



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 126 OF 2016.
ALFRED BIKUNDO NYANGAU.....APPELLANT
VERSUS
REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case 5055 of 2013 delivered by Hon. Suter, Rm on 15th July, 2016).

JUDGMENT

Background

Alfred Bikundo Nyangau, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. The particulars of the charge were that on 19th October, 2013 in Embakasi Division within Nairobi Area County caused his penis to penetrate the vagina of GWW, a child aged 8 years old.

In the alternative he was charged with indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. The particulars of the charge were that on 19th October, 2013 in Embakasi Division within Nairobi Area intentionally touched the breast and vagina of GWW, a child aged 8 years.

The Appellant was found guilty in the main charge. He was sentenced to life imprisonment. He was displeased with both the conviction and sentence and lodged the present appeal. The Appellant filed amended supplementary grounds of appeal. He was dissatisfied that the prosecution did not prove the case beyond a reasonable doubt, that he was convicted on the basis of contradictory evidence, and that **Section 200(3) of the Criminal Procedure Code** was not complied with.

Submissions

The Appellant filed written submissions alongside the grounds of appeal on 5th April, 2017. He submitted that the complainant's (PW1) evidence was not proved beyond a reasonable doubt. His contention was that it lacked corroboration of eye witnesses. He stated that the offence having been committed on a Sunday when the streets are ordinarily congested by members of the public at least an independent witness should have been called to confirm that he pulled PW1 into his house. Furthermore, the lady who owned a shop where PW1 was before he allegedly lured her into his house ought to have been a crucial prosecution witness. In that respect, the Appellant submitted that he was convicted purely based on suspicion which is not evidence.

He submitted that the medical evidence adduced did not sufficiently establish that he defiled PW1. He submitted that the case for the prosecution was that when PW1 was examined, she was found to have contracted a sexually transmitted bacterial infection. However, no examination was done on him to confirm that he too suffered from the same infection thereby linking him to the infection PW1 had. In lieu thereof, a DNA sampling would have been conducted with a view to establishing whether he had defiled PW1. His further submission was the prosecution failed to call a crucial witness one, Tatu who is said to have seen him with PW1. The failure to call the witness meant that had been called, he would have adduced adverse evidence for the prosecution. On the whole, he submitted that the case was not proved beyond a reasonable doubt and urged that the appeal be dismissed. Amongst the cases cited to buttress the submission were; **Woolmington vs DPP[1935] AC 462, Sawe vs Republic [2003] eKLR and Bukenya & Others vs Republic [1972] EA 549.**

Learned State Counsel M/s Sigei opposed the appeal. She submitted that the prosecution proved the key elements for the offence of defilement namely; penetration, identification of the Appellant and age of the victim. She urged the court to take note that the Appellant was not a stranger to PW1. He found her seated at a shop from where he lured her into his house where he defiled her. She did not disclose to her mother (PW2) what transpired until after three days when she started feeling pain in her stomach. She was taken to a nearby GSU Clinic after which she was referred to Nairobi Women Hospital. On examination, she was found to have been defiled. The vagina had lacerations and the hymen was swollen. The urine and vaginal swab showed traces of infection. A police Doctor who also examined PW1 came up with a similar findings on noting that the external genitalia was hyperemic, labia majora was red and the hymen widened with a tear at 7.00 o'clock. The Appellant was PW1's neighbor and the latter was categorical that she knew him by the name Bikundo. Furthermore, PW1 was retrieved from the Appellant's house by PW3 who called out her name from outside. The age of PW1 was also sufficiently proved.

Miss Sigei submitted that the trial court properly complied with **Section 200 of Criminal Procedure Code**. Although the Appellant had requested that witnesses who had testified be recalled after a succeeding magistrate took over the conduct of the trial, the court based on information by the investigating officer declined to allow the application. She submitted that the court had given sufficient reasons why the witnesses could not be recalled to give evidence afresh.

Evidence

The case for the prosecution majorly revolved around the evidence of PW1,2 and 3. PW1 was the complainant then aged 9 years. At the material time on 19th October, 2013, she was seated in a shop around where she lived when the Appellant went and pulled her out of the shop. Being at day time, she recognized him by the name Bikundo as they were neighbours. He then took her to his house where he defiled her. She started crying and as her mother looked for her stumbled on her at the Appellant's house. She did not immediately report to her mother what had happened as she was scared to tell the truth. Three days later when she started complaining of stomachache, her parents took her to a clinic and later to Nairobi Women's Hospital where she was examined and diagnosed to have been defiled.

PW2, M M and the mother to PW1 corroborated the evidence of PW1. Her testimony was that at the material time she left PW1 skipping a rope near her friend's shop and returned to her house to collect a sweater. After returning to where PW1 was ten minutes later, she did not find her. She asked her neighbor, one Mama N where PW1 was. She started looking for PW1 together with Mama N whereupon they found her in the house of the Appellant. PW1 unfortunately did not disclose that she had been defiled. All she did was to cry. She disclosed to her mother what had happened when she started complaining of some pain in the lower abdomen. Thereafter, she was taken to the hospital and the matter escalated to the police.

PW3, L W recalled seeing PW1 skipping a rope outside where she sells fruits on 19th October, 2013 at 4.00 pm, later PW2 approached her to ask her whether she had seen PW1. Her testimony was that she joined PW2 in looking for PW1 and that they traced her in the Appellant's house. Later she learnt that PW1 had been defiled by the Appellant.

PW4, Police Corporal Christine Inyaro investigated the case. She summed up the evidence of the prosecution witnesses. In addition, she produced PW1's Birth Certificate as exhibit 3 which showed that PW1 was born on 28th January, 2005.

PW5, Dr. Kinuthia Edward of Nairobi Women's Hospital examined PW1 on 23rd October, 2013. She presented herself with lower abdominal pains and allegations of defilement. On examination, PW1 was found to have a vagina with lacerations, a broken hymen and with little swelling. The urine and vaginal swab had traces of infection. Other tests were negative.

PW6, Grace Adhiambo Onyango was a nurse at GSU Training Centre where PW1 was first seen. She also noted that PW1 had lower abdominal pain and experienced pains when urinating. On examination, she had a yellowish smelly discharge which was a sign of bacterial infection. The vagina was inflamed. She prescribed ARVs to prevent HIV infection. She also wrote some treatment notes which she produced in court.

PW7 Dr. Shako of Police Surgery examined PW1 on 25th October, 2013. She noted that the external genitalia was hyperemic, Libia minora lips were red as a sign of inflammation and the hymen was reddened and widened with a tear at 7.00 o'clock. She produced the medical examination form (P3 Form) as an exhibit.

After the close of prosecution case, the court ruled that the prosecution had established a prima facie case and called the Appellant to tender his defence. He gave an unsworn statement of defence. His defence was that sometime in the year 2010, he moved into a plot where PW2 was the caretaker. Both had a cordial relationship. Sometime in the year 2013, he got a girlfriend who PW2 did not approve of. The latter proceeded to introduce him to another girl whom she thought was a better match for the Appellant. He stated that he was framed for the offence sometime on 26th October, 2013, when PW2 went to his house to correct some soda bottles. As she left his house, she locked his house door from outside. Shortly afterwards, members of the public milled around complaining that he had defiled PW2's daughter. He was thereafter arrested and charged accordingly. He maintained that he was a neighbor to PW2 and that he was innocent.

Determination

This being the 1st appellate court its duty is to reevaluate the evidence and come up with its independent conclusions. The court must however bear in mind that it has neither heard nor seen the demeanor of the witnesses and give regard for that. **See Okeno v Republic (1972) EA 32.**

I have accordingly considered the issues for determination to be whether **Section 200(3)** of the **Criminal Procedure Code** was violated, whether the offence was proved beyond reasonable doubt and whether the Appellant's defence was considered.

On whether **Section 200 of the Criminal Procedure Code** was violated, the Appellant submitted that when the succeeding trial magistrate, Hon. Suter took over the conducted of the trial, he elected to recall the witnesses who had testified. The effect of the same would have been to have the case heard de novo. The Appellant's request was opposed by the prosecution who urged the court to consider the nature of the offence and the traumatizing effect of dragging the complainant through the trial process again. The trial magistrate, in light of the differing opinions made an order for the investigating officer in the matter appears before the court to explain the availability of the witnesses who had testified specifically the complainant and PW5. The investigating officer was heard on 5th October, 2015 and a ruling delivered on 9th October, 2015 that the case should proceed from where it had reached. After the ruling the Appellant's sentiments changed and he was grateful that the matter was matter would be concluded expeditiously. It is then surprising at this point that he complains that he was not accorded a fair trial because the trial was not heard de novo.

The framing of **Section 200(3) of the Criminal Procedure Code** clearly places the onus upon the

succeeding magistrate to explain to the accused that he may recall witnesses. In this case, the trial magistrate did so and as seen above the court could not acquiesce to the applicant's request on the basis of the witnesses' unavailability and trauma. Be that as it may, I emphasize that it is not mandatory that the accused's wish must carry the day. The court must take into consideration all circumstances before arriving at a finding of whether the case should be heard de novo. In the instant case, it was not expedient that the case should have started afresh and the learned trial magistrate was right in so finding.

The next ground of appeal was that crucial witnesses were never called. The Appellant submitted that the failure to call one Tatu was detrimental to his case. The witness was mentioned by PW3. Her testimony was to the effect that as she and PW1 were searching for PW1, they first reached at the house door of the said Tatu which was open but PW1 was not in that house. The next door was of the house of the Appellant where PW1 was. The said Tatu would not have added any value to the prosecution case as evidently, he is a person who was unaware of what was happening. After all, what was crucial was that the witnesses the prosecution called proved the case to the required standard.

The next issue the Appellant raised was that his defence was not considered. This submission is far from the truth. It is clear from the judgment that the trial magistrate considered the defence and found that it was a mere denial that did not rebut the evidence by the prosecution. He also found that the Appellant's assertion that he was framed due to a grudge between him and PW2 was too remote in attempting to dislodge the strong prosecution case. I hold a similar view.

I now determine is whether the offence was proved beyond reasonable doubt. The prosecution was enjoined to prove the age of the complainant, penetration and whether it is the Appellant who committed the offence. In this case, the complainant was proved to be 8 years old whose age was proved by a Birth Certificate identified by PW2 and produced as exhibit by PW4. The same showed that PW1 was born on 28th January, 2005.

On penetration, the same was corroborated by PW5, 6 and 7. They all reached at a conclusion that PW1 had been defiled. They observed lacerations on her vagina and a widened hymen that was reddened. PW7 in addition noted that the hymen had a tear at 7.00 o'clock. She had also contracted a sexually transmitted infection. Although the Appellant was not examined for an infection, one thing remained unshaken; that it is the Appellant who pulled PW1 from the shop into his house where he perpetrated the heinous act. PW1 did not only identify him physically but called him by his name when she disclosed what had happened. She was in no uncertain terms sure that the person who defiled her was the Appellant. I am also convinced that the perpetrator of the offence was the Appellant.

In light of the above observations, this court finds that the prosecution proved its case beyond a reasonable doubt. I find the Appellant's appeal without merit. The same is hereby dismissed. I uphold both the conviction and sentence. It is so ordered.

Dated and Delivered at Nairobi this 23rd May, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

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