



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 52 OF 2015
ELPHAS LUSENO ALUKWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 1502 of 2013 delivered by Hon. E.O.Juma SPM on 13th of April 2014)

JUDGEMENT

The Appellant, **Elphas Luseno Alukwe**, was charged with **defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act no. 3 of 2006**. The particulars were that on the diverse dates between 10th and 13th of March, 2013 within Nairobi County, unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of M M M a child aged 17 years.

He was also charged in the **alternative with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the diverse dates between 10th and 13th of March 2013 within Nairobi County, unlawfully and intentionally committed an indecent act by rubbing his genital organ namely penis to the genital organ namely vagina M M M a child aged 17 years.

The Appellant was convicted in the main charge and subsequently sentenced to serve 15 years' imprisonment. He was dissatisfied with both the conviction and sentence. He filed a Petition of Appeal on 20th of March, 2015. His grounds of appeal were that the learned trial magistrate failed to consider that there existed a grudge between himself and the complainant, that the trial court erred in admitting contradictory evidence and that there was a failure in not taking him for medical examination. During that hearing of the appeal, he added that he was not provided with prosecution witness statements, that the court did not consider that he had raised a complaint of theft against the complainant vide OB No.45/20/03/2013, that he was denied a second age assessment of the complainant, that the witness statements transported by the father of the complainant was done contrary to the law.

The appeal was canvassed before me on 15th March, 2017 by way of oral submissions. The appellant faulted the investigators for failing to investigate his complaint of theft of his personal belongings by the complainant (PW1) on 11th March, 2013. He stated that he made the report at Muthangari Police Station vide OB number 45/20/3/2013. Indeed, the allegation of defilement was raised much later on 15th April, 2013 after he blamed the police for not investigating his complaint. He added that although PW1 was

initially arrested, she was released to pave way for his arrest and subsequent arraignment in court.

He submitted that he was unable to cross examine PW1 because he was not furnished with prosecution witness statements. He said this violated his right to a fair trial. He also submitted that his right to a fair trial was violated because a second age assessment of PW1 was not done despite his request for the same. He further faulted the manner in which investigations were carried out. He pointed to the fact that PW1 recorded a statement at Molo whereas the report of the incident was made in Nairobi. She recorded her statement at Molo and police allowed her to physically take it to Nairobi whereas procedurally, only the police should take possession of statement of witnesses.

On medical evidence, the appellant submitted that the same was insufficient to warrant a conviction. He submitted that the same was contradictory in that PW2, the mother to PW1 testified that he had defiled PW1 for three days both day and night. PW1 on the other hand testified that she only used to be defiled at night because the appellant would work during the day. Further, that since PW6 testified of the presence of a sexually transmitted infection, it was important that further tests be done to confirm which infection she suffered from. This would have revealed whether the defilement was a recent or old occurrence. Furthermore, since the medical evidence showed that the hymeneal tear was old, sufficient evidence ought to have been tendered to demonstrate that the tear occurred long before the appellant met PW1. The absence of such crucial evidence meant that it was not demonstrated that it was the appellant who defiled PW1. He also submitted that PW1 not having testified that she bled after sex, meant that the prosecution failed to establish that she was having sex for the first time as alluded by Dr. Maundu. According to the doctor, a woman is expected to bleed if she is having sex for the first time. The appellant further doubted that PW1 had an incomplete abortion at Molo because the prosecution did not avail such medical evidence or a DNA result to establish who was responsible for the pregnancy. He urged that the appeal be dismissed.

Learned State Counsel on the other hand submitted that the prosecution proved their case beyond a reasonable doubt. She emphasized that the three elements of the offence namely; penetration, age of the victim and identification of the perpetrator were sufficiently established. She submitted that the fact that the appellant reported of the theft of his property by PW1 demonstrated that the latter was in his house. Her view was that no DNA test would have been conducted on the foetus owing to the abortion. She submitted that it was also not true that the presence of puss cells is an indication of recent sexual intercourse. Furthermore, the medical evidence sufficiently demonstrated that there was penetration. On age assessment, she submitted that PW3 had adequately assessed PW1's age to be below 18 years.

On whether the appellant's right to a fair trial was violated, counsel submitted that the trial court made an order that the appellant be furnished with witness statements. Subsequently, the appellant did not complain that he did not have the statements which was an indication that he was duly furnished with them. Finally, counsel submitted that the sentence imposed was lawful. She urged that the appeal be dismissed.

This being the first appellate court, its duty is to reevaluate the evidence and come up with its independent findings. It should however bear in mind that it has neither seen nor heard the witnesses. See the case of **PANDYA V. REPUBLIC [1957] EA., 336.**

In total, the prosecution called 6 witnesses. **PW1, M M M**, the complainant was aged 17 years at the time of the incident. On the 10th of March, 2016 after closing school and having visited her aunt, she was summoned by her brother to visit him. It was her testimony that she arrived at Nyamakima, Nairobi at around 7.00 a.m. and was stranded since she had no fare to take her to Satellite where her brother lived. A stranger offered to take her to her brother and she obliged. It happened that the stranger was the Appellant. It was in his house that he defiled her. She did not scream because the Appellant threatened her. The defilement continued for three consecutive days until 13th March, 2013. He would defile her when he was not going to work. On this day, she noticed where the Appellant normally stored the house keys so she let herself out and carried his suitcase with her. She got a good Samaritan who took her to town where she was assisted by drivers who took her back to Molo. She did not mention the matter to the mother who arrived later that night. She left for school the following day on the 14th of March, 2013. She

later learned that someone had called her parents claiming that they had been robbed by PW1. PW2 found the suitcase under the bed of PW1 and sent it to her father who was in Nairobi at the time. Later when the schools closed, she left for Nairobi where the matter was reported. She got treatment at Nairobi Women's Hospital.

PW2, G N M, mother to PW1 recalled that she found PW1 in the house on 13th of March, 2013 at about 6.00 p.m. She took her daughter back to school on the 15th of March, 2015. On the 13th of April, 2013, she got numerous calls from a stranger who was asking for PW1's mother and claiming PW1 had stolen his phone among other things. She proceeded to give this number to her husband. Her husband advised her to search the house in a bid to find the missing stolen property. She found a suitcase below PW1's bed. In the strange suitcase, the items found inside are listed: 2 trousers, extension cables, one KCPE certificate, one KCSE certificate, a police abstract on the loss of an ID belonging to Elphas Alukwe Luseno, 2 wrist watches, earphones, water heater, sky blue long sleeved cotton shirt, Maasai Shuka, bed sheets, SONY DVD player, remote control as well as a number of CDs and DVDs. She sent the suitcase to her husband in Nairobi. It was thereafter that PW1 reported to PW2 that she had been defiled.

PW3, Doctor Joseph Maundu, of police surgery examined PW1 on 17th April, 2013 and filled her P3 Form. He noted that her hymen was broken but not recently. It had irregular margins on both sides and had whitish discharge. He also did an age assessment of PW1 which he noted was below 18 years. He based the assessment on a Birth Certificate dated 27th of July, 1996. **PW4, M K**, an aunt of PW1 accompanied her to at Muthangari Police Station on 14th of April, 2013 to report the incident. **PW5, PC Shawn Rungu** of Muthangari Police Station booked the defilement report on 15th April, 2015. He summed up the evidence of all the prosecution witnesses. He issued a P3 Form to PW1 and referred her to hospital. He also produced as exhibits all the Appellant's items that had been taken away by PW1. **PW6, Doctor Daniel Nguku** based at Nairobi Women's Hospital produced a medical report signed by Dr. Kamau that was prepared in respect of PW1. It showed PW1 had a broken hymen, had pus cells in her urine and was pregnant. She was referred to the ante-natal clinic for counselling.

After the testimonies of the 6 prosecution witnesses, the court ruled that the Appellant had a case to answer and was put on his defence. He gave an unsworn statement in which he denied committing the offence. He worked as a guard with KK Security attached to UN Gigiri. He testified that on the night of the 19th of March, 2013, he got a report at around 2.30 a.m., that his house had been broken into. He lodged a report at Muthangari Police Station on the 20th of March, 2013 as OB No. 45/20/3/2013. On the 3rd of April, 2013, while in Kinoo, he boarded a motorcycle that looked familiar to his which had earlier been stolen. He lodged a report at Kinoo Police Post. After arguing with Anthony Kimani, the motorcycle rider, he was taken to the person who sold the motorbike to him and it was an Administration Police officer. At the shop, he found his mattress, gas cylinder, furniture and seats. He was arrested at the police station when he went to collect a police abstract relating to the theft of his guard uniform. He attributed his arrest to reporting a police officer against allegations of theft.

I have accordingly considered the evidence on record. The main issue for determination is whether the offence of defilement was established and whether the person who perpetrated it was the Appellant. The medical evidence of PW 3 and 6 noted that PW1's hymen was broken. This proved that there was penetration. The same therefore corroborated the testimonies of PW1 and 2 that that the former had been defiled. Her age was also established as 17 years having been born on 27th July, 1996. A Birth Certificate was adduced in court in this respect.

The question that begs is whether it is the Appellant who committed the offence. No doubt both the Appellant and PW1 had a contact and it is obvious that the contact was sometime between 10th and 13th March, 2013. It is exhibited by the fact that PW1 was later found in possession of the Appellant's personal belongings which according to PW2 were on 15th March, 2013 sent to PW1's father in Nairobi. Moreover, the Appellant himself had the mobile number of PW2 which he used to call to report that PW1 had stolen his personal belongings. Indeed the recovery of the property capped it as was in PW1 mother's house. He also went to the police station where he reported that the theft was orchestrated by PW1.

The case for the prosecution was that the defilement was perpetrated between 10th and 13th March, 2013. It is clear however that the incident was not reported until 15th April, 2013. Even after the Appellant called PW2 to report about the theft of his personal belongings and the same having been found under PW1's bed in a suit case, no eyebrow was raised that an offence had been perpetrated against PW1. Indeed evidence disclosed that PW1's father sent the suit case to Muthangari Police Station on 15th April, 2013. Surprisingly, the Appellant had in the same police station vide OB extract number 45/20/03/13 reported about the robbery in his house. He then attributed the case at hand to the report he had made about the theft of his personal belongings. He also had reported of theft of his motor cycle by an administration police officer. His defence was that the instant case was trumped up against him because of the complaints he had made against police officers.

Although no good explanation was offered on why the Appellant reported the case of theft of his personal belongings on 20th March, 2013, nine days after PW1 had left his house, it begs why if indeed PW1 had been defiled, it took her over a month to report. She was not a young girl and at the age of 17 years, she could not claim to have been intimidated by the perpetrator. Any intimidation in my view would only have arisen for the period she was in the perpetrator's house. She ought to have reported the incident as soon as she left the house of the Appellant.

I give regard to the fact that the prosecution advanced a case that prior to the incident, PW1 was abducted from the house of her brother whom she had gone to visit in Nairobi. Interestingly, even after she re-appeared on 15th March, 2013, it did not arouse the attention of either her brother or parents to report a case of abduction. All these circumstances do not add up and clearly raise eyebrows on the credibility of the prosecution case. In my view, the circumstances lend credence to the Appellant's defence that he was charged after he made a complaint of theft of his property. Besides, PW5, the investigating officer was evasive on why the police did not investigate the case of theft reported by the Appellant against PW1 yet there was direct evidence that she had been found in possession of the Appellant's belongings. I am of the view that, PW1's brother whom she was going to visit before she landed into the Appellant's house ought to have been called as a key prosecution's witness to shed light on the circumstances under which she lost contact with her. That way, the police would have pieced up the evidence that could have concretely demonstrated whether or not it is the Appellant who abducted and defiled her. The failure to call such a crucial witness leads the court to conclude that probably had the witness been called, he would have adduced adverse evidence for the prosecution case. **See *Bukenya & Others v Republic (1972), E.A.,459.***

Be that as it may, it is clear that after her sexual encounter, PW1 became pregnant. She however went through an abortion at Molo. The unfortunate bit is that no medical evidence was adduced to state how old the foetus was and whether it was possible to conduct a DNA on the foetus. This is a matter that was brought up in court in a very elusive manner. One would not fail to make a conclusion that probably the abortion was intentional and aimed as a cover-up of PW1's adventures. In the midst of the shambled evidence, the only other evidence that would have nailed the Appellant was the DNA test of the foetus. The same having not been done, it is my view that the evidence linking the Appellant to the defilement was far from being established.

In the result, I find that the appeal has merit. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free and unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 26th April, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Miss Atina for the Respondent.