



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 9 OF 2018

PETER MUSYIMI MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence by Hon. Gilbert Shikwe (SRM) in Kithimani Senior Resident Magistrates' Court SOA No. 34 of 2016 on 18th January, 2018)

JUDGEMENT

1.The appellant was convicted for defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. Aggrieved by the same, he lodged this appeal on grounds that can be summarized as: that defilement was not proved to the required standards and that the trial court convicted him on contradictory evidence.

2.This court sitting as a first appellant court is under duty to re-evaluate and re-consider the evidence afresh with a view of making its own independent conclusion bearing in mind also that it did not have the opportunity to see the witnesses' demeanor.

3.FK recounted that she was on 20th June, 2016 at 3 am asleep when the appellant to whose house she had been taken to assist with house chores removed her clothes and defiled her. She stated that she felt a lot of pain in her private part. That the appellant threatened to kill her if she reported the incident to anyone. That she informed the appellant's wife but who brushed her off. She was later taken to the police station and to hospital. That she was later sent to the market where she met the appellant who insulted her owing to her lodging a complaint to the police. On cross examination, she stated that she used to sleep alone and the appellant warned her of closing the house and told her that she should sleep naked. That the appellant closed her mouth during the ordeal and she could not scream. AK (PW2) stated that she gave birth to FK on 2nd January, 2008 and produced her immunization card as P. Exhibit 2. That she was informed by FK. that the appellant defiled her on 20th June, 2016 at 4 am. She took her to Matuu General Hospital and reported the matter to Matuu Police Station. She stated that the appellant went for FK on 15th June, 2016 and was defiled on 30th June, 2015. That she informed her of the ordeal on 1st July, 2016 and she reported to the police on 2nd July, 2016. Benjamin Maingi (PW3) who is a clinical officer produced the P3 form in respect of FK on behalf of Alfred Toronke who filled the same. He stated that FK was examined on 2nd July, 2016 and re-examined on 4th July, 2016. That she was defiled by a person known to her on 30th June, 2016. That she was found to have a swelling of the labia minor and majora, her hymen was broken and she had laceration on her vagina. That the signs were consistent with forceful vagina penetration. Corporal Diana Musumba (PW4) received a report from PW2 who took FK to the station on allegation of defilement on 30th June, 2016 by a person known to her. She escorted her to Matuu General Hospital where she was examined and P3 form filled. She stated that the matter was reported to the clan hence the delay of a few days.

4.The appellant was put on his defence where he stated that FK woke up on the morning of 30th June, 2016 and went to school but did not return from school. That she returned at 6.00 pm and was questioned on where she had been by the appellant's wife. That the next day, FK's parents visited and the appellant inquired if there was a problem. The father stated that her mother had an issue. That FK claimed that he had defiled her on the night of 30th June, 2016. That he took them to where F.K. sleeps and asked them to take her with them. Later on 6th July, 2016 at 2pm he was arrested and charged. Domiana Mbithi Musyimi (DW2) who is the appellant's wife stated that on 30th June, 2016, FK went to school to prepare for a school trip. She did not return home until 6.00 pm when she informed her that she had gone to her mother's house. The next day her parents visited with her mother claiming that the appellant had defiled her. She denied that the appellant committed the act since she was with him the entire night.

5.It was the appellant's Counsel's submission that there was no evidence of identification. That the trial court did not interrogate whether or not the circumstances were sufficient for identification thereby the conviction was not safe and he relied on **John Muriithi Nyagah v. Republic [2014] eKLR**. That there is material contradiction between the evidence of PW1 and PW2 that the appellant and his wife slept in separate rooms which contradiction tend to dent the prosecution case.

6.The counsel for the respondent submitted that PW1 testified that the incident occurred at 3.00 am. That the incident occurred when it was

dark and during examination in chief the prosecutor did not seek any clarification on how FK identified the person who defiled her. In this regard the prosecution cited **Wamunga v. Republic [1989] eKLR**. That PW1's evidence is challenged by DW2 who alleges that she was with the appellant and did not hear him leave their matrimonial bed. That the general conclusion is that the case was not proved beyond reasonable doubt and that the court be pleased to quash the conviction and sentence meted upon the appellant. It was submitted that the appellant having been sentenced to life imprisonment he will not be prejudiced if a retrial is ordered.

7.I have given due consideration to the case herein. The issues for determination are whether or not the appellant was convicted on contradictory evidence and whether the charge was proved beyond reasonable doubt. The said issues shall be discussed together.

8.The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. Applying the test, FK's immunization card (P. Exhibit 2) was produced. The same revealed that she was born on 2nd January, 2008. She was therefore aged about 8 years and 5 months old at the material time and therefore a child. It was her evidence that while asleep, the appellant removed her clothes and defiled her and that the appellant threatened to kill her if she reported the incident. PW3 stated that upon examination which was conducted on 2nd July, 2016, she was found to have a swelling of the labia minor and majora, her hymen was broken and she had laceration on her vagina. Bearing in mind the provision of section 2 of the Sexual Offences Act, it is clear that there was penetration and hence PW1's evidence as to penetration was corroborated by the evidence of PW3. It was contended that the appellant did not commit the act since his witness indicated that she was with the appellant the entire night and did not hear him get out of bed.

9.From the evidence presented before the trial court by the Prosecution, there is no doubt that the complainant was indeed defiled. The remaining issue for determination is whether or not the Appellant was the assailant. The complainant in her testimony claimed that it was the appellant who had defiled her and who thereafter warned her not to reveal to anyone about the ordeal. The complainant went on to add that despite alerting the Appellant's wife and her mother nothing positive came out of it. She further claimed that the appellant had earlier instructed her not to close her door when retiring to bed and also not to sleep with her clothes on. If indeed the door had been left unlocked then it is possible that some other person other than the appellant might have entered therein and committed the offence. It was necessary to rule out any possibility of a mistaken identity so as to ensure that the right culprit was indeed dealt with by the law. The complainant did not state in her testimony how she was able to identify the person who defiled her. There was no mention of any source of lighting in the house. The complainant had been brought to the appellant's home barely a week prior to the incident and it is thus possible that she might not have become acquainted with the appellant that much. In any event no medical tests were conducted upon the appellant so as to link him with the crime. Even though the learned trial magistrate in his judgment pointed out that he had believed the complainant, I find there still lingered some doubt as to whether or not it was the appellant and nobody else who had entered the unlocked house and proceeded to defile the minor. It seems to me that the appellant was only linked to the offence through some suspicion. It is trite law that suspicion however strong cannot found or sustain a conviction unless there are other circumstances which would weaken or destroy the inference of guilt. In the case **Wamunga v. Republic [1989] eKLR** the Court of Appeal in regard of identification of an accused person held as follows:-

“What we have to decide now is whether that evidence is reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is vital importance that such evidence is examined carefully to eliminate this danger. Whenever the case against a defendant wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

It is trite law that where the only evidence against a defendant is evidence of identification or recognition and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.

Going by the above test, it is noted that the alleged incident took place around 3.00 a.m. when it was pitch dark. The complainant was not interrogated as to how she was able to identify the intruder and assailant as there was no source of lighting in the house. The appellant's wife stated that her husband was with her throughout the night and did not venture out. The question then is “**could the appellant have been the assailant or it was someone else?**” This doubt should have been resolved in favour of the Appellant by the trial court. Hence I find the issue of identification was not proved by the prosecution beyond any reasonable doubt and which eventually affected the prosecution's case in the end regarding the standard of proof. The prosecution therefore did not discharge that burden and hence the charge was not proved beyond reasonable doubt. The trial court therefore went into error when it convicted the appellant on the evidence available.

10. Learned counsel for the Respondent sought for a retrial in this matter. The issue of concern however is whether the appellant will be prejudiced if a retrial is ordered. It is trite that a retrial should only be allowed if the appellant would not be prejudiced and further if the justice of the case warrants it. It is noted that the Respondent's case went through a full trial where four witnesses were called and the Appellant's side called two witnesses in defence. A re-trial ordinarily would not be ordered if it will enable the prosecution to fill up gaps in their case. I find that if a retrial is ordered herein, then it is obvious and likely that the prosecution would use it to seal any loopholes in their case which would be to the disadvantage and prejudice of the appellant. The prosecution right from the word go was under a duty to ensure that it proved its case against the appellant beyond any reasonable doubt. Now that some doubt has been noted to have occurred in the prosecution's case, the proper thing to do is to allow the appellant enjoy the benefit of that doubt. In the premises I find an order for a retrial is not appropriate.

11.In view of foregoing observations, the order which commends itself is that this appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 29th day of November, 2018.

D.K. KEMEI

JUDGE