



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 167 OF 2016

HARRISON GATERU MUIRURI..... APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the conviction and sentence by Hon J. NDEDA at Thika Chief Magistrate's Court on 30th September 2011)

JUDGMENT

A. INTRODUCTION

1. Harrison Gateru Muiruri (“Appellant”) was presented before the Chief Magistrate’s Court in Thika in Criminal Case NO. 426 of 2010 charged with a single count of defiling JWG, a child aged fourteen years contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The allegations were that the Appellant had, on 23/01/2010, in Muranga South District within Central Province defiled JWG by causing his penis to penetrate the vagina of JWG.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 23/01/2010 in Muranga South District within Central Province he intentionally touched the private parts (vagina) of JWG, a child aged fourteen (14) years with his hands.

3. The Prosecution called four witnesses to prove its case and after the Prosecution closed its case, the Learned Trial Magistrate put the Appellant on his defence. The Appellant gave an unsworn statement and did not call any witness. At the conclusion of the trial the Learned Trial Magistrate found that the Prosecution had proved the main charge beyond reasonable doubt and sentenced the Appellant to twenty (20) years imprisonment. The Appellant is aggrieved and has appealed to this Court.

4. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality

and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

C. THE EVIDENCE PRESENTED IN THE TRIAL COURT

6. The evidence that emerged in the Trial Court was as follows.

7. JWG testified that on 23/01/2010, at around 6:00pm she was sent by her mother to a nearby *posho* mill to have maize milled to *unga*. She testified that while at the *posho* mill, the Appellant, who was known to her came and told her that her mother was calling for her at [Particulars Withheld] Secondary School. Believing this to be true, she left the maize at the *posho* mill and accompanied the Appellant in the direction of [Particulars Withheld] Secondary School.

8. By JWG's rendering, however, a little distance away, the Appellant assaulted her – grabbed her wrists and warned her that he would kill her if she shouted. The Appellant, then, gagged her using a torn piece of cloth and put her on his back and carried her all the way to his house. All the while, JWG was crying – but could, obviously, not scream because she had been gagged.

9. JWG testified that since the Appellant's house was not too near, they arrived there at around 8:30pm. At the house, the Appellant announced that he needed sex and when JWG declined, he proceeded to tie her to a bed and forcibly had sex with her –four times in total throughout the night. Presumably, JWG was tied to the bed the whole night.

10. At 6:00am the following morning, the Appellant set JWG free. Afraid to go home where she feared she would get a beating, JWG went to the shopping centre instead. It is not entirely clear where exactly in the shopping centre she went. But she remained away from home until that evening at around 6:00pm when she finally went home and told her mother what had happened. Her mother then arranged for her to record a statement at the Police Station and for a medical examination.

11. JWG's mother, A M testified as PW2. She confirmed that she sent her daughter to the *posho* mill on 23/01/2010 at around 6:00pm but that JWG never returned that night. She and a friend embarked on a mission of looking for her and continued in the search until 1:00am the following morning when they called it a day. Early the following morning, she woke up her son to help her and they resumed the search. Eventually, A testified that her son was told by a boy that JWG had been seen with a certain man the previous night. The description of the person fitted the Appellant who was known to A's son. So, A's son went to the Appellant's home. They later reported to the Area Chief and the Police and the Appellant was arrested.

12. PW3 was the investigating officer. He received the report about the defilement at Kabati Police Station. He gave JWG a note and a P3 form on 25/01/2010 to take to Thika Hospital. Curiously, PW3 testified that he had started investigations about a case of defilement that had been reported to him on 23/01/2010 – that is the day JWG disappeared. He completed his investigations and decided to bring charges against the Appellant.

13. The last Prosecution witness was Dr. Rose Jalang'o. She did not examine JWG but the doctor who did – a Dr. Nyangasi had travelled out of the country for further studies. Dr. Jalango produced the P3 form. Upon examination, Dr. Nyangasi had found white discharge and a broken hymen. There were no lacerations or bruises. No other tests were carried out.

14. Against this prosecution version of events, the Appellant's theory is one of simple denial. He denied ever defiling JWG and specifically on that day. He believes that this is a frame-up. He testified that on 24/01/2010, he was walking home from work when he was arrested and charged with the offence. He insisted that he did not know anything about the defilement.

D. ANALYSIS OF APPEAL

15. After hearing all the evidence presented, the Learned Trial was persuaded that the Prosecution had proved its case beyond reasonable doubt. In particular, the Learned Trial Magistrate found RNM to be a truthful and consistent witness. She was impressed by her testimony calling it “very explicit”.

In material part, the Learned Magistrate finds thus:

I have, too, noted the accused person’s defence which is a mere empty denial and on how he was arrested. To me PW1 was very explicit. Her testimony is believable and credible. I am convinced that the accused person did defile her after covering her mouth and tying her to bed. The Complainant is 14 years old. PW2 confirms PW1 went missing. PW4 opinion that PW1 was defiled is watertight. I need not belabor this.

Bottom line [is that the] Prosecution case is put beyond reasonable doubt. I consequently find the Accused Person guilty as charged on the main count of defilement and convict him accordingly.

16. On my part, I am unable to express such effusive optimism that the evidence led by the Prosecution left no reasonable doubt that the Appellant defiled JWG on 23/01/2010. In particular, I am troubled by three material inconsistencies or discrepancies and the failure to call a crucial witness. I will begin with the former.

17. In going through the trial record, I noted at least two contradictions which I would consider material. First, in her examination-in-chief, JWG was categorical that she was at the *posho* mill when the Appellant called her and lied to her that her mother was calling her. Yet, in her cross-examination as well as the story she first gave the Investigating Officer (PW3), she was at the butchery where she had gone to buy meat when the Appellant told her that her mother was calling her. This contradiction is compounded by the fact that in her cross-examination she introduces another person who apparently called her – and identifies her as Bernard’s brother.

18. The second material contradiction is introduced by the evidence of PW3 who testified that he began investigations into defilement on 23/01/2010 – the day JWG disappeared. It is possible that this could be a mistake in dates – but it is unlikely to be so because PW3 confidently states that he began investigations before JWG had reported the matter to the Police. This raises significant doubts as to the narrative by JWG and PW2 about what happened.

19. Thirdly, A, JWG’s mother who testified as PW2 testified that her son told her that he had been told by a certain boy that JWG had been seen with the Appellant at the shopping centre. Indeed, this is crucial evidence because it is the only link between the Appellant and the offence other than JWG’s testimony. If that narrative is true, it belies JWG’s narrative about how the Appellant took her wrists by force, gagged her and carried her on his back all the way to his house. This aspect of the narrative invites more doubt considering the seeming implausibility of the Appellant carrying a young lady of fourteen years old on his back for what JWG estimated was “quite some distance.”

20. In my view, these contradictions assume critical significance when one considers two other factors. The first one is that JWG admits that she did not go straight home on 24/01/2010 but instead went to the Shopping Centre and only later that night went home. Secondly, the medical evidence was not categorical that the hymen had been recently perforated or that sexual intercourse had taken place recently. While it is possible for defilement to take place and for there to be no lacerations or bruises, none were found here making the medical evidence inconclusive as to the date of the defilement. All the medical evidence showed was that JWG had been defiled at some point in her life. The medical evidence did not show who did it. This is important in view of the contradictions raised above.

21. Finally, perhaps the evidence that would have brought it all together would have been the evidence of a certain Bernard who JWG said on cross-examination was present when the Appellant called her from the *posho* mill (or butchery). There was no explanation why this Bernard was not called to corroborate

this story. In my view, this would have been an essential witness in view of the contradictions in the Prosecution story. Without his evidence, I follow *Bukenya & Others Vs Uganda (1972) EA 549* where the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

22. While it is true that minor discrepancies and inconsistencies in the Prosecution case can be ignored (see *Erick Onyango Ondeng' v Republic [2014] eKLR CRIMINAL APPEAL NO. 5 OF 2013*), I am unable to overlook the inconsistencies here. These are not just minor inconsistencies.

23. In my view, therefore, when all is said and done, I find that the material contradictions in the testimonies of Prosecution Witnesses coupled with the seeming implausibility of some of the narratives lead me to the conclusion that it is not possible to say that the charges against the Appellant in this case were proved beyond reasonable doubts. There are too many un-answered questions left for the conviction to be said to be safe.

E. CONCLUSION, DISPOSAL AND ORDERS

24. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

- a. For the reasons stated above, the appeal is allowed and the conviction of the Appellant in Thika Chief Magistrate's Criminal Case No. 426 of 2010 is hereby quashed.
- b. The sentence imposed by the Trial Court of twenty years imprisonment is hereby set aside.
- c. Consequently, the Appellant shall be set free forthwith unless he is otherwise lawfully held in custody.

25. Orders accordingly.

Dated and delivered at Kiambu this 28th day of June, 2017.

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JOEL NGUGI

JUDGE