



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 9 OF 2016

JOHANA LWEBE MUYOGA ALIAS KAJIWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 489 of 2013 of the Senior Principal Magistrate's Court at Kilifi – Honourable L.N. Juma, Resident Magistrate)

JUDGEMENT

1. The Appellant, Johana Lwebe Muyoga alias Kajiwe is serving life imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, 2006.
2. It was alleged that on 22nd October, 2013 at Mtwapa Township in Kilifi County, the Appellant intentionally caused his penis to penetrate the vagina of N.M. a girl aged eleven years.
3. Being dissatisfied with the conviction and sentence he has appealed to this court. His five grounds of appeal show that he faults the trial magistrate for convicting him on insufficient evidence.
4. The duty of this court as a first appellate court is to subject the evidence adduced before the trial court to fresh analysis and reach its own independent decision. In doing so, it must be remembered that this court, unlike the trial court, did not have the opportunity of seeing and hearing the witnesses testify so as to assess their demeanour.
5. The Appellant filed his submissions on 22nd May, 2017. He starts by questioning the authenticity of the birth certificate that was produced to show that the victim was eleven years old. He accuses the trial magistrate of being too quick to conclude that the victim was eleven years old. According to him, it was questionable for the investigating officer, Corporal Victoria Nyambura to produce the birth certificate as an exhibit as the same had already been produced by the complainant who had testified as PW1. He does not understand how a document that had already been surrendered to the court's custody by the complainant could again be withdrawn and reproduced by the investigating officer.
6. Pressing on with his claim that the case against him is fabricated, the Appellant refers to a statement in the evidence of PW3 Lydia Kadzo that the police officer had spoken to the doctor as evidence of conspiracy against him. He alleges that the doctor was influenced by the police to fabricate the medical evidence against him.

7. The Appellant asserts that there was no prove of penetration. His case is that the statement by the doctor that the hymen was not intact is not in itself sufficient to prove sexual intercourse. According to him since it was alleged that both the vagina and the anus of the child had been penetrated, there ought to have been bleeding but the medical evidence adduced did not establish any bleeding.

8. It is the Appellant's case that PW4 Gladys Kupali Kingi and the investigating officer did not see any bloodstain on the beddings at the site of the alleged defilement. Further, that the child's alleged stained underwear was not produced as an exhibit. His position is that this kind of evidence can only lead to the conclusion that the complainant was not defiled.

9. Further, that Dr. Usra Ahmed indicated that semen was not seen as the child was examined three days after the incident. According to the Appellant even the said medical evidence is contradictory as at one point the doctor says that no sperm was found during the examination and shortly thereafter states there was evidence from the samples showing that the perpetrator's semen was found. The Appellant submits that since no semen was seen, it means that the child was not defiled.

10. Still on the medical evidence, the Appellant contends that even though the victim is said to have been infected, he was not taken for examination so as to connect him with the infection.

11. Another point taken up by the Appellant was the failure by the prosecution to call crucial witnesses. The Appellant submits that although the complainant had clearly stated that she slept with an aunt called D and her elder siblings M, F and N none of these witnesses was called to testify. According to him, failure to call these witnesses resulted in miscarriage of justice and amounts to violation of his right to adduce and challenge evidence as guaranteed by Article 50 (2) (k) of the Constitution.

12. It is the Appellant's averment that the case against him was not proved beyond reasonable doubt. According to him, the panties of the victim said to have had faeces and creamish matter ought to have been produced as exhibits. Also that the investigating officer ought to have given her observation on the state of the roof which he allegedly went through in order to reach the complainant.

13. The Respondent's submissions were filed on 2nd March, 2017. On the Appellant's claim that he was convicted based on an unproved case and poor investigations, the Respondent asserts that its case was strong and all the ingredients required to prove a case of defilement were established. According to the Respondent, it had proved the age of the complainant and the occurrence of penetration. It had also proved that the penetration was by the Appellant.

14. On the alleged failure to call crucial witnesses, the Respondent submits that it presented the witnesses who proved its case satisfactorily. Further, that the proviso to Section 124 of the Evidence Act allowed a conviction based on reliance on the sole evidence of the victim.

15. The Respondent asserts that the Appellant was correctly convicted as the evidence was corroborated. It is the Respondent's position that its evidence was not fabricated as alleged by the Appellant. Further, that the defence of the Appellant was considered by the trial Court.

16. In considering the appeal this court will have to find out if the prosecution established the ingredients of defilement namely penetration, the age of the complainant and the nexus between the offence and the Appellant.

17. On the age of the victim, a birth certificate was produced by the investigating officer showing her date of birth as 2nd September, 2002. The offence is said to have been committed on 22nd October, 2013. The complainant was therefore a child aged eleven years at the time of the alleged offence.

18. There is the allegation by the Appellant that the birth certificate of the complainant was produced twice implying that it was not genuine. I have perused the proceedings and note that what the complainant did was simply to identify the birth certificate. The court record shows that at that point the birth certificate was marked for identification as Prosecution Exhibit No. 1. It wasn't produced by the

complainant. It is indeed the investigating officer who produced the birth certificate as an exhibit. The Appellant's claim that a document that had been produced by the victim was again produced by the investigating officer is therefore not correct.

19. The next question is whether penetration was proved. The medical evidence adduced by Dr Usra Ahmed confirmed that the complainant's vagina and anus were penetrated. PW2 K J, the mother of the complainant told the court that she was away with her employer when her child was assaulted. Upon receiving information of the incident she travelled back home arriving at Kilifi District Hospital on 24th October, 2013. She found her child could not walk and in a bad shape. She told the court that the child had been defiled.

20. PW3 told the court that she is a community health worker. She testified that after receiving the report of the defilement from D she went and checked on the complainant. She found her sleeping with her legs widespread. Her private parts were swollen. Her panties had faeces and creamish matter.

21. PW4 testified that the child did not go to school although she kept quiet when asked what the problem was.

22. The evidence of all these witnesses confirmed defilement.

23. The final issue is whether the Appellant is the person who assaulted the complainant. The age of the child and her penetration were established by the evidence of the child and corroborated by the evidence of the other witnesses. However, the identification of the Appellant was solely based on the evidence of the child.

24. The Appellant is indeed correct that there were other persons who could have been called by the prosecution as witnesses. The complainant talked of D, her siblings, an uncle and an aunt. She said her siblings were asleep. She talked of her uncle responding to her alarm but she does not say that her uncle saw her assailant. PW4 told the court that she did not hear any alarm by the complainant. It is important to note that the complainant never stated that her attacker was seen by anyone else. Calling the potential witnesses could therefore not have changed the prosecution's case. I suspect their evidence would have only established that the complainant who was a child had been sexually violated. Those facts were adequately proved by the witnesses who testified. I therefore find that failure to call those witnesses is not fatal to the prosecution case.

25. The prosecution correctly pointed out that in sexual offences there is an exception to the requirement for corroboration by Section 124 of the Evidence Act. The proviso to the said provision is that a court can convict on the strength of the evidence of the victim alone. In my view, the exception should only be resorted to when there is no other evidence that can corroborate the victim's testimony.

26. In this case for example, the production of the panties could have supported the complainant's testimony that she was defiled. This particular exhibit was not produced. Failure to produce it is however not fatal to the Respondent's case as there is medical evidence and testimony of eye witnesses showing that the complainant was defiled.

27. On the other hand, the only evidence on identification of the assailant is that of the complainant. This is the evidence that the trial court was to consider. The complainant told the court that she knew the person who defiled her as Kajiwe. Her evidence was that the 'mkebe' lamp was still on when he came through the roof. She identified him as a neighbour. She also clearly identified him in court.

28. Her mother (PW2) testified that her daughter told her that Kajiwe had defiled her. She stated that Kajiwe was another name for the Appellant.

29. PW3 testified that the victim identified the Appellant a week after the incident. She stated that nobody told the complainant to name the Appellant as her assailant.

30. The investigating officer told the court that the Appellant went into hiding after the incident. She later found him in a secluded place following a tip-off by elders who had been monitoring his movements.

31. Looking at the evidence on record, I do not find any reason why the complainant would have falsely accused the Appellant. Although the Appellant was a neighbour of the complainant's family, there no evidence of bad blood between the families.

32. The Appellant did not say much in his defence. He simply made what looked like a mitigation by saying he had a family to take care of. There was therefore nothing to be considered apart from what had come out during cross-examination of the prosecution witnesses by the Appellant. The trial magistrate considered what the Appellant had stated which amounted to a denial. The defence was upset by the evidence adduced by the prosecution. I therefore find that the trial court correctly convicted the Appellant.

33. As for the sentence, I find that the life imprisonment meted on the Appellant is provided for by the law. The trial magistrate cannot be faulted for complying with the law.

34. The outcome is that this appeal fails and the same is dismissed.

Dated, signed and delivered at Malindi this 22nd day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT