



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 51 OF 2017

BONFACE MWENDA GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Embu Chief Magistrate in CM Sexual Offences No. 2 of 2017. The appellant being dissatisfied with the judgment lodged this appeal.
2. The appellant was convicted of the offence of defilement contrary to **Section 8(3) of the Sexual Offences Act No. 3 of 2006** and an alternative charge of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** and sentenced to twenty (20) years imprisonment.
3. In count II, he was charged and convicted with abducting with intent to confine contrary to **Section 259 of the Penal Code** and sentenced to serve two years' imprisonment. The sentences were to run concurrently.
4. In his memorandum of appeal, the appellant set out the following grounds: -

a) That the learned trial magistrate erred in law and facts by rejecting my plausible defence on weak reasons, hence violating Sec 169 (1) of the CPC.

b) That the learned trial magistrate erred in both matters of law and facts by not observing that the evidence/testimonies adduce by the prosecution witnesses were full of contradictions, wherefore the same did not collaborate to sustain the conviction of the appellant, thus contravening Sec 163 (1) of the Evidence Act, Cap 80 LOK.

c) That the learned trial magistrate erred in matters law and facts by not observing that no independent witness was called to confirm the charge of defilement.

d) That the pundit trial magistrate erred in law and facts by convicting the appellant without considering that as per Sec 36 (1) the appellant was not indicated in the alleged offence.

e) That the learned trial magistrate erred in law and facts by not observing that the prosecution failed to prove the case beyond reasonable doubts as stipulated by law.

f) That the learned trial magistrate erred in law and facts by not considering that the grudge had erupted between the prosecution witnesses and the appellant which was raised by the appellant during trial.

g) That the learned trial magistrate erred in law and facts by not considering that the appellant was not examined by a medical doctor to prove his involvement in the alleged offence.

5. The appellant filed his written submissions to which the respondents responded by way of oral submissions.

B. Appellant's Case

6. The appellant submitted that the trial magistrate failed to consider his defence especially since he raised the issue of lack of corroborating

evidence to the testimonial evidence of PW1 and PW2 whose evidence he insisted should not stand as they were “close relatives”.

7. The appellant further submitted that there were multiple contradictions in the testimony of PW2 as well as those of PW4, the arresting officer, and as such he submitted that said evidence should not stand as they were inconsistent and uncorroborated.

8. The appellant further submitted that he was not examined by a doctor so as to confirm his involvement in the crime and further no DNA test was carried out on him to prove the allegations against him as stipulate in Section 36 (1) of the Sexual Offences Act.

9. It was further submitted that a crucial witness had not been called to prove the case beyond reasonable doubt as required by the law under section 150 of the Criminal Procedure Code and he specifically mentioned a “Murugi” who was alleged to take PW2 to the appellant’s house. He relied on the case of **BUKENYA V UGANDA EACA** as well as that of **PETER MUTIRIA MITAMBO Chuka High Court Criminal Appeal No. 28 of 2015**.

10. He challenged his arrest in that it was as a result of mistaken identity as the evidence of the arresting officer, PW4 was in contrast to the charge sheet in terms of where the appellant was arrested vis-a- vis the contents of the P3 form in regards to the incident. On this, the appellant further submits that the charge sheet is consequently defective and cannot be corrected and as such the mistake should be taken as benefits of doubt to the appellant.

11. The appellant further submits that evidence by the doctor that PW2 hymen had been breached was inconsequential as the same can happen during insertion of tampons.

12. The appellant further submitted that he was denied a fair trial since he was denied an opportunity to recall prosecution witnesses and further that the trial court misdirected itself by failing to test whether PW2 was qualified to give sworn or unsworn statement through *voire doire* examination but instead proceeded to have PW2 give sworn testimony.

C. Respondent’s Case

13. It was submitted by the respondents that on allegations of mistaken identity, the appellant never raised the issue during his trial and further that on contradictions in evidence by the prosecution witnesses, the same did not exist.

14. It was also submitted by the respondents that the nature of offence the appellant was charged with does not require an independent witness. Counsel for the respondent relied on **Section 124 of the Evidence Act**.

15. On the ground that there was a grudge between the prosecution witnesses and the appellant, counsel for the respondent submitted that there was a corroborative testimony by prosecution witnesses and that the appellant had not proved the existence of any grudge.

16. On taking the appellant for a medical exam, Counsel for the respondent submitted that **Section 36 of the Sexual Offences Act** does not make it mandatory to take an accused for a medical examination and further that PW3’s evidence never identified the blood on the victim as menstrual period.

D. Analysis of Law

17. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of **ODHIAMBO VS REPUBLIC CR APP NO 280 OF 2004 [2005] 1 KLR** where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

18. As to whether the appellant’s constitutional rights to a fair trial were infringed. The appellant contended that he was denied an opportunity to recall a prosecution witnesses.

19. It is important to examine the provisions of **Section 150 of the Criminal Procedure Code** which provide,

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

20. In the case of **ELIJAH OMONDI OWINO VS R (Nairobi High Court, Criminal Appeal No. 464 of 2009)**. The court, Warsame J, as he then was, stated as follows: -

" It was incumbent upon the advocate for the applicant to state the reasons why it was necessary to recall the two witnesses who had given evidence and who were cross-examined by the applicant. The court is guided by reasons and without stating the reasons for recalling the two witnesses it is not open to the applicant to expect the court to merely recall the two witnesses simply because there was a request or an application made for their recalling. I think the magistrate was right in refusing to recall the witnesses without being given sufficient explanation for the said cause. It is clear that the applicant was given an opportunity to cross examine the two witnesses and in the absence of any basis to say that the applicant may have been prejudiced or is likely to suffer by reason of further cross-examination by his advocate, then the court had no option but to refuse the application for recalling the two witnesses."

21. It must be noted that rights go hand in hand with responsibilities. It is clear from the court record that the trial court took the necessary considerations when faced with the appellants request for recalling the witness. The trial magistrate in principle was correct in not allowing the application for recall as no reasons were given to support the request as required by the law in my view. The court must ensure that resourced are used economically and not keep going back and forth unless there is a good reason to do so.

22. In the circumstances, I find that the appellant's right as alleged were not in any way violated and this ground of appeal fails. The appellant further pleaded that there was material contradictions in evidence of the prosecution witnesses.

23. The appellant further cites contradictions by PW2 and PW1 regarding his identity. PW1 said she was taken to the home of the accused by one Murugi, who knew the accused well. She is the one who had taken the complainant there the previous day. As for PW2, she said she knew the accused well as a friend. From the evidence of PW1 and PW2, I find no contradiction as to the identity of the appellant. Close perusal of the evidence of PW1 and PW2 reveal corroboration but not contradiction.

24. PW4 is the investigating officer stated the age as a matter of fact which fact may not have been correct. It is important to note that unlike a birth certificate, that the birth notification is not an official document. The evidence to be relied on regarding age is that of PW3 the doctor who examined the complainant. She gave the estimate age as 15 years which agrees with the age given by the complainant herself who gave the year of birth as 2002.

25. I therefore find that the age of the complainant was established as 15 years. The contradiction brought in by PW4 is minor and immaterial.

26. In my view, minor contradictions even assuming they exist, which is not the case here are not sufficient to impeach the testimonies of the prosecution witnesses as it was held in the following cases: -

i. In **ERICK ONYANGO ONDENG' VS REPUBLIC [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case of **TWEHANGANE ALFRED VS UGANDA, Criminal App. No 139 of 2001, [2003] UGCA.**

ii. As noted by the Uganda Court of Appeal in **TWEHANGANE ALFRED VS. UGANDA, Criminal App. No 139 of 2001, [2003] UGCA, 6** it is not every contradiction that warrants rejection of evidence. As the court put it:

"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."

27. In view of the foregoing, I find that the allegation by the appellant has no basis.

28. The appellant further pleaded that the prosecution deliberately omitted material witnesses to cure the contradictions of some of its witnesses. I am not persuaded by this. In the case of **Criminal Appeal, No. 31 of 2005 JULIUS KALEWA MUTUNGA VS REPUBLIC** (unreported), the Court of Appeal held that:

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

29. It is my finding that this court should respect the discretion of the prosecution in calling witnesses. As for the accused the subject is immaterial. He ought to deal with the evidence of the witnesses who have testified other than bother with the ones who were not called.

30. The appellant submitted at the hearing that he had not been examined by a doctor after the incident, that it was only the complainant who was examined. The state's response was that it is not mandatory that samples be taken from an accused person who has committed a sexual offence to confirm that he has committed a sexual offence.

31. **Section 36 of the Sexual Offences Act** provides as follows:

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

32. The same was upheld by Justice Mumbi Ngugi in the case of **DAVID KIPNGENO BETT V REPUBLIC [2017] eKLR** where she stated;

“My reading of this provision is that there is no requirement that a person who is charged with committing a sexual offence be taken to court for the purpose of obtaining evidence that he committed the offence. The Sexual Offences Act, in the section set out above, leaves the discretion to the trial court, which I believe would be exercised on the basis of the circumstances before the court”.

33. I conclude that there is no legal requirement that an accused person be examined by a doctor in the course of the investigations.

34. In defence the appellant denied the offence saying he was not with the complainant at the material time and did not commit the offence. The evidence of the complainant which the trial magistrate found truthful was corroborated by that of PW1, PW3 the doctor and PW4 the investigating officer who found the minor in the house of the appellant having spent the night there.

35. It is my finding that the prosecution proved the act of sexual intercourse between the appellant and the complainant. The medical report proved penetration and confirmed the age of the complainant.

36. PW1 testified that when he went to the home of the appellant to pick the complainant, the appellant told her that he had married the complainant.

37. PW3 the investigating officer testified that she went to the home of the appellant where she found him with the complainant.

38. I find that the defence of the appellant has not shaken the overwhelming evidence of the prosecution and remains just a mere denial.

39. Having evaluated all the relevant evidence and considered the grounds of appeal, I am of the considered view that the prosecution proved their case against the appellant beyond any reasonable doubt. The convictions on both counts were based on cogent evidence and are hereby upheld.

40. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **OGALO S/O OWUORA 1954 24 EACA 70**. It is well set out that:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice”

41. Consequently, it is my opinion that the trial court did not err in meting out the sentence which was within the law. I find no reason to interfere with the sentence. The appeal blacks merit and it is hereby dismissed in its entirety.

42. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Appellant present