



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 44 OF 2014
LUCAS ODHIAMBO MUGUANAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief Magistrate's Court at Makadara Cr. Case No. 4626 of 2012

delivered by Hon. L.C. Kosgei, RM 6th of February 2014).

JUDGEMENT

The Appellant, Lucas Odhiambo Muguanah, 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 7th of July, 2012 at around 4.00 p.m., in [particulars withheld] within Nairobi County, unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of G A a child aged 9 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 27th of August, 2012 at around 4.00 p.m., in [particulars withheld] within Nairobi County, unlawfully and intentionally had an indecent act with G A a child aged 9 years.

The Appellant was convicted in the main charge and sentenced to serve life imprisonment. He was dissatisfied with both the conviction and sentence and preferred the current appeal. He filed the following grounds of appeal.

- 1. That the magistrate erred in matters of law and fact by conducting the trial in a manner that violated his Constitutional rights to a fair hearing under Article 50 (2)(c) and (j)***
- 2. That the Prosecution did not prove that there was penile penetration on PW1.***
- 3. That the contrast in time and date regarding the date and time the alleged crime was committed and reported cast doubt on the commission of the crime.***
- 4. That there is a possibility that PW2 may have tampered with the genitalia of PW1.***

5. *That the court created its own theories outside the law*

6. *That the court based its conviction on the Prosecution's evidence that had material contradictions.*

7. *That the Honorable magistrate did not consider the Appellant's defence.*

SUBMISSIONS.

The Appellant filed written submissions on 6th March, 2017. He submitted that his right to a fair hearing under Article 50 of the Constitution was violated because he was not furnished with the prosecution witness statements within reasonable time so as to enable him prepare for his defence. On proof of penetration, he submitted that the medical evidence adduced showed that as at the time PW1 was examined, her vaginal walls were reddened. At the same time, the hymen showed an old tear. This, according to him was a contradiction since if the vaginal walls were reddened then the hymeneal tear also ought to have been fresh. The Appellant further submitted that the medical evidence contrasted that of PW2, the mother to PW1 to the effect that PW1's genitalia was enlarged. He was of the view that PW2 may have interfered with the genitalia of PW1 with the sole purpose of implicating him.

The Appellant further submitted that there was discrepancy with regard to the date the offence allegedly occurred. He submitted that according to PW1, she was defiled on 2nd July, 2012, yet police indicated in the charge sheet that he was arrested on 26th August, 2012 and PW3, the Clinical officer who treated PW1 testified that PW1 was defiled in June, 2012. These discrepancies ultimately weakened the prosecution case.

On the whole, the Appellant submitted that the learned trial magistrate entertained extraneous matters in arriving at a finding that the prosecution had proved their case beyond a reasonable doubt. That had she given regard to the inconsistencies in the prosecution case and taken into consideration his defence, he would have arrived at a different verdict. He urged the court to allow the appeal.

Learned State Counsel, M/s Sigei opposed the appeal. She submitted that the prosecution proved the key ingredients of the offence of defilement. On penetration, she submitted that the medical evidence of PW3 and 6 corroborated that of PW1. On identification of the Appellant, she submitted that he was well known to PW1 as a neighbour. The latter candidly narrated how the Appellant sent her to buy a matchbox. When she delivered the same he lured her into his house where he defiled her. She was unable to scream as he had sealed her mouth with a cello tape. He warned her not tell anyone. He also gave her Ksh.5/ so as to silence her. Since PW1 was scared of the Appellant, he did not speak out. It was not until the 25th August, 2012 when her mother, PW2, was washing her that she noticed she was feeling pain on her genitalia on touch. She noticed that the same was widened after which she reported the matter to the police after PW2 disclosed who the culprit was. With respect to the age of PW1, the learned counsel submitted that a Birth Certificate produced by PW2 properly proved the age of PW1. Counsel went on to submit that the Appellant was supplied with the prosecution witness statements before evidence was adduced. She submitted the Appellant's defence was properly considered and urged that the appeal be dismissed.

EVIDENCE.

This being the first appellate court, its duty is to re-evaluate 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 VS REPUBLIC [1957] E.A, 336.**

In total, the prosecution called 6 witnesses. Their case was that the complainant PW1 then aged 9 years was on the material date at about 9.00 p.m. playing with her friends. The Appellant approached her, gave her Kshs. 5/ to buy a match box. On bringing back the match box, the Appellant asked her to enter into his house which he locked from behind. He then laid her on a large seat, undressed her, sealed her mouth with a cello tape and proceeded to defile her. After the ordeal, he removed the cello tape from the mouth,

gave her Kshs. 5/ and told her not to tell anyone what had happened and indeed she did not disclose to anyone what had happened. She just returned and continued to play with her friends.

On the 25th August, 2012, PW2 L A the mother to PW1 was washing PW1 when she noticed that she was feeling pain in her private parts. On enquiry, PW1 disclosed what had happened. PW2 in turn took her to a clinic owned by MSF where upon examination, it was discovered that PW1 had been defiled. A Post Rape Care Form was filled and issued to PW1. The matter was reported to Mathare Police Post and later at Muthaiga Police Station where a P3 Form was issued. The Appellant was known to both PW1 and 2 as he was their neighbor where they lived.

PW3, Irene Nyangwaci, a Clinical Officer at MSF Clinic in Mathare examined PW1 on 27th August, 2012. She observed that her hymen had irregular margins, was pink in colour and had a notch at 6.00 o'clock. The tear was old and healed. She concluded that she had been defiled. In corroborating the evidence of PW3, **PW6 Dr. Joseph Maundu** of Police Surgery examined PW1 on 30th August, 2012 and filled her P3 Form which also indicated that her hymen was broken and had irregular tags. Both witnesses produced respective medical examination reports. **PW4, PC Darius Sowele** of Muthaiga Police Station re-arrested the Appellant from Mathare AP Camp and escorted him to Muthaiga Police Station. **PW5, PC Darister Dimitu** investigated the matter and in all respects corroborated the evidence of PW1, 2, 3, 4 and 6.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and he was put on his defence. He gave an unsworn statement of defence in which he denied having committed the offence. He stated that he was arrested on the 5th of September, 2012 while coming back from an m-pesa shop close to his residence. His wife called him while at the shop and told him that Police officers were looking for him. He learnt of the reason of his arrest after he was taken to Muthaiga Police Station. He stated that the charges were framed since he had a grudge with PW2 who was angry that he refused to marry her sister.

DETERMINATION.

It is now the onerous duty of this court to determine whether the Appellant's right to a fair trial was violated, whether the prosecution proved the case as required by the law and whether the defence of the Appellant was considered.

On whether the Appellant was accorded a fair trial, he submitted that he was not availed prosecution witness statements before the trial commenced. The record shows that the court made an order on 7th September, 2013 that he be furnished with the statements. A similar order was made on 10th April, 2013 after he complained of not having received the statements. The issue also came up again on the 2nd of May, 2013 and the case was further adjourned. PW1 testified on the 7th of May, 2013 and the Appellant did not object to the evidence being taken. He never thereafter complained that he did not have the statements. I therefore conclude that he was duly furnished with the statements by the time the evidence was adduced. This ground of appeal then fails.

On prove of the case, the Appellant submitted that penetration was not established. This is a key element constituting the offence of defilement and is defined under Section 2 of the Sexual Offences Act as:

'... the partial or complete insertion of the genital organs of a person into the genital organs of another person...'

It was the evidence of PW1 that the Appellant put his 'urinating thing' into her 'urinating thing' and did bad manners to her. PW1 had a voire dire examination conducted on her and the court ascertained that she was indeed telling the truth. The testimony of PW2 was that she noticed when washing PW1 that her vagina was bigger than normal and she felt pain. This fact was corroborated by the medical evidence adduced by both PW3 and 6. They both observed that PW1's hymen had irregular margins and that the labia minora was not normal in redness. They concluded that she had been defiled.

At this point, I would wish to comment on the Appellant's submission that the medical evidence adduced did not support the charge because of the discrepancy of the date the offence was alleged to have been committed and the time that the offence was reported and examination done. Back to the evidence of PW1, she testified that the Appellant warned her not to tell anyone what had happened. She obeyed the orders and remained mum until her mother enquired from her on 25th August, 2012 when she noticed the abnormality in her vagina. Therefore, the offence could not have been investigated earlier than the date PW1 reported the incident. As corroborated by the medical evidence, the hymeneal tear was old which was indicative that the defilement had not just taken place on 25th August, 2012. PW1 was therefore speaking the truth that she was defiled on 7th July, 2012.

It was the testimony of PW1 that she not only knew the Appellant by name but also identified him by his name, Lukas. She also gave a candid account of how he lured her into his house and defiled her. The learned trial magistrate was satisfied that PW2 spoke the truth. Indeed she gave a sworn statement which was not shaken on cross examination. On the part of this court I am equally satisfied that PW1 told the truth. The Appellant's defence that he was implicated by PW2 because he declined to marry her sister was unsubstantiated and entirely intended to divert the court's attention to the core issue. Besides, the Appellant never cross examined PW2 on this issue, which means that it was brought up at the defence stage as an afterthought.

It is also trite to note that no one witnessed the offence taking place. PW1 was her own witness. But again, it must be borne in mind that more often than not sexual offences will usually be perpetrated to the exclusion of eye witnesses. That is why the proviso to Section 124 of the Evidence Act allows a court to convict based on the sole uncorroborated evidence of the victim as long as the court believes in that evidence. The same reads as follows;

'... 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 the reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth...'

The learned trial magistrate was convinced that PW1 told the truth. This court too has no reason to doubt that she spoke the truth. Accordingly, I overrule the Appellant's submission that the learned trial magistrate entertained extraneous matters in arriving at a guilty verdict.

I agree there were discrepancies on some dates given on record. This was noticeable with regard to the evidence of PW6, the police doctor who examined PW1. He testified that he did the examination on 20th August, 2012. However, the P3 Form he adduced in court indicates that he did the examination on 30th of the same month. Further, Part I of the Form which is filled by the police indicates that PW1 was referred to him on 30th August, 2012. It follows that his oral evidence was an oversight and he may not have thoroughly perused the P3 Form before he testified. Besides, that discrepancy was minor and did not taint the strong prosecution evidence that it is the Appellant who defiled PW1.

As to the age of the child, PW1 asserted that she was 10 years old at the time of giving her testimony. This was corroborated by her mother, PW2, who produced her Birth Certificate which proved that PW1 was indeed 9 years old at the time of the incident which was approximately 10 months prior to her testimony.

On whether the learned trial magistrate disregarded the defense of the Appellant, the Appellant claims he was accosted by PW2 and her husband on the 26th of February and asked whether he indeed defiled their daughter. He said that he had no reason to defile the child. He however contends that PW2 had earlier threatened him since he had promised to marry her sister but later changed his mind. The Appellant raised these issues in his defence but failed to ask any question in this respect to PW2 on her cross examination. He had ample time and opportunity to assert his claims and bring it to the attention of the court.. This attests that his assertion was an afterthought. It was also a self-serving statement intended to exonerate him from the crime. In his submission, he added that there was a possibility that PW2 interfered with the

genitalia of PW1 so as to have him arrested and charged. The claim was unsubstantiated and failed to shutter the strong prosecution's evidence. I also dismiss it as lacking in merit.

In the result, I find that the prosecution proved its case beyond reasonable doubt. The appeal has no merit and the same is hereby dismissed. It is so ordered.

Dated and Delivered at Nairobi this 11th April, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant present in person.*
- 2. M/s Atina for the Respondent.*