



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.5 OF 2018

GEORGE LEMAYON

LENAMIRIA alias ABUBAKAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in

Criminal Case No.834 of 2015 by Hon BOAZ

OMBEWA Principal Magistrate Marsabit)

JUDGMENT

The appellant was charged with the offence of defilement Contrary to Section 8(1)(2) of the Sexual Offences Act, number 3 of 2006. The particulars of the offence are that the appellant on the 7th day of November, 2015 at [particulars withheld] in Marsabit South within Marsabit County, intentionally and unlawfully caused his penis to penetrate the vagina of S.A, a child aged 10 years. The trial Court convicted the appellant and sentenced him to serve life imprisonment.

The grounds of appeal are THAT:-

- 1. The learned magistrate erred in law and fact by failing to re-evaluate and re analyze the evidenc, to the prejudice of the appellant.***
- 2. The learned magistrate erred in law and fact by handing the appellant a very harsh sentence despite being a first offender.***
- 3. That the trial was not conducted according to the law.***
- 4. That the trial Magistrate misdirected himself in law and in fact by ignoring that the appellant was not taken for medical examination or DNA samples being tested to conclusively connect the appellant to the alleged offence.***
- 5. That the trial Court convicted the appellant of the offence charged notwithstanding, that there was no spermatozoa found on the victim.***
- 6. The trial court convicted the appellant despite the fact the prosecution evidence was riddled with contradictions, discrepancies and inconsistencies.***
- 7. That the trial Court convicted the appellant of the offence charged notwithstanding that the complainant's written statement and her oral testimony/evidence in court contradicted each other.***
- 8. That the trial court convicted the appellant of the offence charged notwithstanding, that he was not positively and clearly identified at the scene of crime.***
- 9. That the trial court convicted the appellant of the offence charged notwithstanding, that the evidence of PW1 upon which it based its decision was not corroborated as required under the provisions of Section 24 of the Evidence Act.***

10. That the trial Court based its decision on the prosecution evidence and completely ignored the evidence of the defence.

11. That the trial court failed to appreciate that on the alleged date of the offence the appellant had visitors who slept in the room the alleged complainant was defiled on.

12. That the prosecution deliberately chose and/or failed to call witnesses who were mentioned by the complainant in her statement.

13. That the prosecution did not call for evidence from Kargi Catholic medical clinic where the complainant was alleged to have been initially treated and also did not call for any letter of referrals from the said facility to Marsabit hospital

14. That the prosecution failed to call for evidence from the doctor at Nairobi Women's hospital who attended the complainant herein thus failing to prove their case.

15. That the magistrate who pronounced the judgement did not give adequate consideration to the evidence of the defence.

Mr. Biwott appeared for the appellant. Counsel submit that the circumstances at the scene were not conducive for positive identification. The incident occurred at 9.00am in a house that had no electricity. The complainant alleged that she had a torch and that appellant had a red T-shirt and a kikoi as per her statement to the police. When testifying she gave a totally different story. Initially she alleged that she was with a young girl. In Court she alleged that she was alone. She told the Court that she was defiled three times and another lady responded. The lady is the complainant's auntie who did not testify. The evidence in Court is inconsistent.

Counsel submit that PW2 was not at the scene. The appellant was not examined. A P3 form was produced but no sign of spermatozoa was noted. No DNA test was conducted on the appellant. PW1 was taken to Nairobi Women Hospital but no evidence was produced from that hospital. The investigation officer visited the scene. PW1 in her statement indicated that the house has electricity but PW2, the owner of the house testified that the house has no electricity. Her solar panel was not working. The investigating officer testified that PW1 told her that she was defiled for 30 minutes but PW1 told the court that she was defiled the whole night. Mr. Biwott contend that the defence evidence was ignored. The defence witnesses testified that nothing happened that night. No treatment notes from Kargi Health center were produced.

Mr. Chirchir, prosecution Counsel, conceded the appeal. Counsel submit that it is true that complainant was defiled. However, the identification was not full proof. There was no light in the house. PW1 did not state how she identified the appellant. PW2 confirmed that there was no electricity in the house. There were three other men in the same building. It is not known who among those men defiled PW1.

Secondly, Mr. Chirchir contend that the prosecution evidence has contradictions. PW4 testified that PW1 was defiled for 30 minutes whereas PW1 indicated that she was defiled throughout the night. PW4 testified that PW1 was defiled in three different occasions by the appellant but PW1 told the court that it was the first time. PW1 alleged that the lights were on yet there were no lights. Thirdly, Mr. Chirchir maintains that crucial witnesses including a neighbour were not called. A village elder, a doctor from Nairobi Women Hospital and a nurse from Kargi were all not summoned. The defence was also not considered.

This is a first appeal and the Court has to evaluate the evidence afresh and make its own conclusion. Four witnesses testified for the prosecution. **PW1 is the complainant.** She told the Court that she was nine years old. On 7.11.2015 at 9.00pm her aunt had left for Marsabit. She closed the door. She switched on a torch. The appellant was staying in the next house. While asleep she heard the door being opened. She saw the doctor opening the door. She switched off the light. The appellant covered her mouth with black papers. He had a red T-shirt, a kikoi and spectacles. The appellant threatened to kill her if she screamed. She screamed. Her hands were tied with a rope. The appellant repeatedly defiled her four times. In the morning he left the house. They had slept the whole night. It was on a Saturday. She informed her aunt by the name Umadho about the incident. This was on a Tuesday. She was feeling pain in her private parts. The elders were informed. She was taken to Kargi hospital and later to Marsabit hospital where she was hospitalized for two days. She was later taken to Nairobi Women Hospital. She was issued with a P3 form.

PW1 further testified that when the appellant entered the house she had switched off the torch. There was no electricity. when she screamed a certain woman went there. She couldn't remember the woman's name. She denied that she was with a child by the name Arbe that night. She was alone in the house.

PW2 L.K.L is PW1's aunt. She testified that PW1 was living with her other aunt who is a teacher. She was informed about the incident on 10.11.2015. A neighbour, S L is the one who informed her. She reported the matter to the Police. PW1 was taken to hospital for treatment. PW2 is the owner of the house where the appellant was residing. There is a solar panel in her house where PW1 was sleeping but it was not working.

PW3 DR. DUB HALAKE DIDO was stationed at the Marsabit referral hospital. He filled P3 form for PW1. It is his evidence that PW1's hymen was missing. PW1 had strangulation marks. There was no discharge. He ascertained PW1's age to be 10 years. No spermatozoa was noted.

PW4 PC SALO JARSO was attached at the Marsabit Police station. He investigated the case. The case was reported at the station by PW2 on 10.11.2015. The appellant and PW1 were taken to the station on 10.11.2015 at 2.00pm. PW1 told him that her friend Arbe escaped while she was being defiled. PW1 told him that they had slept while the lights were on. PW1 was with Arbe who is her age mate. PW1 had difficulty in walking.

DW1 SHEIKH HUSSEIN YUSUF was the Imam of Kargi Mosque. He used to meet the appellant at the mosque. On 7.11.2015 there was a ceremony for KCPE candidates for [particulars withheld] primary schools. He was a part time Islamic Religious Education (IRE) teacher at [particulars withheld] primary school. He attended the ceremony. In the evening he met the appellant at the mosque. He once again met the

appellant the following day 8.11.2015 for Friday prayers. He did not stay with the appellant the whole night on 7.11.2015.

DW2 MERCY BUSURU works at Marsabit District hospital. She knew the appellant as a Public Health officer. Together with other colleagues, they went for an outreach programme on 1/11/2015. On 7.11.2015 they decided to spend the night at [particulars withheld]. It was about 8.00pm. She had vaccines that were to be kept in a refrigerator. She saw the appellant passing and asked him to assist. They went to the Kargi Health center and kept the vaccine. The appellant offered to accommodate them. They went to his house. It was a mabati house. The appellant showed them a room which had a bed. Some of her colleagues slept on the bed while others slept in the sitting room. The appellant slept in an adjacent room. She did not hear any commotion or noise at night. They were three women in the room. There were also three men. There was a driver, a doctor and another man whom they had given a lift. They woke up at 6.00am and left using their motor vehicle.

DW3 DIBA DIKA is a clinical officer stationed at Marsabit County referral hospital. He was in the same team with DW2. They were in [particulars withheld] with DW2. He asked for a lift. They reached [particulars withheld] at around 9.00pm. They had a driver by the name Arero Roba. They met the appellant. DW2 and the appellant left for the local hospital and returned. The appellant took them to his place. He slept in one room with the driver. The women occupied another house. The appellant occupied the store. They slept well until morning. They left at about 6.00am. They saw the appellant early that morning coming from the mosque. He did not hear any screaming or shouting in the house.

DW4 is the appellant. He gave sworn evidence. He is a Public Health Officer. He was transferred to [particulars withheld] in 2014 from [particulars withheld]. On 7.11.2015, there were prayers for class 8 candidates. DW1 attended but he did not. At about 9.30pm he saw their work place vehicle. He found his colleagues. DW2 wanted to pass by the dispensary. He went with her together with the driver to the dispensary. He took his colleagues to his house. There were three women, DW2, and a nurse from Mt. Kulal were known to him. There was another woman whom he did not know. They slept and the guests left the following morning. The following Tuesday elders went to his house and informed him that pW1 was accusing him of defiling her. He was arrested and taken to Marsabit Police station. It is his evidence that he slept in a single room. The house has no electricity. He took the visitors to his house as they wanted to go to a lodging. The male visitors slept in a traditional house outside. There were three men visitors in his house.

The prosecution evidence does prove that pW1 was defiled. The medical evidence does confirm that PW1 was defiled. It is pW1's evidence that she was in pain and was passing urine continuously. Her hymen was missing. The main issue for determination is whether it is the appellant who defiled PW1. The incident occurred at night. PW1 was alone in the house although PW4 testified that PW1's friend, Arbe was with her. Counsel for the appellant contends that the Prosecution evidence is full of contradictions. There is the issue of light in the house and the number of times the complainant was defiled. Some witness statements were produced as exhibits. In her statement to the Police, PW1 stated that she was sleeping in the house with her friend and agemate, Arbe. She also stated that the incident was the fourth time she was defiled by the appellant. The statement of G who is PW1's aunt is that PW1 told her that the appellant had defiled her three times previously. The same information is contained in the statement of **MBELE MATACHO**, a village elder. According to Mbele Matacho, PW1 told them that she had been defiled on diverse dates between 6th to 9th November 2015. These two witnesses did not testify. The P3 form indicate that PW1 had previously been defiled by the same person. In her evidence in Court, the complainant stated as follows:-

“ The doctor had not done this to me before.”

From the above evidence, it is unclear as to whether pW1 had been defiled by the appellant before the incident which led to the charging of the appellant. Since PW1 testified that the appellant had not defiled her before, I will take it that this was the first incident involving the appellant.

The main issue revolves around the identification of the appellant. PW1 testified that there was no electricity. She had switched off the torch. It is not clear how she identified the appellant. PW1 did not alledge that she identified the appellant by his voice or that at one time she switched on the torch. It is further not clear how PW1 was able to identify the clothes the appellant was wearing. PW1 talked of a rope that was used to tie her. She did not testify on how the rope was later untied. There is the complainant's statement that she was with her friend Arbe that night. PW4 did not know who Arbe was. It must be PW1 who told him about Arbe. PW1 in her statement indicate that she did not tell anyone about the previous defilements. At the same time she testified that the appellant had not defiled her before.

The complainant told the Court that she was 9 years old. PW3 estimated her age to be about 10 years. Although it is expected that the complainant was a child who can be excused for some discrepancies in her evidence, the differences in the previous alledged defilements as per her statement and what she told the Police and PW3 cannot be excused. This is a criminal case which has to be proved beyond reasonable doubt. There is doubt as to whether it is the appellant who defiled her. There is no doubt that she was indeed defiled. It is her evidence that she was defiled once by the appellant. However, the Court has to be satisfied beyond reasonable doubt that it is the appellant who defiled her.

The defence evidence is that the appellant had visitors on the 7.11.2015. The visitors did not hear any noise or screams that night. PW1 testified that she screamed and a female neighbour went there. Its not clear what the neighbour did after hearing the screams. The defense witness did not stay with the appellant in the same room that night. The only relevance on the evidence of the defence witnesses is that they did not hear any screams.

The state conceded to the appeal. Although the Court is not bound by the position taken by the state, I do agree with the contentions by Mr. Chirchir that the identification of the appellant is doubtful. The non-calling of the other witnesses is not fatal to the prosecution case. However, there is doubt on the identification by the appellant. If the incident took 30 minutes as per the evidence of PW4, and the defiler left, this raises more doubt on the identification of the defiler. If the defiler stayed the whole night, its not clear how PW1 could not have escaped. If PW1's hands and legs were tied with a rope, it is not clear how she managed to untie herself.

I do find that the conviction is unsafe. It is an unfortunate incident but the prosecution was required to prove its case beyond reasonable doubt. There is doubt as to whether it is the appellant who defiled PW1. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 29th day of October, 2018

S. CHITEMBWE

JUDGE