



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 35 OF 2017

GEOFFREY NYABERO OICHOE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an Appeal against the conviction and sentence of Hon. J. Mwaniki – SPM

delivered at Keroka in Keroka Senior Principal Magistrate’s Court

Criminal Case No. 19 of 2016]

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The particulars of the charge were that on 5th January 2016 at [particulars withheld] Sub-location in Masaba North Sub-county within Nyamira County he intentionally caused his penis to penetrate the vagina of M N N, a child aged 8 years.

The appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act in that on 5th January 2016 at [particulars withheld] Sub-location in Masaba North Sub-county within Nyamira County he intentionally touched the vagina of M N a child aged 8 years with his penis.

The appellant pleaded not guilty on both count. In the ensuing trial the prosecution called four witnesses while the appellant made an unsworn statement. After evaluating the evidence, the trial magistrate came to the conclusion that the principal charge had been proved beyond reasonable doubt. He convicted the appellant and sentenced him to life imprisonment.

Being aggrieved by the conviction and sentence the appellant preferred this appeal. The appeal is premised on the following grounds: -

“1. That my Lords I did not plead guilty to the charge and firmly maintain the same.

2. That my lord the trial magistrate faulted both in law and fact when maliciously contravened article (50) 2 (f) & (h) 49 (i) & (f) of the constitution whereupon the appellant was unlawful held in police custody for more than 24 hours and his fundamental rights were glossy violated contrary to the provisions of the constitution.

3. That my lord the trial learned magistrate further faulted both law and fact when miserably based the conviction on substandard evidence. The prosecution was below the weight and unreliable given to the fact that the complainant molten merely colluded with the complainant to mislead the court by fabricating the crime in question against me.

4. That my lord the trial learned magistrate once more faulted both in law and fact when seemingly based the conviction on presumption and misdirection caution that the misconduct between the appellant and molthen of complainant who was also a wife to the appellant her testimony ought have been treated with the greatest care.

5. That my lord the trial learned magistrate finally faulted both law and fact when miserably objected the defence of the appellant without cogent reasons yet the same was comprehensive in casting considerable doubts to the strength of the prosecution case.

6. That my lord the overall effect is that may this appeal be allowed conviction quashed and the sentence set aside.”

The appeal was canvassed partly by way of written submissions and partly through oral submissions.

I have considered the rival submissions but as the first appellate court I am required to reconsider and evaluate the evidence in the court below so as to arrive at my own conclusion. I have done so bearing in mind that unlike the trial court I did not have the benefit of seeing or hearing the witnesses give evidence. The complainant in this case was 8 years old. This was the apparent age given to her by the clinical officer who examined her after this occurrence. It was her evidence that the appellant was her father (he was as a matter of fact her step father).

She stated that on the material day (she could not remember the date) her mother had gone to the river and she had been left at home with her younger siblings and the appellant. She stated that the appellant took her to his bedroom where he dropped his trouser up to knees, removed his manhood and did bad things to her between the legs. She told the court that she felt a lot of pain and that she also bled. It was her evidence that he had removed her ants and skirt and only wore them again after the appellant left. She was emphatic that the ordeal took place in the appellant's bedroom and that M witnessed it all. However, when her mother (Pw2) gave evidence she told the court that it was on 5th January 2016 and that she had gone to fetch water at 10 pm only to return and find the appellant having sex with the complainant in the sitting room. She stated that although the appellant had removed the complainant's underpant, she had her other clothes on. She stated that she asked him what he was doing but he kept quiet. She screamed but nobody responded. She also reported the matter to her in-laws but they too did not respond so she sought help from the village elder and members of her village community policing. She too confirmed that M was present but that he did not record a statement probably because the appellant is his brother.

The village elder (Pw4) testified that he was in his house when he heard the voices of the complainant's mother and one M beseeching him to go rescue some children who the appellant was beating. When he got there the appellant allegedly stretched out his hands and told him to arrest him. He testified that one of the children, a girl, told him that the appellant had taken her to bed and defiled her. He took her to some women who examined her and told him the girl had been defiled. He reported the matter to the chief and then apprehended the appellant and took him to the police station.

Treatment notes produced as Exhibit 1 show that the complainant was seen at Masaba North Sub-county Healthy Facility on 6th January 2016. The notes indicate that on being examined by use of a finger blood stains and a broken hymen were detected. No spermatozoa were seen and she was discharged on medication. It is these notes that Joel Ongaro (Pw3) a clinical officer at the facility used to complete the P3 Form on 10th April 2016. He concluded that the complainant had been defiled. By the time he completed the P3 Form 12 weeks and 5 days had elapsed.

In his defence the appellant stated that on 6th January 2016 he had gone home only to find his wife with Pw4 (village elder). That the village elder left and returned with one M M. They arrested him and his wife and took him to a police post where he was locked up for allegedly defiling his child. He stated that he had not seen the children on 5th January 2016. He contended that the child was taken to a private hospital and that Pw4 had warned him he would lock him up. He further contended that when Pw4 took him to Keroka Police Station he gave the police 2500/= to have him implicated by a doctor. As for his wife he stated that she framed him for beating her up for brewing traditional brew while Pw4 was having an affair with his wife and had a grudge against him for refusing to sell land to him.

The evidence of the complainant sounded so cogent and credible until her mother testified and contradicted it all together. If according to the complainant this incident occurred in the appellant's bedroom, why did her mother testify that she found the appellant defiling her in the sitting room? Who between them was telling the truth and why was M, who the two of them claim was present, not called as a witness. It is my finding that this is not just a case of there being no requirement on the number of witnesses the prosecution should call. The evidence of M was crucial given the contradiction of the complainant's evidence by her mother. M who was a competent and compellable witness was not even asked to record a statement and no explanation was given to the court. The proviso to Section 124 of the Evidence Act states: -

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Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

It is based on this proviso that courts have held that in sexual offences there need be no corroboration. However, the provision itself makes it clear that it applies only where the only evidence is that of the alleged victim. In the instant case the prosecution called the complainant's mother whose evidence, I must say, rather than giving credence to that of the complainant casts doubt on the credibility of the complainant. The evidence of the clinical officer need not have been adduced because as Section 124 of the Evidence Act states the evidence of the victim would have sufficed. Indeed, the medical evidence did not add any value to the case as the examination took place four months after the incident when all traces of the defilement would have been erased. It is instructive that the arresting officer and the investigating officer did not testify in this case and although it is not always necessary that they do so it is my finding that they just like M would have been important witnesses. The omission to call them left gaps in the prosecution's case which they could only fill.

The rule of the thumb is that where even a shadow of doubt is cast upon the prosecution's case the benefit of doubt must go to the accused person. Accordingly, I give the benefit of the contradiction in the prosecution's case to the appellant and find his appeal merited. The appeal is allowed and the conviction is quashed and the sentence set aside. The appellant should be released forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and pronounced in open court this 31st day of October 2018.

E. N. MAINA

JUDGE