



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 69 OF 2015

HAMISI NGALA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 732 of 2014 in the Senior Principal Magistrate’s Court at Voi delivered by Hon E. M. Kadima (RM) on 22nd September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Hamisi Ngala, was tried and convicted by Hon E.M. Kadima, Resident Magistrate on two (2) Counts. Count I was in respect of committing the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. He had also been charged with the alternative offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. Count II related to the offence of kidnapping from lawful guardianship contrary to Section 255 as read together with Section 257 of the Penal Code Cap 63 (Laws of Kenya).

COUNT I

“On diverse dates between 20th September 2014 and 24th September 2014 in Taita Taveta County, intentionally caused your male genital organ (penis) to penetrate the female genital organ (vagina) of ANS a girl aged 14 years.

ALTERNATIVE CHARGE

“On diverse dates between 20th September 2014 and 24th September 2014 in Taita Taveta County, intentionally touched the female genital organ (vagina) of ANS a child aged 14 years with your male genital organ (penis).”

COUNT II

“On diverse dates between 20th September 2014 and 24th September 2014 in Taita Taveta County, you enticed and took ANS a minor girl aged 14 years from the lawful custody of her parents and took her to Mikindani in Mombasa without the consent of the minor’s (sic)parents.”

2. Being dissatisfied with the said judgment, on 25th November 2015, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed as having been duly filed and served. The Grounds of Appeal were as follows:-

1. THAT the honourable magistrate erred in law and fact basing on the evidence which were not water-tight enough to give him that harsh sentence (sic).

2. THAT the honourable magistrate erred in law and fact by relying on the single evidence (sic).

3. THAT the magistrate erred by not finding the truth of the case against him and the prosecution side (sic).

4. THAT the magistrate erred in law and fact by not considering the defence as the true fact(sic).

5. THAT the magistrate erred in law and fact by considering the allegation of the prosecutor by changing the charges which he was not aware of because he was poor person by the law (sic).

3. On 23rd November 2016, the court directed him to file his Written Submissions. On 20th December 2016, he filed Amended Grounds of Appeal along with his Written Submissions. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by believing the evidence of PW 2 which was not proved and lacked faith (sic) to sustain conviction (sic).

2. THAT the honourable trial magistrate erred in law and fact by finding that there was corroboration evidence that of PW 2 and PW 3(sic).

3. THAT the learned trial magistrate erred in law and fact by failing to appreciate on (sic) whether PW 2 was with the appellant or with the two (2) boys who went together with her while at Mombasa.

4. THAT the learned trial magistrate erred in law and fact by not calling the key witnesses of the case in his sentencing (sic).

5. THAT the trial magistrate erred in law and fact by not considering arresters and the investigations made at Maungu Police Station as unfair and not proved(sic).

6. THAT the learned trial magistrate erred in law and fact by appreciating the medical evidence relating to the missing hymen and hence penetration.

4. The State's Written Submissions were dated 15th February 2017 and filed on 16th February 2017. The Appellant's Further Submissions in response to the said State's Written Submissions were filed on 7th March 2017.

5. When the matter was mentioned on 19th April 2017, both the Appellant and counsel for the State informed this court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

6. The Appellant submitted that the evidence of the Complainant herein, ANS (hereinafter referred to as “PW 2”) could not be believed as she was said to have run to his house which was about ten (10) kilometres at about 7.00pm after saying that she was going to buy “kaimati.”

7. His argument was that it was not possible for him, a stranger, to have held (**sic**) her without her screaming or neighbours coming to her rescue. He also pointed out that despite her saying that he had locked her in his house, she said that on Sunday, she went back to his house at 7.00 pm meaning that she went to her home and returned to his house. He wondered why no one saw her in his house on that Monday before he took her to Mombasa.

8. He stated that she never explained how the house looked like or whether or not she was locked in the house at Mombasa and that no witness was called to testify in this court on how she found herself there. He contended that there were two (2) other people who had planned to take her to Mombasa. He was emphatic that her evidence was not corroborated by Hassan Lewa Kenya (hereinafter referred to as “PW 3”).

9. It was his submission that the Learned Trial Magistrate did not record the reason why he believed PW 2 as required by Section 124 of the Evidence Act. He averred that her evidence was not believable because there were no injuries on her genitalia. He urged this court not to be swayed to believe there was penetration merely because her hymen was broken.

10. He also contended that PW 2’s age was not proved. It was his contention that No 69298 CPL William Kamau (hereinafter referred to as “PW 6”) did not inform the court how he came to be in possession of the documentary evidence. He did not elaborate what this documentary evidence was.

THE STATE’S CASE

11. On its part, the State contended that it was not necessary for the Learned Trial Magistrate to have conducted a *voire dire* examination of PW 2 as she was aged fifteen (15) years at the time she adduced evidence. It replaced reliance on the case of **Criminal Appeal No 16 of 2014 Samuel Warui Karimi vs Republic** where it said the Court of Appeal dealt with the issue of witnesses who should undergo a *voire dire* examination. It did not furnish this court with a copy of the said authority.

12. It urged this court to consider the proviso to Section 124 of the Evidence Act that provides as follows:-

“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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

13. It pointed out that PW 2 testified that she had sexual relations with the Appellant herein several times. It was its contention that this was evident of the fact that she was in a relationship with him because if that were not so, she would never have slept in his duka, gone to see him again or eloped with him to Mombasa.

14. It argued that although there was no eye witness to what transpired, PW 2’s evidence was corroborated by the medical evidence that was adduced in court that showed that her hymen was not intact. It submitted that her age was proven by the Birth Certificate that showed that she was aged fourteen (14) years at the material time and consequently, the Learned Trial Magistrate acted correctly

when he imprisoned the Appellant to twenty (20) years imprisonment.

15. It further submitted that the Learned Trial Magistrate exercised his discretion in sentencing the Appellant to twenty (20) years as Section 8(4) of the Sexual Offences Act provides for a minimal sentence of fifteen (15) years imprisonment. It was its further assertion that since the Appellant was a first offender and he was a young man who would most likely reform which was an aim of the criminal justice system, a sentence of fifteen (15) years imprisonment would suffice.

16. In respect to Count II, it stated that PW 2 went to Mombasa with the Appellant at a time she was still living with her parents. It said that PW 3 confirmed having collected her from Mombasa and that No 84054112 Senior Sergeant Danson Kyalo confirmed that two (2) boys went to Mikindani AP Post having been sent from Chagamwe Police Station and informed him that PW 2 had been abducted but he knew where she was.

17. It was its contention that although the Appellant did not forcefully kidnap PW 2, the circumstances of the case showed that she was enticed to go with him to Mombasa and that she went with him without the consent of her parents. It pointed out that he failed to prove his alibi and that the Learned Trial Magistrate correctly upheld the objection of the Prosecution for him to produce receipts as it had not had time to verify the authenticity of the same.

18. It was its argument that the Appellant failed to provide proof that would have established a grudge between him and the Prosecution witnesses that would have resulted in him having been charged maliciously. It therefore urged this court to dismiss the Appeal herein as the Prosecution had proved its case beyond reasonable doubt.

LEGAL ANALYSIS

19. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

20. It appeared from the respective parties' Written Submissions that the issue that had been placed before this court for determination was really whether or not the Prosecution had proved its case. The court therefore dealt with all the Amended Grounds of Appeal as they were all related.

21. According to PW 2, she said that met the Appellant at his house on 20th September 2014. It was her evidence that she had gone to his shop to buy “kaimati” but then he locked her in his shop. She said that he removed both her clothes and his clothes and he inserted his penis into her vagina. Her testimony was that he did that two (2) times and that she slept in his house till morning.

22. She averred that she went back to the Appellant's house on Sunday at about 7.00pm. Her testimony was that the Appellant cooked whereafter he removed her clothes and had sex with her. She stated that she stayed in his house the whole day on Monday when he also removed her clothes and had sex with her. She also said that he had sex with her on Tuesday.

23. She further testified that he took her to Mombasa on Wednesday evening at 8.00 pm and they reached there at 1.00 pm. She said they kept “vigil” upto 7.00 am and then he took her to his friends in Mikindani. It was her averment that on Thursday, he took her to another Giriama lady and she gave the number for PW 3, her brother.

24. Her evidence was that PW 3 came at about 8.00pm and he took her to Mikindani Police Station along

with the son of the said Giriama lady. They then took her to a child of his uncle who took her to his girlfriend's house where she slept. On Sunday, they boarded the vehicle to Maungu where they met her father, the Appellant and other youth at the Maungu Stage.

25. She then said that on Thursday, "he" lied to her that he was going to buy credit and he disappeared. Although the court record was not clear, it appeared that "he" may have been referring to the Appellant herein. Her evidence was that they then went to Maungu Police Station to report the incident and that on Sunday, she went to Moi District Hospital where she was issued with a P3 Form.

26. During her Cross-examination, she denied that she took herself to Mombasa and was emphatic that it was the Appellant who took her there against her will. She pointed out that the Appellant's kiosk was ten (10) kilometres from where she stayed.

27. PW 3 said that PW 2 disappeared on 20th September 2014 and that a boy called him on phone and told him that the Appellant had taken PW 2 "there." Similarly, although the court record was not clear, it appeared that "there" may have been referring to Mombasa. All the same, he immediately went to Mikindani Police Station and he was given two (2) policemen. He said that he called two (2) youths who came out with PW 2 and the youths were set free. He stated that the Appellant had spent three (3) days and added that PW 2 told him that the Appellant defiled her, threatened her with a knife and dressed her in male clothes and took her to Voi.

28. During his Cross-examination, he stated that he received the call from an unknown male on 25th September 2014. He confirmed that the Appellant's kiosk was ten (10) kilometres from Marungu. When he was re-examined, he was categorical that PW 2 told him that she did not know the Appellant but that he enticed her to enter his house.

29. No 2006058001 APC Jacob David Mkubwa (hereinafter referred to as "PW 4") testified that members of the public brought the Appellant to the AP Post at Maungu. No 84054112 Senior Sergeant Danson Kyalo (hereinafter referred to as "PW 5") stated that two (2) youths found him at Mikindani AP Post and informed him that PW 2 had been abducted but that they knew where she was. They then came back with PW 2. PW 6 reiterated the evidence of the other Prosecution witnesses.

30. In his sworn evidence, the Appellant stated that on 27th September 2014 he was at Mzedu Café when an old man known as Salim Lewa and another unidentified man handcuffed him. Prior to that he had mentioned about a business transaction which this court found not to have been relevant to the circumstances of the case herein. He said that when he asked them why he was being arrested, they told him that he would know ahead. They took him to Maungu AP Post where they found PW 2 and two (2) youths. He denied having defiled PW 2.

31. He stated that he had travelled to Taveta on 20th September 2014 and denied having travelled to Mombasa on 24th September 2014 or PW 2 having been in his house between 20th -27th September 2014. He did not call any witnesses.

32. The circumstances of the case herein were that it was PW 2's word against that of the Appellant as there were no actual eye witnesses to the alleged incident. To understand what transpired herein, this court analysed the sequence of events. PW 2 allegedly went to the Appellant's shop on 20th September 2014 which was a Saturday. She slept in the Appellant's house till Sunday which was 21st September 2014. She appeared to have left his house as she said that she returned back to his house at 7.00pm.

33. She stayed in his house until Wednesday which was 24th September 2014 when the Appellant allegedly took her to Mombasa. On Thursday which was 25th September 2014 she stayed at "another Giriama lady" who asked her if she knew anyone from home. She gave the Giriama lady PW 3's number and she called him. PW 3 came at 8.00pm. The day PW 3 said he was called by an unknown man, being 25th September 2014, tallied with PW 2's evidence of when PW 3 was called.

34. However, that is as far as there evidence matched. Notably, there were certain pertinent inconsistencies in their evidence. Whereas PW 2 stated that PW 3 came to the Giriama lady's house and he took her to Mikindani Police Station, PW 3 said that he went to Mikindani Police Station where he was given two (2) policemen and went to where PW 2 was.

35. His evidence about the two (2) youths who came out with her sister and were subsequently released made no sense to this court as it was not clear how they came to be connected to PW 2. It was not clear to this court who the two (2) youths were or where they came from. They appear to have just popped into the scene. However, PW 5's evidence appeared to have been clearer as he corroborated PW 3's testimony regarding the two (2) policemen accompanying him to where PW 2 was.

36. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

37. A careful of the evidence that was adduced by PW 2 made this court express doubt as to what really transpired in the case herein. This court found difficulties in comprehending her version of what transpired as her testimony was very erratic. At one point she said that she was being beaten by PW 3 because of her mother's phone and then the next moment she was at the Appellant's house, which was ten (10) kilometres from where she stayed. It did appear to this court that she was being economical with the truth of how she found herself at Mombasa.

38. It was apparent that if PW 2 went to Mombasa, then she went there voluntarily. Indeed, she did not adduce any evidence to demonstrate that she was unable to leave the Appellant's house from 20th September 2014 to 24th September 2014 when they supposedly travelled to Mombasa. She did not proffer any plausible reason to explain her inability to escape from Miritini where she said the Appellant took her to his friends. She did not also give an indicating that she was unable to escape from the Giriama lady.

39. It was the considered view of this court that there was clearly a gap in the Prosecution's case as the witness who PW 3 said informed him where PW 2 was not called as a witness. Where Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the prosecution the discretion to decide the number of witnesses to prove a fact, the aforesaid witness was crucial as he or she would have removed any doubt in the mind of this court by verifying the authenticity of PW 3's assertions of how PW 2 found herself at Mombasa, if at all.

40. Appreciably, kidnapping connotes the taking of a person forcibly and illegally detaining such person with the intention of extorting ransom from others to secure the release of such kidnapped person. The ingredients of kidnapping can be one or a combination of more than one of the following:-

a. The person must have been taken forcibly and without their will;

b. Such person must have been illegally detained in a secret place;

c. Such person must be held captive or hostage;

d. The person who has detained such person must have the intention of confining the abducted person secretly, illegally and wrongly;

e. The person who has detained such person must want to extort monies from others to secure the release of the detained person.

41. Notably, Section 259 of the Penal Code provides as follows:-

“Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven

years.”

42. In this regard this court placed reliance on the case of **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported) where the Court of Appeal held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”.

43. Having evaluated the evidence that was tendered in the Trial Court, this court did not discern proof of such kidnapping in the proceedings that were recorded by the Trial Court as had been contended by the Prosecution and determined by the Learned Trial Magistrate found, then. To the contrary, it did appear to this court that the Prosecution failed to prove its case of kidnapping, abduction and/or unlawful confinement because travelling to Mombasa without her parent’s consent, if at all, did not amount to kidnapping.

44. Turning to the defilement charges, this court noted that there was no evidence of PW 2 having been defiled. Whereas Dr Asha Udu (hereinafter referred to as “PW 1”) testified that the probable type of weapon was blunt and categorised the nature of injury as harm, she did testify that there was no visible injury to the external genitalia.

45. A careful perusal of the P3 Form that she adduced as evidence before the Trial Court on behalf of Dr Gichuki showed that PW 2’s clothing was not torn or blood stained. PW 2’s head, neck, thorax, abdomen, upper and lower limbs were all said to be normal. There was also no discharge, blood or sign of infection in her genitalia.

46. In view of the fact that no injury was noted at all, this court was at a loss as to how Dr Gichuki concluded that the probable type of weapon was blunt and that the approximate age of injuries was seven (7) days. In fact, the Post Rape Care Form also showed that there was no visible injury to the vulva and that there was no sign of spermatozoa.

47. Clearly, this court was therefore unable to reconcile as to how the Learned Trial Magistrate arrived at the conclusion that PW 2 was defiled when there was absolutely no evidence of any injuries whatsoever. The fact that a witness states a fact is not itself proof of a fact. Such fact must be proven by evidence. Indeed, courts must be careful not to take a witness’ testimony hook, line and sinker when the same is not supported by evidence. It was the considered opinion of this court that the Prosecution did not also prove Count I that had been preferred against the Appellant herein.

48. All in all, having analysed the evidence that was adduced before the Trial Court, this court came to the firm conclusion that the trial was a miscarriage of justice against the Appellant because there was no evidence to sustain the two (2) Counts and he was also denied the opportunity to present receipts as proof of his alibi.

49. The Appellant was a lay person and was acting in person. Benefit of doubt must be given in his favour that he may not have had no ill intentions in not referring to the said receipt very early on in his trial. Indeed, although the defence of alibi should be raised very early during trial so as not to appear as an afterthought, the Prosecution had an opportunity to seek an adjournment to verify the authenticity of the same.

50. Section 309 of the Criminal Procedure Code Cap 75 9(Laws of Kenya) provides as follows:-

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

51. Accordingly, having perused the Appellant's Petition of Appeal and his Written Submissions as well as those of the State, this court did not find difficulty in finding that the Prosecution failed to prove its case to the required standard, which is, proof beyond reasonable doubt. Based on the evidence that was on record, it was the view of this court that the Learned Trial Magistrate clearly misdirected himself in having found to the contrary.

52. Although this court found and held that the Prosecution had not proved its case against the Appellant herein, this court nonetheless found it necessary to render its opinion regarding the State's submissions that the Learned Trial Magistrate could have sentenced the Appellant to fifteen (15) years' imprisonment as it was a minimum. This was not correct.

53. PW 2 was said to have been aged fourteen (14) years at the time of the alleged incident. Section 8(3) of the Sexual Offences Act is clear that the Appellant could only have been sentenced to twenty (20) years imprisonment as that was the minimum sentence. The same provides as follows:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

54. In the event, this court would have found that the Prosecution had proved its case beyond reasonable doubt against the Appellant herein, it would have sustained the sentence of twenty (20) years' imprisonment the Learned Trial Magistrate had imposed on him. This has now been overtaken by events.

DISPOSITION

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 25th November 2015 was successful and same is hereby allowed. The doubts that were raised in the mind of this court led it to give the Appellant benefit of doubt that led to hereby quash the conviction and set aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

56. It is so ordered.

DATED and DELIVERED at VOI this 20th day of JUNE 2017

J. KAMAU

JUDGE

In the presence of:-

Hamisi Ngala-Appellant

Miss Karani-for State

Josephat Mavu- Court Clerk