



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL CASE NO. 5 OF 2017

DOLLAVIN MAINA IRAKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

DOLLAVIN MAINA IRAKI was charged in the Lower Court, in the main count with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of this offence being that on the 2nd day of April 2013 at Siyoi Sub-Location within West Pokot County, the appellant caused his penis to penetrate the vagina of N C K, a child aged 15 years old.

In the alternative, the appellant faced a charge of committing an Indecent Act with a child, contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars hereof being that on the 2nd day of April 2013 at Siyoi sub-location within West Pokot County. The appellant intentionally touched the vagina of N C K, a girl aged 15 years.

On 8.9.2015 the complainant gave unsworn evidence. A voire dire was not conducted and the language of the court was not indicated. She said she was aged 17 years old and was a student at St. [particulars withheld] School, in form two. She was from [particulars withheld] area and did not know the appellant in this case. She said she only sees him and they do not know each other. She went further to state that she was pregnant and did not know who the father of the child was. She alleged she was speaking the truth and recorded her statement when she was forced to. She could not remember what she said in her statement. She said she did not know the appellant and only saw him in Siyoi area. She alleged on 2.4.2013 at 10.00 p.m she was from Chepareria headed home, she met with Maina at Siyoi Centre, talked with him and left. She proceeded home with her brother. She stated she recorded something different in her statement to the police. She said in it, it was by the riverside where they met. Thereafter she went home and missed her periods. She did not know exactly what happened that she became pregnant. The father got to know the 8th month. He asked her and she told him that it belonged to Maina the appellant herein. She ended up saying she informed the father that the pregnancy is Maina's.

The appellant did not cross examine her. The court questioned her and she said the child was one year, nine months old. She said she slept with the appellant twice.

The state prosecutor at this point applied for a DNA test to be done to establish the paternity of the child. The appellant did not object to the application.

On 16.9.2015 the prosecutor stated that the complainant had been charged, and the case be heard afresh and she will co-operate;

The case proceeded on 17.9.2015 "PW1" was recalled. She said in the month of September 2012 she was staying at [particulars withheld] area. She met with Maina at Siyoi Area. He talked to her and said he wanted her. She was born in 1998 and was by then aged 14 years. The appellant was a driver of Tecla Lorupe. She agreed. On 2.4.2015 she was from Kacheliba Sports day headed home. She met with the appellant at Siyoi Area. They started meeting by the lake side at night. He did not use any protection. In June 2013, she missed her periods. She told the appellant about it, and he told her to wait for a month in order to confirm. Her father later noticed of it. She told him it belonged to Maina. He took her to hospital. She slept with Maina about 4 different times of which they had sex. He could remove her clothes, inner garments and then have intercourse. He could touch her under parts, breasts and then enter himself into her. She was certain it was him and not anybody else. She liked him. She recorded her statement with the police. She was examined and told she was pregnant. She gave birth to a baby boy on 28.12.2013 at Kapenguria District Hospital.

On Cross Examination, she said the appellant was her boyfriend. She had no other boyfriend. The father who was PW11 said in the year 2013, while the complainant was at home, he noted that she was not well. He informed the mother to find out. She did and told him that she was pregnant. He interrogated her and she said it was Maina's pregnancy. He reported to the police. On 6.11.2015 the appellant was arrested. Complainant was issued with a P3 form. She was examined and confirmed pregnant. The appellant was then charged

PW – 3 said he examined the complainant at Kapenguria Hospital on 6.11.2013. He noted the hymen was broken. Pregnancy test was positive and venereal disease, negative. He concluded she had been defiled and impregnated.

On cross examination, he confirmed that she was 15 years old.

The Investigating Officer gave evidence as PW4. He said they had a Birth Certificate showing complainant was born in 1998 and was aged 15 years then. The state prosecutor applied the witness be stood down for purpose of conducting DNA test. The appellant had no problem with the application and it was allowed. Later on, 12.10.2016 the court was informed that samples got misplaced. On 13.10.2015 the state prosecutor indicated that the police file was also misplaced and closed their case. Upto 12.10.2016 the case was heard before the Principal Magistrate, Hon. D.M. Machage. However, on 13.10.2016 it was heard before Hon. P. Y. Kulecho, an (RM) who made a ruling that the accused had a case to answer and placed the case for defence hearing on 8.11.2016. Hon. DM Machage heard the defence on 21.11.2016. The appellant gave unsworn testimony in which he stated that he saw the complainant in court. He denied the offence. He alleged in April 2013 he was away in Uganda. He went there on 20.2.2013. He returned back on 20.8.2013 and could not have committed the offence on the alleged day.

The court delivered Judgment on 28.3.2017 whereby the appellant was found guilty, convicted and sentenced to serve 20 years imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The appellant right to a fair criminal trial was violated with impunity in the following manner; -

a) The evidence of N C the complainant was received on two independent occasions without an oath being administered to her, Contrary to section 17 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya.

b) The court failed to indicate the language used by N C the complainant, in the course of adducing her evidence on the two independent occasions.

c) Allowing N C the complainant to give evidence on a second occasion after she had already fully given all her evidence on the first occasion, without an application to re-call her having been made by the prosecution and without giving the appellant an opportunity to respond to such an application. The result was having on record two versions of evidence that was extremely contradictory from the same person.

d) The learned magistrate contrary to the law cross examined the complainant (not clarifying an issue or issues) and obtained evidence incriminating the appellant and without giving the said appellant an opportunity to question the complainant on such evidence.

e) The finding that the appellant had a case to answer was made by a magistrate who had not heard the case and contrary to the law.

2. That the learned trial magistrate erred in law when he found and held that an offence of defilement contrary to section 8(1) of the Sexual Offences Act had been proved since;-

a) The age of the complainant was not established by the evidence to the required standard of proof.

b) Penetration was not proved

c) There was no credible evidence implicating the appellant with the commission of the Criminal Offences charged with.

3. That the learned trial magistrate failed to appreciate that the complainant who had contrary to the law given two different versions of contradictory evidence could not be trusted and her evidence remained discredited and unworthy.

4. That the learned trial magistrate erred in law when he failed to appreciate that the alibi defence put forward by the appellant was not dislodged

5. That the finding of the trial magistrate were against the weight of the available evidence.

The appellant therefore urged this court to quash the conviction and the sentence.

The state prosecutor conceded to the appeal on the given reasons, save for that section 200 of the Criminal Procedure Code needed not be complied with when the ruling on a case to answer was made as the magistrate who made it heard no evidence, but just made the ruling.

I have as shown on the earlier part of this judgment, re-evaluated the entire evidence and the procedure followed during the trial. To a good extent I do agree with the appellant that the trial was not properly conducted in accordance to the provisions of the law. Voire Dire was not conducted on PW1 to find out whether she was intelligent enough to give evidence and understood the meaning and nature of oath. If the trial magistrate was of the opinion that she was not a child of tender years, should have indicated so and sworn her. Having not done so, there are no justifiable legal basis on which she gave unsworn evidence.

The language she used was not indicated. We are not certain it is a language which the appellant understood. When the appellant alleges it is

a language he did not understand, it becomes hard to find otherwise given that in the first instance when PW 1 gave evidence he did not cross examine her.

The complainant gave full evidence twice. The first time she was indicated as M.C.K. and as PW1. The second time she was indicated as N.C and as PW II. This is confusing as to whether she was one and the same person who gave evidence at the two instances. The basis on which she gave the second evidence are not justifiable in law. It was simply to correct or amend the first evidence of which the prosecution felt was unfavourable to them. The words of the prosecutor while applying to recall her should have made the court cautious of the evidence. The prosecutor indicated that the complainant had been charged and was willing to co-operate. This indicates she was coerced into giving evidence favourable to the prosecution. Evidence such obtained cannot be said to be freely and fairly offered. The two versions of evidence are contradictory as to who impregnated her. The trial court in its judgment did not make it clear as to which version it relied on, and though clear it is the second version of which was favourable to the prosecution, the issue of the position of the first version was not considered and settled.

It's true that the ruling on a case to answer was done by a different magistrate from the one who had heard the evidence, for no good reason, and without complying with section 200(3) of the Criminal Procedure Code. Since the trial magistrate was available the magistrate who made the ruling had no legally justifiable cause to make the ruling. The said ruling was made against clear provisions of the law.

DNA test was called for twice in the case. It was explicit that the complainant claimed she was defiled and as a result got pregnant. She had given birth which would have made it easy to carry out a DNA test. The appellant was not opposed to it on the two occasions when it was requested for. If this evidence was availed, it would have been the best evidence to corroborate the complainant's claim. It is not clear why such test was not conducted. In the first instance, the prosecution opted to recall PW1 who was then willing to co-operate and did away with DNA test. In the second instance the prosecutor claimed the samples taken were misplaced and closed his case. The question is, why was this highly vital evidence blocked from the court? There is high possibility that the prosecution were aware that the evidence if availed would have been unfavourable to their case.

The trial magistrate relied on uncorroborated, unsworn evidence of a minor of which was contradictory, in finding that it is the appellant who defiled her. While I find the question of her age settled by the birth certificate and defilement confirmed by the fact that she had conceived. There is no reliable evidence that it was by the appellant. In her first version of evidence she had, to a good extent, exonerated him.

I accordingly find that the wrong procedure and errors occasioned while taking the evidence of PW1, renders this trial a mistrial. The appellant should have been accorded the benefit of doubt on the question of whether he was the culprit and acquitted of the offence. On the said grounds the appeal is merited. It is allowed, the conviction and sentence are hereby quashed and the appellant should be released forthwith unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of Mr. Ndarua for the appellant and Ms Kiptoo for the State this 20th June, 2018.

S. M. GITHINJI

JUDGE

20.6.2018