by DW2, the wife of the appellant, the fact that the complainant PW1 had never spent night in the appellant's house and DW3 supported the same too.***

The appellant submit that the prosecution did not prove its case beyond reasonable doubt as required by the law. PW1, the complainant gave two different versions of the incident. In the first instance, PW1 testified that on 30.4.2014 at about 7.00pm she went to borrow a Kiswahili text book from her friend, YW. She did not find her. It became dark and she decided to spend the night there. She went home the following day. She testified that nothing happened to her. The witness was stood down. The prosecutor then gave PW1 instruction and on 25.3.2015 PW1 gave a different story. The evidence of PW1 was contradictory and is contrary to Section 163 of the Evidence Act, Cap 80. The evidence should not be relied upon or the court should rely on the first version. PW1 was not a child of tender age who could be directed on what to say. The appellant rely on the case of ***JOHN BARASA V REPUBLIC KITALE Criminal Appeal No.22 of 2005*** where the court

observed as follows:-

“It is a trite law that where evidence is contradicted or inconsistent, the court should not rely upon it.”

The appellant further submit that the prosecution evidence lacks corroboration. PW2 and PW3 alleged to be the key witnesses. PW2 alleged that PW1 was locked in the appellant's house. PW2 alleged that it was the accused's parents who showed him the accused's house but those parents were not called to testify. PW2's wife alleged that she was told by PW1's friend that PW1 was locked inside the accused's house. Both PW2's wife and the friend were not called to testify. Therefore crucial witnesses were not called to testify. No photographs were taken to prove that PW1 was found in the appellant's house. PW4 testified that when they called PW1, she opened the house. Therefore she was not locked inside. It was all alleged that he door was locked from outside.

It is further submitted that PW1's grandfather, PW3, had a grudge with the appellant due to land dispute. PW3 denied the existence of a grudge. If the offence was indeed committed, the appellant could have been arrested immediately. The accused was arrested on 11.6.2014 after the case was reported on that day. There is no evidence that the appellant had ran away or that the Police were looking for him.

Although PW5, testified that PW1's hymen was freshly broken, PW1 had initially testified that nothing had happened to her. PW5 sated on the P3 form that the age of the injury was not applicable, the degree of injury was also not applicable. The P3 form does not support the allegation that the hymen was freshly broken. The trial Court held that the evidence of PW1 was corroborated by that of PW5.

The appellant also contend that his defence was rejected without any good reasons. The appellant called two witnesses. There was a land dispute which had caused the grudge. The appellant's wife testified and confirmed that the appellant was at home.

Miss Nandwa, prosecution counsel, opposed the appeal. Counsel submit that the evidence of PW1 was corroborated by that of PW5. PW1's hymen was freshly perforated. The evidence of PW1 was truthful and did not require corroboration as held by the Court of Appel in ***P.M.M V REPUBLIC [2014]eKLR***.

PW2, PW3 and PW4 further support the evidence of PW1. The appellant was positively identified by PW1. PW1 informed PW2, PW3 and PW4 what had happened. The issue of land dispute only came in during the defence hearing. The appellant was at large and that is why he was arrested after a period of one month. All the crucial witnesses were called to testify. The complaint's age was proved through a birth certificate.

The record of the trial court show that six witnesses testified for the prosecution. PW1, the complainant, gave sworn evidence. On 3.12.2014 PW1 testified that on 30.4.2014 she went to borrow a Kiswahili text book from her friend YW. Her friend was not there. She waited for her at her aunt's place. It became dark and she slept at Y's place. Nothing happened. She was forced to record her statements by Police officers from Kivwe . The witness was stood down. On 25.3.2015 PW1 testified that on 20.4.2014 she went to borrow a text book from Y. She was with P. Y was not there but arrived later. They went to Y's home. It was late and she decided to spend at Y's place. One person tied her mouth and nose. She does not know what happened as the following day she found herself in another house. She felt dizzy. She felt pain on the abdomen, stomach and private parts. She was naked. The appellant was there. The appellant locked her inside the house. She was confused. The appellant left and went back at 10.00pm while drunk. The appellant had sex with her again. The radio was on. She did not scream as the radio was on high volume. The second day the appellant locked her inside. The Police went there and broke into the house. She was rescued by her grandfather and the sub area. She was taken to Kivwe Police post. She was later taken to Embu Provincial General hospital.

PW2 AM is PW1's grandfather. His evidence is that his wife was called by PW1's friend and told that PW1 was locked in a house. He went to report to the sub area (village elder). They reported to the Kivwe Police post. They went to the appellant's home and the appellant's parents showed them the appellant's room. The Police broke into the room and found PW1. PW1 told them that she had been defiled. He took PW1 to Embu Level 5 Hospital. He had initially reported to the Police that PW1 was lost.

PW3 MICHAEL NJUE KIMATHI is the area village elder (sub area) – [particulars withheld] village. On 30.4.2014 PW2 went to inform him that his granddaughter had gone to borrow a book but was lost. They reported at Kivwe Police Post. On 2.5.2014 the Police went and broke into the appellant's house and the complainant was found inside the house. He denied that he had any land dispute with the appellant.

PW4 Corporal JOHN THAREYA was attached to the Kivwe Police Patrol base as the incharge. On 2.5.2014 PW2 went to inform him that PW1 was living with a man in a certain homestead. They went there and found the house had been closed. PW2 called PW1 and she opened the door. PW1 told them that she was feeling pain in her private parts. PW1 was referred to hospital. He later arrested the appellant. It is his evidence that the appellant married his wife later.

PW5 DR. GEOFREY NJUKI NJIRU was stationed at Mbeere South hospital. PW1 reported that she was detained at the appellant's house for three days from 30.4.2014 to 2.5.2014. PW5 examined PW1 and noted that her hymen was freshly perforated. He filled the P3 form.

PW6 Inspector EVERLYNE LWANGASI was stationed at the Itabua Police Station. On 2.5.2014 she was asked to investigate the case. She issued PW1 with a P3 form. The appellant was at large. She obtained PW1's birth certificate. The appellant was arrested on 11.6.2014 and was charged with the offence.

In his unsworn evidence, the appellant testified that he sells miraa. On 14.3.2014 he was arrested and charged with the offence of defilement. He is married and has one child who was one moth old. He had a boundary dispute with a neighbour who framed him. The neighbour is PW3. He denied defiling PW1.

DW2 ALICE MUKAMI is the appellant's wife. She testified that PW1 was not found in their house. Her husband was framed. On 30.4.2014 she was at home. In February 2014 her husband was selling miraa. Their house was not broken into. Their house has four rooms.

DW3 PATRICK NJERU MURUATETU is a welder. He is the appellant's relative. On 30.4.2014 he was at the appellant's house and left at 10.00pm. PW3 is their neighbour and had a land dispute with the appellant. It was a boundary dispute.

The issue for determination is whether the appellant defiled PW1. The main issues being raised by the appellant are that PW1 initially testified that she was not defiled. She was stood down and later changed her story. Further, PW2 and PW3 alleged that the house was broken into while PW5 testified that it is PW1 who opened the house. It is also contended that the medical evidence does not support the charge. On the other hand the prosecution maintain that the case was proved. PW1 was a minor that is why she was stood down.

The record of the trial Court shows that initially PW1 testified and stated that she slept at Yvonne's place and nothing happened. She was then forced to record her statement by the Kivwe Police officers. This was on 3.12.2014. About three months later, PW1 testified that she was defiled by the appellant. The circumstances of the defilement is that she was at Yvonne's place when someone went there and tied her mouth and nose. She does not know what happened as she became unconscious. The following day she found herself in another house. The appellant was there. She was naked. She was locked inside the house until when she was rescued by her grandfather. It is her evidence that she was locked inside. She could not make noise as the radio was on high volume.

The record shows that no one witnessed the alledged defilement. PW5 testified that PW1 informed him that she was detained from 30.4.2014 to 2.5.2014. The issue is whether indeed PW1 was detained.

The evidence of PW2 and PW3 is that they had reported that PW1 was lost to the Police at Kivwe. On the Contrary PW4 who was the incharge of Kivwe Police station testified that the incident was reported on 2.5.2014. It appears that no report had been made before then. There is the issue of the house being broken into. The Police officer (PW4) who went to the scene testified as follows:

“We found the house had been closed. One M called his granddaughter called “S” who opened the door. We found her and she said she felt pain in her private parts.”

It is therefore evident that the house was not locked from outside. The evidence of PW1 that she was locked inside is not true. The evidence of PW2 and PW3 that the door was broken is equally not true. It is true that a Court can convict an accused in a Sexual Offence charge if it is satisfied that the victim is stating the truth. Here is a case where the victim initially testified that she was not defiled and was forced by the Police to record a statement. PW1 once again testified that she was locked inside the house yet the evidence shows that she opened the door. She could have easily opened the door and went home since the appellant was not at home. PW1's evidence that she could not scream since the radio was on high volume cannot be true. If she was in the room alone for two days and the appellant was not there, how comes she did not scream? How come she did not escape? The appellant's wife testified that she was at home on 30.4.2014 and the house has four rooms. This is not a case where the victim is locked in a secluded area and cannot be assisted. It is clear to me that PW1 was not confined in the house. Her hands were not tied. Even the way PW1 explained how she found herself in the appellant's house is not convincing. She does not state that she was drugged. All what she says is that the following day she found herself in another house. There is no evidence that the appellant threatened her.

The P3 form was filled on 7th May 2014. Apart from the indication that the hymen was freshly perforated nothing else was observed on PW1. The treatment notes were not produced. The mere fact that the hymen was freshly perforated cannot lead to a conclusive conclusion that it was perforated between 30th April, 2014 and 2.5.2014. The P3 does not indicate if there were any other injuries noted. The abdomen was okay yet there was allegation of pain on the abdomen. No bruises were observed on PW1.

Although the prosecution submitted that the issue of land dispute arose in the defence, that is not the case. PW1 testified that she did not know the appellant before. She also stated that she was not framing the appellant due to land dispute. PW3 also testified that he had no land dispute with the appellant during cross examination. That issue was raised during cross examination of pW1 and PW3. It is not an afterthought.

From the evidence on record, I do find that several issues remain unanswered. Where was Y when PW1 was tied on the mouth and nose? How far is Yvonne's place to the appellant's place? PW2 and PW3 knew that PW1 had gone to borrow a book from Y, why didn't they go to Yvonne's place to inquire about her but alledge to have gone to report to the Police. Why didn't PW1 scream or open the door and escape? Why did PW1 initially testify under oath that she slept at Yvonne's place only to change her story about three months later? Why was Yvonne not called to testify. Why didn't PW1 reduce the volume of the radio after she was left alone in the house and scream for help.

This is a criminal case which has to be proved beyond reasonable doubt. I am not satisfied that the prosecution proved its case beyond reasonable doubt. The initial evidence by PW1 that nothing happened cannot be ignored. She was not treated as a hostile witness. She told the Court that she was forced to record her statement. Her grandfather and PW3 alledged that they reported at Kivwe Police post that pW1 was lost but that seems not to be the case. PW1 was 14 years old. She had turned 15 when she testified. The defence evidence also raises some doubt on the prosecution case. I do find that the conviction is not safe and cannot be left to stand.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and Signed at Marsabit this day of March, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 20th Day of March,2018

F. MUCHEMI

JUDGE