



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 138 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

KENNETH MUTUGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. M. Ayuka, RM dated 8th November 2017 at the Principal Magistrate's Court at Nkubu in Criminal Case (SOA) No. 17 of 2017)

JUDGMENT

1. The appellant, **KENNETH MUTUGI**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that on 20th May 2017 at [particulars withheld] Village in Imenti South Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of PK, a child aged 9 years.

2. As the first appellate court, I am required to re-analyse the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**). In order to proceed with this task, I will set out the facts as they emerged before the trial court.

3. The child, PW 2, was sworn after a *voir dire*. She testified that on 20th May 2017 at about 2.00pm she was attending a ceremony at her grandmother's house when the appellant, who was her neighbour told her he required something from his house. The appellant took her on his motorbike to his home and then took her to his house. He took her to his bed, removed her pants and put his penis into her vagina. She tried to scream but the appellant gagged her mouth with his hands. After he was done he locked her in the house until he returned at 9.00pm when he allowed her to leave. She went home, narrated her ordeal to her mother, PW 3.

4. PW 3 recalled that on the material day she was attending the same function with PW 2 but when she returned home at about 8.30pm, PW 2 was missing. As she was searching for her, PW 2 arrived home 9.00pm and narrated her ordeal to her. She went and confronted the appellant but he denied. She took the child to Murungurune Police Post from where she was referred to Kanyakine Hospital.

5. A neighbour to PW 3, PW 4, recalled that on the material night as she was going home at about 8.30pm, she met the appellant on the motorbike with PW 2. When she arrived home, she told PW 3 that she had seen the appellant with PW 2. PW 4 further testified that PW 3 then called PW 2 and PW 2 told PW 3 that she was at a neighbour's home. When PW 2 and PW 4 went to the appellant's home to confront him, he denied that PW 2 had been there. When PW 4 interrogated PW 2, she told her that she had been defiled by the appellant.

6. The appellant' neighbour, PW 5, testified that on the night of 20th May 2017 at about 8.00pm, he was also at the ceremony and as he was heading home, he saw the appellant on his motorcycle carrying PW 2 away. He went and reported this to PW 3. They went to look for PW 2 and met her on the way. She told them that she had been at the appellant place. They all went and reported the matter to the police station.

7. The investigating officer, PW 6, told the court that the appellant was brought to the police station by members of the public at about midnight on 20th May 2017. He re-arrested him. PW 2 was also present and she stated that she had been defiled. He took both of them to Kanyakine Hospital for examination. A clinical officer at the hospital, PW 1, confirmed that the child was brought to the hospital on 20th May 2017. She examined the PW 2 two days later and noted that the child's private parts were red with pain and the hymen was absent. No spermatozoa were seen. She concluded that since the child was in pain in her vagina and the absence of the hymen, the child had been defiled.

8. In his sworn defence, the appellant denied committing the offence. He testified that on the material day, he went to look after his livestock until 5.30pm, when he boarded a vehicle and went home. At 9.30pm, he went to his parents' home and at 10.30pm, he heard people knock at the door and when he opened, several people, who were drunk, arrested him.

9. The key issue raised by the appellant is that there were contradictions in the evidence of the witnesses as to when the incident took place. He pointed out that PW 2 testified that the appellant took her from the function at 2.00pm and locked her in his house until 9.00pm when he returned. PW 3 testified that she did not see her until 9.00pm. PW 4 met PW 2 and the appellant at 8.30pm while PW 5 saw the appellant take PW 2 away from the function at 8.00pm. Moreover, PW 5 testified that when he saw them he went and told PW 3 and they went to look for the appellant and PW 2. This was inconsistent with what PW 3 said took place. Based on this contradiction counsel for the appellant submitted that the conviction was unsafe as it is not clear whether and when the act of defilement took place.

10. Counsel for the respondent submitted that these contradictions were not material as they related to the time of the incident and that PW 2 gave clear testimony of the what took place and that the evidence taken together was consistent.

11. In any case, there are bound to be contradictions and inconsistencies in the evidence based on what each witness observed. If they are minor and do not affect the substance of the case, then they can be ignored. In this regard the Court of Appeal in ***Erick Onyango Ondeng' v Republic*** NBA CA CRA No. 5 of 2013 [2014] eKLR observed that:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

12. Having analysed the evidence in this case, I cannot say the inconsistencies are minor or can be rationalized to give a consistent narrative of what took place. The testimony of PW 2 and PW 3 clearly contradicts that of PW 4 and PW 5 who are really independent witnesses. PW 4 and PW 5 undermine PW 2's case that the appellant took her from the function at 2.00pm and locked his house until 9.30pm when she was left to go home. PW 4 and PW 5 saw the appellant and PW 1 on the motorcycle at about 8.30pm. In all these, PW 3 states that she only realized that PW 1 was missing when she arrived home yet PW 5 stated he told PW 3 that he had seen the appellant and PW 1 on the motorbike that evening before she went home and they went looking for him.

13. These inconsistencies cannot be explained away and are important in such a case because the **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** allows the court to convict a person for a sexual offence without corroboration if the court believes, for reasons to be recorded, the victim was telling the truth. These contradictions leave the question who was telling the truth or who was lying. The Court of Appeal in ***John Mutua Munyoki v Republic*** NRB CA CRA No. 11 of 2016 [2017] eKLR observed as follows:

How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully.

14. The trial magistrate did not consider or weigh these inconsistencies carefully. He also did not express any view on the whether PW 2 was telling the truth and the reasons thereof as required by the proviso to **section 124** of the ***Evidence Act***. Having considered these contradictions, I have come to the conclusion that the appellant's conviction is not safe.

15. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MERU this 22nd day of October 2018.

D.S. MAJANJA

JUDGE

Mr Kaimba instructed by Kaimba Peter and Company Advocates for the Appellant.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.