



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 45 OF 2015

ZAKARY KIMONDO GITARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Nyeri

Criminal Case No.26 of 2011 by Hon. W.A. Juma, CM on 13.12.12)

JUDGMENT

The Trial

The Appellant herein **Zakary Kimondo Gitari** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that:-

On 2.7.11 at [particulars withheld] in Kieni West District within Central Province intentionally and unlawfully did an act of penetration by inserting his penis into the vagina of EWW a girl child aged 10 years

The prosecution called a total of six (6) witnesses in support of their case. Complainant **EWW** told court that she was 10 years old and was in class 4. She recalled that on 2.7.11 at about 2.00 pm, she was defiled by appellant when she was sent by her mother to sell eggs to him. It was her evidence that one Ndungu also defiled her on the same date.

PW2 E W, the complainant's grandmother noticed that complainant was walking with her legs astride and had urine incontinence on 5.7.11 and upon questioned her said that Zacharia had defiled her. PW3 M W recalled that on 11.7.11, complainant who looked sickly told her that she had been defiled by Zakayo Kimondo and Ndungu. PW6 M W who was with PW3 said that she had been defiled by Zakary.

PW4 PC Patricia Mwendwa the investigating officer conceded that complainant said she was defiled by appellant and another person.

PW5 Dr. Njoroge Susan presented complainant's P3 form filled by Dr. Muturi as PEXH. 1. The P3 showed broken hymen, superficial friction burns on thighs caused by excessive force, foul discharge and pus cells and blood cells. She said complainant's age was estimated to be 10 years.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He denied seeing complainant on the material date. He said he working for Moses Maina on the material date from 8.00 am to 4.00 pm and denied that complainant delivered eggs to him. He said he was arrested together with one Ndungu who was not charged. He said that the complainant's grandmother has a habit of framing people with allegations of defiling the complainant and that she settles the cases after she is paid off.

His witness Moses Maina told court that appellant worked for him on the material date from 8.00 am to 4.00 pm.

The learned trial magistrate considered the evidence, dismissed the defence and sentenced appellant to serve life imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 21st July 2016, the appellant set out 8 grounds of appeal which can be summarized into 6 grounds to wit:-

- 1. The learned trial magistrate erred in law and fact by finding that there was sufficient evidence to support the charge of defilement beyond any reasonable doubt***
- 2. The learned trial magistrate erred in law and fact by finding that the testimonies of the prosecution witnesses were contradictory but nonetheless proceeded to rely on the same to convict the appellant***
- 3. The learned trial magistrate erred in law and fact by relying on secondary evidence against the provisions of the law***
- 4. The learned trial magistrate erred in law and fact by not considering the defence case***
- 5. The learned trial magistrate erred in law and fact by ignoring the legal principles governing circumstantial evidence***
- 6. The learned trial magistrate erred in law in sustaining a charge of defilement when the age of the complainant was not established***

Mr. Muchiri, learned counsel for the appellant submitted that the prosecution case was not proved beyond any reasonable doubt since there the charge sheet and evidence by complainant, PW2, PW3 and PW6 shows that offence was committed on 2.7.11 while the P3 form refers to an offence committed on 30.6.11. He also submitted that one Ndungu who had also been arrested after he was implicated by the complainant and her grandmother (PW2) was released without charges. He submitted that there is doubt as to the identity of the appellant as the one that defiled complainant especially since complainant said she had been defiled by Zakayo Kimondo and Ndungu a fact that was corroborated by her grandmother and PW3. The trial magistrate was also faulted for convicting appellant under section 8(2) of the Sexual Offences Act even after finding that complainant was mentally challenged and appellant ought to have been charged under 7 of the Act. Counsel faulted the trial magistrate for ignoring the defence, trivializing the contradictions and convicting the appellant against the weight of evidence.

Mr. Nyamache, learned counsel for the state conceded that that there was evidence that complainant was defiled by 2 men and that there were contradictions in the prosecution case but submitted that the contradictions had been resolved by the trial court. Counsel also submitted that complainant was not mentally retarded and that appellant was properly convicted under section 8(2) of the Sexual Offences Act. Additionally, counsel submitted that appellant's defence was rejected because he did not question PW2 on the issues he raised in his defence.

Analysis and Determination

This is the first appellate court and as such I am guided by the principles set out in the case David Njuguna Wairimu V Republic [2010] eKLR where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

I have considered the submission for the appellant and by the state and I will address the issues raised as follows:

1. Was appellant charged under the correct provisions of the law?

Counsel for the appellant argued that trial magistrate after finding that complainant was mentally challenged ought to have convicted appellant to have been charged under 7 of the Sexual Offences Act and not under section 8(1) as read with section (2) of the Act. Although it was alleged that complainant is mentally retarded, no medical evidence was tendered in support thereof. I therefore find that appellant was properly charged under section 8(1) as read with section (2) of the Sexual Offences Act.

2. Is the prosecution case contradictory?

Complainant stated that she was defiled on 2.7.11 by appellant and one Ndungu and the prosecution led evidence in support of that date. The P3 form however shows that the alleged offence was committed on 30.6.11. In her judgment, the trial magistrate found that there were contradictions relating to the date of the alleged offence and ruled that the offence was committed between 30.6.11 and 5.7.11.

Complainant’s evidence raises doubt as to whether it was the appellant and not Ndungu that defiled her. In the face of these material contradictions between the evidence on record and the charge sheet, it was prejudicial to put reliance on the said P3 form and to found a conviction on the same. The conflicting dates were a fundamental contradiction and the court ought to have found that the prosecution’s case was not proved beyond reasonable doubt.

3. Was complainant’s age ascertained?

As regards lack of a birth certificate or an age assessment report to establish the exact age of the complainant for purposes of computing the applicable penal provision under the Sexual Offences Act, the Court of Appeal in J.W.A. v. Republic (2014) eKLR held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report, and said as follows:

“The gist of the appellant’s appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1989 and was thus 10 years old in 2009, when the offence was committed; the P3 Form tendered in evidence as Exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the trial courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years

The complainant said she was 10 years old. The doctor that filled the P3 form PEXH. 1 assessed complainant's age to be 10 years. From the foregoing; I find that the age of the child was proved.

4. Appellant's alibi

On alibi evidence, the Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons”.

The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered by complainant cannot be said to be overwhelming. I have considered the judgment of the trial court and I find that the appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt.

Decision

In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED THIS 18th DAY OF July 2017

T. W. CHERERE

JUDGE

DELIVERED ON THIS 27TH DAY OF JULY 2017

BY: - NGAAH J

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -