



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
HIGH COURT CRIMINAL APPEAL NO. 112 OF 2014
AYUB MURILA MURULI.....APPELLANT
VERSUS
REPUBLICRESPONDENT

J U D G M E N T

Introduction

1. The appellant herein Ayub Murila Muruli was charged with the offence of rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 25th day of May, 2010 at [particulars withheld] Village, Shing'oto Sub-Location in Kakamega East District within Western Province he unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of M K a person with mental disability.
2. He was also charged in the alternative with the offence of indecent act contrary to Section 11(1) of the sexual offences Act No. 3 of 2006. The particulars were that Ayub Murila Muruli on the 25th day of May, 2010 at [particulars withheld] village Shing'oto Sub- Location in Kakamega east district within western province unlawfully and intentionally contacted his genital organs namely penis into the genital organs namely vagina of M K a person with mental disability.
3. After a full hearing the trial court found the appellant guilty on the 1st count and convicted him under Section 215 of the CPC. He was sentenced to serve 10(ten) years imprisonment.

The Appeal

4. The appellant was aggrieved by both the conviction and sentence and appealed on the following principal grounds;-
 - 1.) THAT the learned trial Magistrate erred in law in failing to appreciate that the offence of rape of person with a mental disability does not exist in law and thus convicted the appellant on a defective charge.
 - 2.) THA the learned trial magistrate erred in law and in fact in basing the conviction purely on hearsay evidence
 - 3.) THAT the learned trial Magistrate erred in fact and in law in relying on medical records

produced by the prosecution which were fraught with contradictions and which in fact, exonerated the appellant.

4.) THAT the learned trial Magistrate erred in fact and in law[in] relying upon contradiction evidence by the prosecution witnesses.

5.) THAT the learned trial magistrate erred in fact and in law by failing to consider fully the evidence of the appellant or at all though the same was tendered under oath. The appellant prays that judgment appealed against be set aside and his conviction quashed.

Submissions

5. The appellant in his submission has dwelt at length on whether the evidence tendered by the prosecution by the trial court was sufficient to warrant conviction against him. Counsel submitted that the case herein was a case of rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006 but throughout the case the trial court was not sure whether the complainant was a minor or an adult. The complainant's mother (PW1) indicated that the complainant was born on 2nd November, 1991 and was 19 years old at the time of the trial. The P3 form presented by the medical doctor on the other hand indicated that she was sixteen (16) years.

6. Counsel further submitted that the trial court convicted the appellant on pure hearsay evidence which it proceeded to purport to corroborate with the medical evidence which was already very questionable.

7. Emphasis has been drawn to the evidence by PW4 a child of 14 years and the only eye witness who gave evidence. The appellant maintains that PW1 did not directly witness the incident but only saw the complainant washing her undergarment. Counsel also raised issue with the time the offence was committed and the time it was reported and was doubtful whether any investigations were conducted, especially in view of there being 3 different police reports on the same matter and it not being clear which report the police acted upon.

8. It is also submitted that all the crucial witnesses in this case had no direct evidence linking the appellant to the alleged offence and that the mere fact that PW4 was selective in what to reveal to the police made her testimony not credible. It is also contended that the appellant's identity was not positive. That while the only eye witness PW4 identified the appellant as A A, PW3 went ahead to charge Ayub Murila Muruli for the offences in question.

9. The appellant's counsel maintains that all the evidence given by the prosecution witnesses was unreliable, and based on assumptions. Counsel also questioned why the complainant was not called to give evidence as she could communicate by sign language. They maintain that the appellant was wrongly and negligently convicted of the offence herein.

10. Mr. Oroni Senior Prosecution counsel opposed the appeal. He relied on the evidence of PW1 and submitted that the offence against the appellant was proved to the required standard by the testimony of PW1 which evidence was corroborated by PW2, 3, 4 and PW5. He urged this court to uphold the judgment of the learned trial court on both conviction and sentence.

Duty of an Appellate Court

11. The duty of this court as an appellate court of first instance is now well established as stated in **David Njuguna Wairimu – vs – Republic [2010] eKLR** where the court relying on the holding of the Court in **Okeno- vs – Republic[1972] E.A 32** held that the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusion of the trial court. There are instances where the 1st appellate court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the trial court. It may rehash those conclusions, provided that in doing so, it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the

decision.

12. In analyzing and re-evaluating the evidence on record, this court must of necessity look at both the prosecution and defence cases before making a finding and always giving the due allowance that this court did not see the witnesses as they testified to observe their demeanour which is best left to the trial court.

The Prosecution Case

13. The prosecution called 5(five) witnesses. PW1 an Educational Assessment teacher Gladys Kharere Olembo from the DEO's Office at Kakamega whose work is to see that children who have special needs do get access to the right education assessed the complainant in this case in January, 2010. She diagnosed her as mentally challenged and/or retarded and that she had limited speech. She made a report of her findings which she produced and which is marked as PEX1. She did not know anything about the case herein.

14. On cross examination by the trial court she explained that the complainant was examined by a psychiatrist who found she was mentally challenged but if guided she could follow some instructions.

15. The step mother of the complainant Rosemary Khavela testified as PW2. It came out from her testimony that the complainant went to school at [particulars withheld] Primary which has a special unit. She produced her clinic card (PEX2) which showed that complainant was born on 2.11.1991 and was 19 years old at that time.

16. She testified that she was at home on the 25.5.2010 at 5pm when she was told by a child known as T that the complainant had been taken by a certain old man. Later at about 7pm the same child told her that the complainant had come back home and was washing her clothes. On checking the complainant, PW2 said she saw blood and semen in her private parts.

17. After two days she took the complainant for treatment at Shibuye Health Centre then to Kakamega PGH where the complainant was examined and found to have been raped. Treatment notes from Shinyalu Health Centre dated 26.5.2010 were produced as PEX3. At Kakamega police station, she was issued with a P3 form PEX4. PW2 claimed that the appellant disappeared from home for some time but arrested ultimately.

18. On cross-examination by Mr. Mango PW2 explained that the complainant's monthly periods occurred on 15th of every month. She added that she took the complainant to Shinyalu Health Centre without giving her a bath but before taking her to Kakamega PGH she gave her a bath. The clothes the complainant was wearing were not accepted at the police station because they had been washed. She added that the land issue they had with the appellant had not been resolved.

19. PW3 No. 79482 PC Agnes Wanjiru previously attached at Kakamega police station testified that she received a report from one G M on 2.6.2010 at 11:15 am. G was in the company of the complainant herein. G reported that on 25.03.2010 at 5.00pm the complainant was defiled by the appellant after he lured her into his house. PW3 took all the witness statements but was not able to record the statement of the complainant because she was mentally retarded. She however issued complainant with a p3 form which was filled and which was produced and marked as "PEXp4". She further testified that the appellant was arrested by Ap officers from Shinyalu AP Campon 10.6.2010. She also added that though she met with the complainant she was unable to communicate with her because of complainant's mental retardation and because complainant was using sign language which PW3 could not understand.

20. PW3 was cross examined by Mr. Mango and explained that the incident was first reported to her by the complainant's step mother a week after the incident. She was also taken through her statement by counsel and as per her statement and that of other witnesses the offence was allegedly committed by one Alivera Alitsi but she preferred this offence against Ayub Murila Muruli which name is very different from the person who allegedly committed this offence that is Alivera Alitsi.

21. She further explained that when this matter was reported to her the complainant, her mother and step mother were all present. She further explained that G M was the complainant's biological mother, and that she did not see any other children nor did she carry out any identification parade but stated that appellant was identified by the children who were with the complainant. That it was on the basis of the evidence of those other children that she preferred the charges against the appellant. She added that the appellant is also known as Alivera Alitsi.

22. PW5 was also examined by trial court and explained that as per the occurrence book No. 36/2/6/2010 at 11.15hrs this matter was reported by one V M who reported that the complainant had been raped by one Ayub Muruli. After the said report all other witnesses wrote in their statements that it was Alivera Alitsi who committed the crime. Even her covering report and statement indicated that it was Alivera Alitsi who committed the crime. She recorded her statement on 10.6.2010 and made the covering report on the 8.6.2010. She maintained that Alivera Alitsi is the name used by the appellant in the village but his real name is Ayub Murila Murula.

23. On re-examination she told the court that it is the appellant who gave her his names as Ayub Murila Muruli and she therefore preferred these charges against him.

24. PW4 C A a minor was taken through a viore dire examination and allowed to testify on oath. She testified that on the 25.5.2010 at 5.00pm she was playing with other children, namely M A, S I A, and F A L. While playing the appellant came by and lured them to go take some avocado from his house. They followed him and accused told the girls to enter his house while the boys climbed the avacado tree. The appellant then told her (PW4) to leave together with one F and he remained in the house with the complainant. She testified that the appellant shut the door and when she peeped through the openings she saw him leading the complainant to his bedroom.

25. She added that she overheard the complainant crying while inside the appellant's house and this prompted her to go to the window where she peeped and saw appellant lying on top of the complainant but when the appellant saw that many children had gathered at the window he opened the door and she (PW4) saw that the appellant's trousers were unzipped. She claimed that the appellant gave her kshs.5 and the complainant was given kshs.10 so that they would not disclose to anyone what had happened. PW4 also stated that as they walked home, she saw blood flowing down on the complainant's leg. She left the complainant at the grandmother's house as she went to her parents' home. Later she recorded her statement at Kakamega Police station while in the company of PW2.

26. She was cross examined by Mr. Mango. She explained that she was accompanied by PW2 when she went to the police station to record her statement. She maintained that she was not coached on how to give evidence. She maintained that it was the appellant who is called Alivera Alitsi and that it is him who committed the crime and who is also known as Ayub Murila. She reiterated that during this incident there were six (6) children in total two boys and four (4) girls. She reiterated her earlier testimony on what she saw and that after the incident herein the appellant disappeared from his home.

27. PW5 Akwabi J. Maloba a clinical Officer at Kakamega PGH produced the P3 form in respect of the complainant. He told the court that complainant was 16 years old and that she had a history of sexual assault by a person known to her. He produced in evidence the medical booklet as PExh3, the P3 form "PEx4" post rape care form PEX7" Medical psychiatric Report "PEX8" lab test request forms "PEX6".

28. On cross-examination, PW5 explained that "PExhibit 3 shows that the victim could not clearly illustrate history but the history was given by PW2 a relative and from the history she was born in 1991. He maintained that the offence would be defilement and not rape. At the close of the prosecution case, the trial court found that the appellant had a case to answer and placed him on his defence. He gave sworn testimony and called one witness.

Defence Case.

29. DW1 AYUB MIRILA MURULA denied the charges herein. He told the court that on the 25th May, 2010 he was at home when 7 young girls went to him, seeking to buy fruits which he used to sell. He sold some avocados for Ksh. 20/=. The children gave him a Ksh. 50/= note but he asked them to go and get change which they brought back and he took his Kh. 20/=. The children among them the complainant, left. He gave the complainant an avocado too. He testified that none of the children entered his house and that there were no boys amongst the children.

30. He denied the allegation of any screams coming from his house, arguing that if that were so, neighbours would have been attracted by the same. He also denied the names ALIVERA ALITSI were his. He produced PW4's statement as DExh1.

31. On cross-examination the appellant told the court that he had no ill intention towards the children and that he did not allow PW4 and the complainant in to his house. He also denied the allegation that he defiled the complainant.

32. DW2 PAULO ASUTSA testified that he went to buy chicken from the appellant on the 25th May, 2010 at around 5 PM. He found the appellant at home and they started talking. In the meantime, 7 girls came to DW1's compound asking for avocados. DW1 gave the fruits to the girls who paid and left. DW2 stated that the children are from their village. He also testified that he did not see any child entering the appellant's house. He bought chicken from DW1 and left.

33. On cross-examination he explained that his home was 500 meters from the appellant's house. He reiterated that the girls were given fruits and that if anything happened before or after he had left DW1's home he could not tell. He maintained that he was at the appellant's house on the day of the incident.

Analysis of the Evidence.

34. From the evidence herein above, it is clear that the complainant was mentally challenged. PW1 has stated clearly that she diagnosed the complainant as mentally challenged. This fact was confirmed by PW5 who also produced a mental psychiatric report "PEXh. 8". PW1 clearly stated in her evidence that despite the said challenge the complainant could communicate by way of sign language, and that if properly guided, the complainant could follow instructions.

35. The incident here is alleged to have taken place at the appellant's house on the 25.05. 2010 during the day. PW4 stated she went to the home of the appellant in the company of other children after the appellant promised to give them avocados. PW4 also claimed that she saw the appellant lying on top of the complainant when she peeped through the window.

36. PW4's testimony is not corroborated by any other testimony. The complainant was medically examined by PW5 a few days after the incident and he indicated the same on the P3 form. PW2 the step mother to the complainant was told that the complainant had been defiled. This information she got from a child known as T who was not called to testify. She claimed that she saw the complainant washing her under pants which had blood stains but took some days before taking the complainant to hospital.

37. PW3, the investigating officer got information from PW2 and PW4. She stated that she was not able to communicate with the complainant because of her condition. She relied on the information from PW2 and PW4 to prefer the charges against the appellant herein.

Issues For Determination.

38. The issues for determination in this appeal are summarized as follows:-

- (a) Whether the offence of rape of a person with mental disability exists in law;
- (b) Whether the evidence by the prosecution herein is hearsay evidence and contradictory;

(c) Whether the medical evidence produced was contradictory and;

(d) Whether the appellant's defence was considered.

39. The answer to the first issue is found in the Sexual Offences Act No. 3 of 2010 at Section 7 which provides as follows:-

“7 A person who intentionally commits rape or indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.”

40. It therefore means that the offence exists in law and therefore the charge cannot be said to be defective. However, the appellant has raised a crucial question in his submissions as to whether the case herein was that of defilement or of rape. It is claimed by PW2 that the complainant herein was at the time of the incident aged nineteen (19) years whereas PW5 the Clinical officer gave the complainant's age as sixteen (16) years. Defilement occurs where there is penetration of a minor, whereas rape occurs where there is sex with an adult without consent.

41. A look at the exhibits especially immunization card PExh. 2 shows that complainant was born in 1991. If her age is calculated using the immunization card then her age was 19 years at the time of the incident. Therefore she was an adult at the time. The prosecution and/or investigating officer was right in preferring the current charges against the appellant.

42. The other issue raised by the appellant which is also of great importance is whether the evidence by the prosecution was given in conditions of involvement or pressure and within proximity but not exact contemporaneity as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the appellant.

43. It is worth noting that the complainant in this case did not testify. From the record the prosecution had sought the assistance of a sign language interpreter but they abandoned the same without giving any reason. Was the evidence hearsay? I think it was hearsay evidence. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. Such evidence it is not original evidence.

44. The rule against hearsay evidence is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact. Hearsay evidence may be admitted if the statement by PW1 that the complainant could communicate using sign language was actualized but the complainant never testified. PW3 also did not get any statement about the incident from the complainant nor did PW5 interrogate her. I find therefore that both PW2 and PW4 gave hearsay evidence.

45. PW2 got information from one T, a child who was not called to testify. The evidence by the prosecution cannot therefore be relied on. I find the same to be inadmissible and goes against the tenets of the Constitution.

46. It was incumbent upon the court to get a sign language interpreter for purposes of getting the evidence of the complainant. That omission on the part of both the prosecution and the trial court violated the rights of the appellant to a fair hearing as enshrined in Article 50 (1)(m) of the Constitution leave alone bringing in hearsay evidence which is inadmissible.

Conclusion

47. Having found that the learned trial magistrate relied on hearsay evidence which is inadmissible and the complainant having not testified, the appellant's appeal should succeed.

48. For the above two reasons, the appeal herein is meritorious and the same is allowed in its entirety. The appellant should therefore be released from prison custody forthwith unless otherwise lawfully held.

Orders accordingly

Judgment delivered, dated and signed in open court this 27th day of February, 2017.

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Mango (present).....for Appellant

Mr. Ng'etich (present).....for Respondent

Mr. Polycap.....Court Assistant