



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 51 OF 2015

(Being an Appeal from Original Conviction and

Sentence in Criminal Case No. 2912 of 2013 of the

Chief Magistrate's Court at Naivasha, E. Kimilu – SRM)

HANDAUKA ALI HATIBA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant herein was charged and convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars stated that on the 23rd day of November, 2013 in Naivasha Municipality within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the vagina of **J.W.M.** a girl aged 5 ½ years. He was sentenced to life imprisonment.

2. Aggrieved by the conviction, the Appellant filed the present appeal in which he relies on six amended grounds of appeal as follows:-

“1. THAT the learned trial magistrate erred in both laws and fact by convicting me on the present case yet Article 50 sub section (2) of the new constitution of Kenya was adequately infringed.

2. THAT the learned trial magistrate erred both in law and fact by convicting me on incorroborating evidence.

3. THAT the learned trail magistrate erred in both law and fact by convicting me yet the prosecution case was not proven beyond reasonable doubt.

4. THAT the learned trial magistrate erred in both law and fact and by convicting me on the clinical checkup yet the circumstances and conditions prevailed in the court were of low manner to be considered during judgment.

5. THAT, the learned trial magistrate erred in law and fact by convicting me on the present case which was not properly investigated, it lack credibility and was forged but the trial magistrate never considered such issues but rather consider the conviction which was very harsh and excessive to me.

6. THAT, my plausible defence was not adequately considered by the trial court considered only the hearsay of the witnesses.” (sic)

3. In principle the grounds challenge the prosecution evidence upon which the conviction was based. The Appellant also complains that he did not receive the evidential material in advance and that his defence did not receive due consideration. In support of the grounds the Appellant filed written submissions.

4. Ground 1 and 6 are self-explanatory. Regarding grounds 2, 3, 4 and 5 the Appellant submitted that penetration was not proved and that the complainant minor's evidence was not credible, or corroborated sufficiently as the medical report was not tendered by its author and the evidence itself was inadequate. He complained that the police failed to investigate the case properly and therefore produced witnesses who

could not be believed. In his view the trial court did not properly address itself to his otherwise plausible defence.

5. The **DPP** opposed the appeal, and restated evidence tendered by the prosecution at the trial.

6. Regarding the first amended ground, the record shows that on 12th March 2014 the Appellant requested to be supplied with witness statements. The court gave an order in that regard. On 25th March 2014 at the commencement of the hearing the Appellant stated that he was ready to proceed and would get and read statements. Possibly, he had not paid for them as directed by the court on 12th March, 2014. The matter was adjourned to noon, whereupon the Appellant not only sought adjournment to get witness statements but also documentary evidence.

7. His request was granted and the case was adjourned to 7th April, 2014. On that date he indicated that he was ready, and never again raised the issue of the witness statements and documentary evidence. There is therefore no merit in the complaint raised by the Appellant in that regard. The trial magistrate cannot be faulted as she fulfilled her duty in ensuring that the Appellant received the statements and evidentiary material prior to the trial.

8. Regarding the remainder of the grounds, this court proceeds on the basis of the guidelines set out by Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336**. The court stated:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellate court is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

9. The prosecution case at the trial was as follows. **T.W. (PW2)** was married to the Appellant. They lived in a single room at Kihoto in the material period. While **PW2** ordinarily went out to her work station at Kongoni River Farm, the Appellant did odd jobs at home as he was a black smith or artisan of sorts working primarily from home.

10. On 23rd November, 2013 **PW2** arrived home early in the afternoon and found the complainant **J.W. (PW3)**, a neighbour’s daughter aged about 5 years asleep on a sofa set in her room. She was naked waist down and appeared drowsy. **PW2** questioned her. **PW3** said that Appellant had invited her to the room and defiled her. Confronted, the Appellant became harsh, denying the accusations. When **PW2** insisted on a visit to hospital, he went away allegedly to look for money but did not return or answer telephone calls by **PW2**.

11. On the Appellant’s return the next day **PW2** insisted that he resolves the matter but a commotion ensued as the Appellant became violent. **PW2** then reported the matter to her neighbour **M.N.E. (PW1)** aka **Mama Ciku**, the complainant’s mother. **PW1** immediately rushed the child to the District Hospital and later made a report to police.

12. On examination, it was noted that the child had been defiled and had an infection for which she was treated. The Appellant was arrested by members of public on 28th November, 2013 and handed over to **CPL Habibia Hussein (PW4)**.

13. When the Appellant was placed on his defence he elected to make an unsworn statement to the effect that he was a blacksmith and artist, residing at Kihoto in the material period. He was doing some painting work at the police lines on 23rd November, 2013 and on returning home did not find his wife. He was unaware of her whereabouts.

14. Soon some two relatives of his wife visited. They complained that he had sidelined them in his youth organization. That the wife was not in his house on that date. Upon her return on the next day, his wife revisited her relatives’ complaints and asked for money. He was on the way to the bank when some people attacked him and injured him. He was hospitalized for a week but his wife never visited. He denied the offence.

15. The relationship between **PW2** and the Applicant is admitted, albeit indirectly. There is no dispute that the Appellant and **PW2** resided at Kihoto in the material period and were neighbours to the complainant’s family. That on 28th November, 2014 the Appellant was arrested. That he had been assaulted by members of public during the arrest and was hospitalized for some days.

16. It did not appear to be disputed that **PW3** was aged about 6 years and that on 24th November, 2013 she was presented to the Naivasha District Hospital on allegations that she had been defiled. Initial investigations revealed that her hymen was broken and she had pus cells indicating infection.

17. The key question in dispute was the identity of the perpetrator of the offence. In this regard, the prosecution relied on evidence by the Appellant’s wife (**PW2**) and the child’s mother **PW1**, as well as the minor’s evidence (**PW3**). The three witnesses gave an account of the events leading up to the Appellant’s arrest. Starting with his wife, **PW2**, she narrated her findings on the afternoon of 23rd November, 2013 when she returned home early, possibly unexpectedly. The victim was lying, naked waist down, on a sofa in her room. Her genitalia was marked with wetness. When she inquired **PW3** told her that the Appellant had done to her “*tabia mbaya*” a common euphemism used by children to describe a sexual act.

18. The Appellant who was home did not want to be questioned, got rough and left the home supposedly to get money as **PW2** was insisting on having the child examined. It was not until the next day that **PW2** reported the findings to **PW1** explaining to the court that she had let the child go home on 23rd and herself gone away for the rest of the day, the latter fact confirmed by the Appellant in his defence.

19. It was the evidence of the two women **PW1** and **PW2** that they were neighbours living next to each other. **PW2** was in many ways a star witness alongside **PW3**, of the events of the 23rd. Although **PW2** did not claim to have found the Appellant while in the act of defiling the victim, she maintained that he was present and the child was lying on her sofa, exposed and appearing drowsy. She maintained that **PW3** narrated to her that the Appellant had defiled her.

20. This narrative was also repeated when **PW3** testified. Although **PW3** said that **PW2** found the Appellant committing the offence, she may have assumed so. It seems that by the time **PW2** entered the house, the Appellant had placed the child on the sofa set. That notwithstanding the testimony given by **PW3** is riveting for detail. She described how the Appellant who was known to her as a neighbour called her into the house, undressed her first and then himself before penetrating her. That the Appellant even performed oral sex on her. Is there any chance that the minor made up all this? I doubt it.

21. During cross-examination both **PW2** and **PW3** were consistent. What reason could a neighbour's child to invent such a sordid incident against the Appellant? None in my view, and in the circumstances of the case the Appellants claim that **PW2** wanted to get even with him, framing him up because of some petty quarrel is not capable of belief.

22. Besides, the alleged tiff was not put to **PW2** during cross-examination. The fact, that **PW2** involved a third party, **PW1** in the matter by informing her about the incident of 23rd November renders the Appellant's suggestion unrealistic. There is evidence that upon being confronted by **PW2** on 23rd and 24th November he had fled the home. It was only on 28th November that he was arrested by members of public.

23. The evidence by **PW1**, **PW2** and **PW3** receives strong corroboration in the PRC and P3 forms properly produced by **Dorcas Osoro** on behalf of the examining clinical officer **Joseph Nakuro**. Although the P3 form was completed on 7th January 2014, the PRC forms containing the initial clinical notes were completed on 24th November, 2013. Both medical reports are in respect of **J.W.M.**, **PW3** and document similar findings. Not only were pus cells seen in the child's high vaginal swab, her hymen was broken as at 24th November 2013. The P3 form on the other hand indicates that upon examination on 7th January 2014, "**blood noted on exam with a freshly broken hymen.**"

24. Equally, details of the victim's specimen analysis results indicate the presence of pus cells in the HVS. **PW5** explained that the PRC is used in the completion of P3 form and reiterated findings therein during cross-examination. The Appellant's submission attacking the medical evidence introduces matters that are extraneous to the record of **PW5's** evidence at the trial. The trial court did ask Appellant whether he had any objection to **PW5** producing the medical evidence on behalf of **Joseph Nakuro**. He said he had none. He also cross-examined **PW5** and it is too late for him to raise an objection to that evidence on this appeal.

25. The medical evidence is consistent with and corroborates testimony by **PW1**, **PW2** and **PW3** concerning the defilement of **PW3**. The Appellant's defence was essentially a denial that was completely ousted by the weight of the prosecution evidence placed before the court. Reviewing for myself the evidence at the trial, I am satisfied that the prosecution evidence was solid and credible and that the Appellant's conviction was well founded. The appeal herein has no merit and is accordingly dismissed.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 26th day of July, 2018.

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Handauka Ali Hatiba - present

C/C : present