



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 21 OF 2016

TSUMA LALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 175 of 2015 in the Senior Resident Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 18th April 2016)

JUDGMENT

1. The Appellant herein, Tsuma Lalo, was tried and convicted by Hon E. M. Kadima, Resident Magistrate for the offence of defilement 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 indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows:-

“On diverse dates between 1st September 2014 and 30th September 2014 at *particulars withheld* within Taita Taveta County, intentionally caused your male organs (penis) to penetrate the female organs (vagina) of M R K a child aged 15 years.”

ALTERNATIVE CHARGE

“On diverse dates between 1st September 2014 and 30th September 2014 at *particulars withheld* within Taita Taveta County, intentionally and unlawfully touched the vagina of M R K a child aged 15 years with your penis.”

3. Being dissatisfied with the said judgment, on 1st July 2016 the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time which application was allowed and the Petition of Appeal deemed as having been duly filed and served. His Grounds of Appeal were as follows:-

1. THAT the honourable resident magistrate erred in law and fact by finding that the prosecution had established the appellant's guilty (sic) beyond reasonable doubt to warrant his conviction.

2. THAT the honourable resident magistrate erred in law and fact by believing the alleged medical evidence relating to penetration and hence DNA test(sic).

3. THAT the honourable resident magistrate erred in law and fact by failing to appreciate the appellant's personal and social circumstances in his sentencing.

4. THAT the honourable resident magistrate erred in law and act by not considering his defence submission.

4. This court directed him to file his Written Submissions. Instead of doing so, he filed his Written Submissions on 20th December 2016 along with Amended Grounds of Appeal. His response to the State's Written Submissions dated 15th February 2017 and filed on 16th February 2017 were filed on 7th March 2017.

5. His Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by believing the contents of the charge without seeing that the name appeared (sic) contradict the identity of the prosecution witness on his conviction (sic).

2. THAT the learned trial magistrate erred in law and fact by relying on the evidence of PW1 and PW3 without seeing (sic) that this was merely (sic) fabrication and unbelievable (sic).

3. THAT the trial magistrate erred in law and fact by finding that the prosecution proved its case beyond any reasonable doubt to warrant his conviction.

4. THAT the trial magistrate erred in law and fact by believing the medical evidence relating to scientific examination (sic) - D.N.A. that lacks truth to believe (sic).

6. When the matter came up on 19th April 2017, both the Appellant and counsel for the State asked this court to rely on their respective Written Submissions in their entirety, which submissions were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

7. The Appellant contended that the Charge Sheet did not (sic) go contrary to the evidence on record and that such Charge Sheet ought to have been corrected even if the case was to be taken back or returned for a retrial (sic). It did appear to this court that he may have intended to state that the Charge Sheet went contrary to the evidence on record and ought to have been amended. This is because his argument was that the name "alias Omar Tsuma" ought to have appeared in the Charge Sheet as the Complainant, M R K (hereinafter referred to as "PW 1") had testified that that was the name of the person who defiled her.

8. It was his further argument that her evidence that the alleged incident occurred in 2014 or 2015 showed that she had fabricated the case against him, which fabrication may have been because of a grudge between him and PC Joshua Kopa, the Investigation Officer herein (hereinafter referred to as "PW 5"). He further contended that no investigations were done to establish how he was identified because the scientific evidence showed that Omar Tsuma Lalo was 99.99% the biological father of the child and that the person who came with a car lived in a different village.

9. He was emphatic that everything was done by the said Omari Tsuma Lalo who was PW 1's neighbour and as all the Prosecution witnesses referred to him by that name, for all purposes and intent, Tsuma Lalo and Omar Tsuma Lalo were two (2) different people.

10. He averred that he did not know what was going on after he was examined and that he had complained during his defence in the Trial Court and raised the issue of authenticity of the DNA results. He termed his trial as unfair and that the poor preparation of the Charge Sheet was a violation of the law.

THE STATE'S CASE

11. On its part, the State submitted that although PW 1 was not a child of tender years, the Learned Trial Magistrate conducted a *voire dire* examination whereupon he allowed her to testify under oath. It argued that Section 124 of the Evidence Act Cap 80 (Laws of Kenya) empowered the said Learned Trial Magistrate to convict the Appellant based on the evidence of PW 1's evidence only which was circumstantial.

12. The proviso to the said Section 124 provides 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

13. It added that her evidence was nonetheless corroborated by the evidence of Amina Kilugha (hereinafter referred to as “PW 3”) who testified that although she did not witness the Appellant defile PW 1, they slept in the Appellant's house, by that of Dr Stephen Katana (hereinafter referred to as “PW 4”) who adduced the P3 Form in evidence and confirmed that PW 1 was seven (7) months pregnant and by the evidence of George Lawrence Oguda, the Government Chemist (hereinafter referred to as “PW 6”) who adduced a Report that positively identified the Appellant as the father of PW 1's child.

14. It pointed out that PW 5 tendered in evidence a Birth Certificate that showed that PW 1 was aged fifteen (15) years at the time of incident and consequently, the Appellant was properly sentenced under the proper provision of the law to wit Section 8(3) of the Sexual Offences Act that provides as follows:-

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

15. It was its submission that the Prosecution proved its case beyond reasonable doubt and urged this court to dismiss the Appellant's Appeal as the same was not merited.

LEGAL ANALYSIS

16. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held 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”.

17. Having looked at the Appellant's and State's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds together as they were related.

18. It was evident from the Appellant's submissions that his main argument was that he was not the person who defiled PW 1. He denied that he was known as Omar Tsuma Lalo whom the Prosecution witnesses referred to in their testimony. However, PW 1 confirmed in her evidence that the Omar who defiled her on 13th September 2014 was one and the same person as the Appellant herein. She identified the said Omar by pointing at the Appellant in the dock. PW 3 also pointed at the Appellant in the dock as the person in whose house they slept in on 13th September 2014.

19. The Appellant's assertion that Omar Tsuma was the one to be charged and not him was also negated by the fact that the DNA Report dated 7th August 2015 that was adduced as evidence by PW 6 showed that Tsuma Lalo was 99.99% the biological father of PW 1's child. Indeed, PW 6 was clear in his

evidence that he took the samples from Tsuma Lalo who was the Appellant herein. It was irrelevant that in his oral evidence in court he referred to Omar Tsuma Lalo as the biological father of PW 1's child. The exact conclusion in the DNA Report were as follows:-

“Based on the above findings there are 99.99+% more chances that Tsuma Lalo (emphasis court) is the biological father of S R, M. K. R. son.”

20. However, even if one was to assume that the person who impregnated PW 1 was Omar Tsuma as the Appellant had alleged, then he was not able to demonstrate how the samples that were taken from him connected him to PW 1's child as his biological father and not to any other person. Indeed, going by the scientific conclusion of PW 6, if samples had been taken from the said Omar Tsuma, they would definitely have showed that he was not the father to PW 1's child. In that regard, the Appellant's assertions that Omar was a different person from him fell by the wayside.

21. It was thus immaterial that the Charge Sheet did not contain the name Omar. Indeed, there is no legal requirement that a charge sheet must contain all the names of an accused person. It is sufficient that an accused person can be identified from the names that have been indicated in a charge sheet.

22. A careful perusal of PW 1's evidence shows that the charges were preferred against the Appellant herein after he refused to take up responsibility for having impregnated her. Her testimony was that he had accepted to finance her education but later on started boasting to neighbours that he was playing with their minds.

23. It was immaterial that there were some inconsistencies and contradictions in PW 1's evidence. This is because the scientific evidence that connected the Appellant to PW 1 through her child made this case a fairly straight forward one. The Learned Trial Magistrate therefore arrived at a correct conclusion when he observed that the Appellant had not controverted PW 1's evidence regarding the circumstances under which he defiled her and that she had positively identified him as the perpetrator of the offence herein.

24. His assertions that there was a grudge between him and PW 5 or that his brother, Ndegwa Lalo, could have confirmed his alibi that he was at home on 13th September 2014 were rendered useless as the scientific evidence against him was cogent. His defence was thus not strong enough to displace the Prosecution's case.

25. At the time PW 1 was defiled in 2014, she was aged fifteen (15) years. The Birth Certificate that was adduced in evidence showed that she was born on 20th July 1999. In this regard, the Learned Trial Magistrate also came to the correct conclusion when he sentenced the Appellant to twenty (20) years imprisonment as that is the minimum sentence prescribed by the law. His hands and those of this court are tied.

26. Accordingly, having perused the Written Submissions by the Appellant and the State, this court came to the firm conclusion that the Prosecution had proven its case beyond reasonable doubt. Indeed, PW 1's evidence was corroborated by material evidence of the other Prosecution which was further confirmed by the DNA Results. The conditions under which the Appellant could be convicted under the provisions of Section 124 of the Evidence Act were satisfied as could be seen in the holding in the case of **Musikiri vs Republic (1987) KLR 69** where it was held as follows:-

“The necessity of material corroboration of the evidence of a child of tender years is, under Section 124 of the Evidence Act (Cap 80), an indispensable condition to a conviction of a person charged with an offence.”

27. In the premises foregoing, all the Amended Grounds of Appeal were not merited and the same are hereby dismissed.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 1st July 2016 was not merited and same is hereby dismissed. This court hereby affirms the conviction and sentence that was meted upon the Appellant by the Trial Court as the same was warranted.

29. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Tsuma Lalo - Appellant

Mis Karani - for State

Josephat Mavu – Court Clerk