



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 12 OF 2016

JOHN MUGO THIAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant John Mugo Thiaka was convicted of the offence of defilement of a girl aged nine (9) years contrary to **Section 8(1)(2) of the Sexual Offences Act** before the Chief Magistrate's Court at Kerugoya in Criminal Case No. S.O 11/15 and was sentenced to life imprisonment. He was dissatisfied with both the conviction and sentence and lodged this appeal based on the following grounds:-

- 1. That the learned trial Magistrate erred in both law and facts by not considering the evidence adduced did not support the charges.*
- 2. That the learned trial Magistrate erred in both law and facts by failing to consider that there were gaps and discrepancies regarding the evidence tendered.*
- 3. That the learned Magistrate erred in both law and facts by failing to consider that the evidence produced was un collaborative.*
- 4. That the learned Magistrate erred in both law and facts by not considering there was an existing grudge between the mother of the complainant and I and all those who testified were from that family that resulted to the fabrication of the case.*
- 5. That the learned Magistrate erred in both law and facts by holding that the case was proven beyond reasonable doubt.*
- 6. That the Magistrate erred in both law and facts by not considering that the medical officer report lacked some vital information concerning offence.*
- 7. That the learned Magistrate erred in both law and facts by not considering that some of the witnesses were not called who could have another version of the story and who were present i.e the elder.*
- 8. That the learned trial Magistrate erred in both law and facts by failing to consider my defence.*

The Court gave directions that appeal be disposed of by way of written submissions. The appellant filed submissions and applied to amend the earlier grounds with various grounds which he has raised in the submissions.

The appellant did not seek leave to amend the grounds of appeal. The amended grounds violates **Section 350(2) of the Criminal Procedure Code** which provides:-

“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal.”

The state did not however oppose the reliance on the amended grounds and proceeded to file a response to the amended grounds. In the circumstances I will consider the amended grounds raised in the submissions as this is a procedural technicality. **Article 159(2) (d) of the Constitution** provides:

“Justice shall be administered without undue regard to procedural technicalities.”

This is a first appeal and the law is well settled that it is essentially a retrial based on the proceedings before the trial court which requires the court to analyse the evidence, evaluate it and come up with its own independent finding but bearing in mind that it did not have an opportunity to see and hear the witnesses and assess their demeanor and leave room for that. This gives an appellant a legitimate expectation that the evidence will be evaluated again and independent finding be arrived at. This was held by the court of Appeal in the case of **Okeno – v- R (1972) E.A 32.**

The evidence which was tendered before the trial Magistrate was that PW-1- JN was a child aged nine years. In her testimony she stated that on 2/7/15 she had been sent to the shop by one Mzee M to buy cigarettes. She went but the money was not enough. On her way back she met the appellant who called her by name. He held her and led her to the maize plantation. He ordered her to undress and when she removed her pant he laid on her and removed his pants and inserted his penis into her vagina. He defiled her and after he finished he gave her ten shillings.

The complainant went home and met her mother (PW-2-) and she reported to her. PW-2- went and confronted the appellant who in turn offered her Kshs 100/= . PW -2- refused and went and reported the matter to the Chief and at Kerugoya Police Station.

The complainant was examined at Kerugoya Hospital by PW-3- a clinical officer who found that she had bruises and lacerations which were fresh, the hymen was absent and the entry point of the vagina had abrasions and bruises. There was brownish discharge from the vagina. PW-3- the Clinical Officer found that the injuries were 4 ½ hours old at time he examined the complainant. He confirmed that the complainant was defiled, he filled P.3 form Exhibit -1- and Post Rape Care form, Exhibit -2-.

Upon considering this evidence, it is clear that the complainant identified the assailant as the appellant in this case who is a person she knew very well. She immediately went home and reported to her mother. Her testimony was not shaken in cross-examination. Though the typed proceedings tend to say her mother told her to lie, the hand written notes by trial Magistrate which are available reads; ***“my mother has told me to not lie”.***

The appellant in his defence admitted that he went to the Police Station and he was informed of the allegation. He was arrested the same day and charged.

The evidence tendered shows that it is PW-1- who identified the appellant as the person who defiled her. There was evidence of penetration and the age of PW-1- was ten years at the time the offence was committed. The ingredients of the offence of defilement were proved.

The appellant faults the conviction and raises various issues.

1. Language used not recorded:

The appellant alleged that the language used in trial was not recorded. During plea the language was recorded as Swahili/Kikuyu, it is recorded that accused represented by self said /use Kikuyu. PW-2- testified in Kiswahili and PW-3- and PW-4- in English but there is no indication of any interpretation. As for PW-1- it is indicated that ***‘voire dire’*** examination was conducted in kikuyu.

In the Case of **Munyasia Mutisya –v- Republic (2015) eKLR**

The Court in dealing with a similar issue stated;

The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses.

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however note that the appellant participated fully in the trial by cross examining witnesses. He Cross Examined PW1. He Cross Examined PW2. He Cross Examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not alleged on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court.

The issue of language used during trial is an issue of right to fair trial **Article 50(2) m of the Constitution** provides:-

“Every accused person has the right –

to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

The trial must therefore be conducted in a language which an accused person understands to enable him to participate in the trial, understand the nature of the charge and the evidence in order to allow him to prepare and make his defence if need be.

It was wrong for the trial Magistrate to fail to indicate the language which the court was using. The trial court must always indicate the language which was used at the trial. If the accused indicates the language which he wishes to use, the trial Magistrate must not only indicate

the language but also the fact that there was interpretation and given the name of the person interpreting. This ensure that there was correct interpretation. In *Swahibu Simiyu & Another –v- R. C.A Kisumu, Appeal No. 243 of 2005* while dealing with the issue of the language used at the trial it was stated that the language used must be stated on the court record.

The Court must also ensure that the language used is understood by the accused person. **Section 198 (2) of the Criminal Procedure Code** provides:-

“If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.”

I must consider whether the accused understood the language. PW-1- testified in kikuyu. ThePW-2- in Kiswahili and PW-3- & PW-4- in English. The record shows that at every sitting there was a Court Assistant by name Mbogo. The appellant cross-examined all the witnesses. At the close of the prosecution case the provision of **Section 211 Criminal Procedure Code** were explained to him in Kikuyu. The appellant gave his defence. I am of the view that since the appellant cross-examined all the witnesses and gave his defence, he understood the language used by the witnesses during the trial. It is also noted that this ground was not raised in his grounds of appeal which he filed on 17/3/2016. The record shows that the appellant followed the proceedings. There was an interpreter by name Mbogo throughout the proceedings. The appellant was not prejudiced. His right was not violated. This ground is without merits.

2. Contradictions.

The appellant has indicated the following contradictions:

i) Date of Assault.

PW-1- stated it was on 02/07/2015 while PW-2- states 12/07/2015.

ii) Who had sent PW-1- to buy cigarettes:

PW-1- stated that she was sent by Mzee Nduku to buy cigarettes when she met with the appellant while PW-4- stated that it was reported that PW-1- was sent to buy cigarettes by the appellant.

The said discrepancies are minor and they do not affect the main substance of the prosecutions’ case that PW-1- was defiled and the culprit was identified as the appellant. On the issue of the date it seems to have a typographical error. The charge sheet indicates that the offence was committed on 12/7/2015. PW-2-, 3 & 4 stated that date of offence was 12/7/2015.

In *Erick Onyango Ondeng’ –v- Republic (2014)eKLR*

The Court of appeal held:

“Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at “about 7 pm” in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not very 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.”

The evidence of PW-2- who received the report from the minor confirmed the date and it is the same day that she was examined by the doctor. Contradiction is minor and does not affect the prosecution evidence to the extent that doubts would be cast. They are minor contradictions which do not put the credibility of the witnesses in issue. The evidence remains reliable and the court will ignore the minor contradictions.

3. Uncorroborated Evidence.

The appellant raised the ground that the evidence was uncorroborative (sic). That courts must be cautious before convicting on uncorroborated evidence of minors that can be influence by adults. The appellant further submits that vital witnesses were not called.

This issues were addressed at length in a binding decision by the Court of Appeal in:

In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;.....

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and

the medical evidence must be borne in mind as well *Section 143 of the Evidence Act (Cap 80)* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.

The proviso to **Section 124** of the **Evidence Act** therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

Section 124 of the Evidence Act provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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.”

Therefore failure to call Mzee Nduku and the Chief who were not eye witnesses were not fatal to the prosecution’ case. The evidence of the prosecution witnesses together with the medical evidence proved that PW I had been defiled and it was the appellant who had defiled her.

In this case, the evidence of the prosecution witnesses together with the medical evidence proved that PW 1 had been defiled and it was the appellant who had defiled her.

The trial Magistrate believed the complainant and found the evidence overwhelming. This is what she stated at page 21 of the record.

“On the issue of identity, I agree with the Prosecution case that the Accused was positively identified since he was married to the victim’s mother PW-2- though separated at the time of the offence. It is also noted that the Accused is not the biological father of the victim. The evidence indicates that he lured and grabbed the victim into maize plantation and defiled her with the promise of giving money Kshs 10/-. He was also well known to the victim and her mother since they had once lived together. I do find that the evidence on identity of the Accused was overwhelming. The accused did not challenge the evidence of identification.”

4. Age of the complainant not proved:

The birth certificate of PW-I- could not be traced and she had to undergo an age assessment which confirmed her to be 10 years on 18/12/2015 almost five months after the incident date. In addition, Exh. No. 2 indicated her date of birth as 15/12/2005 therefore at the time of the incident she was aged 9 years and her age was duly proved.

Section 8(1)(2) of the Sexual Offences Act provides:-

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Prove of age of the victim of defilement is crucial as it determines the sentence to be meted out. Under the section, the age of the victim must be Eleven years or less. The age of the victim falls within the age bracket under the section.

5. Existing grudge:

The appellant claimed there was an existing grudge between PW2 and himself and even during cross –examination of PW1 she stated that PW-2- told her to lie. That is confirmed from the typed proceedings by looking at the written proceeds, the same has been amended to read **“my mother has told me not to lie.”** The fact of defilement was corroborated by medical evidence. The appellant did not challenge the evidence on identification. It is possible that he hit back the victims mother with whom they had separated by defiling the victim who was not his biological child. The issue can be two ways and in this case it is the appellant who was prompted by the grudge.

6. Medical evidence.

The evidence of PW-3- proved that PW-1- had bruises and lacerations on her genitalia which were consistent with 4 hours duration. There was also a brownish discharge from the vagina and the hymen was absent. The medical evidence was sufficient and proved there was penetration.

7. Appellant’s defence not considered.

A perusal of the judgment at page 3, the trial court clearly reviewed the defence of the appellant but found that it was mere denial. The defence was considered as required.

8. Did the prosecution prove its case beyond reasonable doubt?

Looking at the whole evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The evidence of PW 1 was corroborated by PW 4 the Clinical Officer. The prosecution discharged its burden to prove the charge beyond any reasonable doubts.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion.

In Conclusion

Having carefully considered the evidence on record and having re-evaluated it, I come to the conclusion that:-

- 1) The appeal lacks merits.
- 2) I hereby dismiss it.

Dated at Kerugoya this 17th day of December 2018.

L. W. GITARI

JUDGE