



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
HCRA NO. 159 OF 2017

JUSTUS MUTUA NDAVI APPELLANT

-VERSUS-

REPUBLIC PROSECUTION

JUDGEMENT

1) The Appellant/accused in lower court Justus Mutua Ndavi was charged with offence of;

MAIN CHARGE: ATTEMPTED DEFILEMENT CONTRARY TO SECTION 9(1) AS READ WITH SECTION 9(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

2) Particulars are that on the 15th day of November 2012 at [particulars withheld] Village, Nguumo Location, within Makueni County intentionally and unlawfully attempted to cause his genital male organ namely a penis to penetrate the female organ namely vagina of N W, a child aged fourteen (14) years.

3) **ALTERNATIVE CHARGE: COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION II (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.**

4) Particulars are that on the 15th day of November 2012 at [particulars withheld] Village, Nguumo Location, within Makueni County intentionally and unlawfully committed an indecent act by touching the vagina of N W, a child aged fourteen (14) years with his fingers.

5) After the matter went into full trial, the trial court convicted the Appellant and sentenced him to serve **10 years** imprisonment.

6) Being aggrieved by the above decision, the Appellant appealed and set out the following grounds in the memorandum of the appeal namely:-

-That the Appellant pleaded not guilty to the offence.

-That the Appellant have not been tried in any court of law in his life before.

-That the Appellant have a wife and one child who depend on him.

-That the sentence is excessive and harsh.

7) Before the hearing, the Appellant lodged amended/supplementary grounds of appeal 1-6 namely:-

-THAT the evidence of PW1, PW2 and PW3 were inconsistent and contradictory hence should not have been employed as a basis for Appellant's conviction.

-THAT crucial witnesses did not testify and vital evidences were not submitted thus eroding the credibility of the case allegations.

-THAT the medical evidence of PW4 as regards Appellant's indictment was not supported by any factual and/or forensic evidence.

-THAT the total evidence adduced was insufficient and failed to prove the allegations beyond a reasonable doubt.

-THAT the trial magistrate factored issues not canvassed during trial hence prejudiced the allegations against the appellant.

-THAT the trial court ought to have accorded appellant with advocate services pursuant to Constitutional Article 50(2) (h).

8) The parties agreed to canvass the appeal via submissions.

9) The appellant filed and served his submissions but the state replied orally.

10) This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

11) In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

12) Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364**. See also **OKENO – VS- REPUBLIC**.

13) The summary of the evidence is as follows:-

14) **PW1** was the complainant one **N W** who informed the court that on **15/11/2012** at about **6.00 p.m.**, she had arrived home from school and had been asked by her guardian one **F M** to wash utensils. She testified that she did was the dishes and thereafter the accused enquired from her whether there was food and if there was, to warm it for him.

15) She indicated that she warmed the food and the accused then sent her to buy tomatoes and onions. She came back and prepared *kachumbari* all this while she informed the court that they were seated in the sitting room. She then served the accused dinner and went to sleep.

16) It was her testimony that while she was sleeping she suddenly woke up and found the accused in her room and on her bed. She indicated that she did not hear him enter her room. She indicated to the court that the lights were off but the accused spoke to her when she was about to run and told her not to go outside.

17) It was in her testimony that the accused laid on top of her and had removed all his clothes and was only wearing a vest. She testified that her pant was still on but had a slimy substance. She stated that she did not feel like she had been defiled but woke up and ran.

18) She indicated that she lied to the accused that she was going to the toilet and went and informed one mama Nzisa who advised her to go back and lock the room from outside so that the accused could not run

away.

19) She therefore acted as advised and later on neighbours came. One of the neighbours mama Wangila checked her to confirm whether she had been defiled. It was her testimony that police officers were called and the accused was arrested.

20) She was then taken to Makindu District Hospital for treatment and was issued with a P3 form that was duly filled.

21) The complainant informed the court that she used to live with the accused in the same home that belonged to her guardian F. She indicated that they had lived together for about two years.

22) Upon cross examination the witness stated that she was not related to the accused. She indicated that on the date of the offence she had slept at 8.00 p.m.

23) She further stated that F used to tell her to call the accused uncle. She clarified that the accused did not threaten her with a knife or tear her clothes.

24) **PW2** was **Rhodah Mutikwa Musembi** who stated that she looks after orphaned children in a group called Orphans Vulnerable Children. It was her testimony that on **15/11/2012** at about **9.45 p.m.**, she was sleeping when she was called by one **Penina Mutuku** who informed her that one of the children in her group had been defiled. She indicated that the child was at **F M's Home** and the child's name was **N W**.

25) She informed the court that when she received the said information she decided to go to F's home but on the way thought it was best to inform the assistant chief of the issue. She thus called the assistant chief and they met on the way and headed there together.

26) It was her testimony that when they got there, they found people had gathered and the child was outside crying and the door had been locked from outside. She thus interrogated the girl and she told her the person locked in the house had defiled her.

27) The assistant chief thus went to Kiunduanu Administration Police Post and came back with officers who proceeded to arrest the accused. The witness stated that they reported the incident to the police and the child was taken to hospital.

28) She testified that she did not know the accused before and only got to know him on the date of the incident.

29) Upon cross examination the witness stated that she called the assistant chief a few minutes before **10.00 p.m.**

30) **PW3** was one **Joseph Maweu Ndolo** who informed the court that he was the assistant chief Nguumo Location. He testified that on **15/11/2012** at about **9.00 p.m.**, he was at home and was called by Rhodah Musembi who told him that a child had been defiled.

31) He consequently woke up and went to the said home and when he got there, he found people had gathered and the accused had been locked inside the house. He learnt that the complainant had escaped and reported the matter to a neighbour.

32) It was his testimony that he called the police and they came and arrested the accused. He informed the court that the accused was new in the area and he had not seen him before.

33) Upon cross-examination, the witness stated that he received the call from Rhodah at 9.00 p.m. and had confirmed the time since he had a watch. He further stated that since the accused was new in the area he believed the complainant.

34) He indicated that as an administrator of the area he had to attend the issue when he was called by Rhodah.

35) **PW4** was **Dr. Esther Musyoki**, a medical doctor attached at Makindu District Hospital who testified that on **16/11/2011** she examined one N W who had allegedly been defiled by someone known to her. On examination, the external genitalia was normal and the hymen was intact. There was no discharge or blood noted.

36) Medical investigations carried out were normal and the HIV and STD tests were negative. The doctor informed the court that her assessment was that there was no physical injuries and opined that there was no penetration but there was an attempt. She proceeded to produce the P3 form as an exhibit.

37) Upon cross-examination, the doctor indicated that she did not treat the accused or the complainant. She clarified that the complainant had already been treated when she examined her. She indicated that she had assessed the degree of injury as grievous harm because of the attempted defilement that had caused the complainant psychological and emotional trauma.

38) **PW5** was the Investigating Officer Sergeant **Bernard Mburia** currently attached at Makindu Police Station. He testified that on **16/11/2012** at around **8.00 a.m.**, he reported to the station and by that time the complainant had reported the defilement case.

39) He also learnt that the accused had been arrested by AP officers from Kunduani AP post. He informed the court that he therefore began his investigations by taking the accused and the complainant to hospital for examination.

40) After examination the investigating officer indicated that it was established when the P3 form was filled that the accused had defiled the complainant. He consequently recorded the witnesses' statements and thereafter charged the accused with the offence before the court.

41) Upon cross-examination the investigating officer stated that the woman the complainant used to live with recorded her statement but thereafter refused to testify. The investigating officer did further state that one woman (PW2) had kept the child in the said home for safe custody but the owner of the house kept travelling and the child would be left alone.

42) The prosecution closed its case and the accused was put to his defence where he opted to give an unsworn testimony.

43) The accused informed the court that he was a commercial driver in Mombasa and thus on **15/11/2012** he woke up as usual and had breakfast and had planned to travel from Mombasa to Kiunduani to her cousin's home.

44) It was his testimony that he left Mombasa at 9.30 a.m. and by 12.00 p.m., he was at Kiunduani. He indicated that he found his cousin in her homestead and they stayed there till 6.00 p.m.

45) At about 6.30 p.m., the accused informed the court that her cousin was called by someone and she left and he was thus left alone in the homestead. He informed the court that he stayed there till 8.30 p.m. and at 9.00 p.m., he slept.

46) It was his testimony that while he was asleep he heard people come to the homestead with boda bodas and they were making noise and they claimed he had defiled the complainant.

47) The accused stated that he then called his cousin and told her what was happening. His cousin came and called officers from Kiunduani AP post who came while drunk and upon being told what had happened they decided to arrest him and on the next day they took him to Makindu police station where he spent the night and on the following day, he was taken to hospital with the complainant who he did not know.

48) He was then charged in court on a Monday and denied the charges. The accused's testimony was that on **14/05/2013**, the case began with the complainant's testimony who stated that she did not record her statement and did not know the people who had recorded their statements whereas PW3 indicated that she had been called by someone who was not a witness to the case and further stated that she did not witness the incident.

49) PW4 was also called by PW3 and did not also witness the offence. The accused then informed the court that PW6, the doctor had indicated to the court that the offence was attempted defilement. In regard to PW7 the accused opined that his investigations revealed that the complainant knew him yet the complainant had indicated she did not.

50) It was his testimony that the investigating officer did not prove to the court why the witnesses had called each other even before the offence. He opined that failure to do so proved that it was an organized gang to attack him.

51) Further the accused informed the court that the case was a revenge on his cousin who had bought land at Kiunduani and they did not want any good for her since she was in good terms with the witnesses and they therefore decided to frame him.

52) The accused had no witnesses to call and therefore closed his case.

53) The Appellant submitted that:-

A: GROUND 1

Contradictions and inconsistencies.

54) PW1 testimony was itself filled with contrary and inconsistent details. *On page 9, lines 23-24:- "I did not hear him enter my room but when I woke up he was on my bed."* However on *page 10, lines 3-4 "When I suddenly woke up I found the accused on top of me."* Same page, *line 8-19 "We had lived together for about 2 months."* Yet *line 22* tells a different story – *"I don't know you and we are not related."*

55) And as regards the alleged incident itself she asserts at *line 3 "He defiled me."* But at *line 7 "I did not feel if I had been defiled."*

56) PW2, Rhodah Mutikwa Musembi testified that she apparently received a call from one Peninah Mutuku at 9.45 p.m. (*See page 11, line 8*) and following which she then called PW3 – i.e. the assistant chief *"Sometimes before 10.00 O'clock"* (*See page 12, lines 9-10*).

57) But PW3 testified that he was called by the said PW2 *"at about 9.00 p.m."* (*See page 12, line 16*) and if there's any doubt, this point of chronology is underscored emphatically on *Page 13, lines 4-5:- "I was called at about 9.00 p.m.. I had a watch and it was 9.00 p.m."*

B: GROUND 2

Witnesses and real evidences not submitted.

58) PW1 claimed that she woke up and found a slimy substance on her panties (*See page 10, line 5*). This was vital and crucial evidence that should have been submitted to test to confirm PW1's allegations. This was not done for reasons better known to the prosecution.

59) In spite of this poignant omission, several other key witnesses were also not paraded in support of the prosecution's allegations, an omission aptly captured by the trial magistrate during judgement as on *Page 28, lines 6-9*.

“.....and although there were some linkages missing like for example the lady who contacted PW3, the lady one mama Nzisa who advised the complainant to lock the door from outside and the owner one F M who did not testify and whom the IO intimated to court that they declined to testify.....”

60) Why would witnesses decline to testify? And more so female witnesses whose sympathies would surely lie with their gender? It is quiet instructive that the investigating officer, PW5 did not advance any concrete reasons as to why said potential witnesses declined to testify.

61) Neither was the court informed of what efforts said IO effected with an aim of providing such crucial evidences before court. Were the witnesses summoned officially? In light of this anomaly appellant begs that the Honourable Court be pleased to be guided by the precedent case of **BUKENYA-VS-UGANDA (1972)EA 549** where the superior court held:-

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. The court has the right and duty to call the witness whose evidence appears essential to the just and fair decision of the case. When the evidence called is barely adequate, the court may infer that the evidence of the uncalled witnesses would have tendered to be adverse to the prosecution.”

C: GROUND 3/4

Insufficient Evidence.

62) The medical witness PW4 adduced evidence to support the allegations of attempted defilement (See page 15, line 13). However the witness did not advance any factual evidence in support of such a hypothesis and consequently it was wrong for the trial court to convict on an unestablished theory. The content as per the P3 form did not allude to any forensic analysis revealed by the medical examination of PW1.

63) The forgoing coupled with the absence of the alleged soiled panty rendered the entire prosecution evidence flimsy and skeletal. For the trial magistrate to declare that the witnesses corroborated each other is akin to fitting a round peg in a square hole. Thus the case failed to meet the threshold of proof beyond a reasonable doubt.

D: GROUND 5

Importation of evidence not canvassed.

64) On page 25 lines 2-3 it is recorded –***“she indicated that they had lived together for about two years.”*** However this finding by the trial magistrate is not supported by the actual evidence as adduced by PW1 and gives the misleading imputation that the appellant and PW1 were well known to each other prior to the alleged incident.

E: GROUND 6

Quest for legal representation

65) Constitution Article 50 (2) (h) is unambiguous and unequivocal on the issue of advocate services to an accused person in the interest of a fair hearing by proclaiming that:-

“Article 50(2) Every accused person has the right to a fair trial which includes the right – (h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

66) The appellant was never informed as regards this constitutional right hence the trial court failed to

discharge a cardinal prerequisite and the result was an injustice against the appellant.

67) The Assistant Director of Public Prosecution replied in opposing the appeal that pw 1, 2, and 3 plus that of pw4 medical office proved prosecution case beyond reasonable doubt. Pw1 knew appellant and thus identity not an issue.

68) After going through the material before the court, I find the following issues emerge:-

i. Whether the case was proved beyond reasonable doubt?

ii. Whether the appellant rights under article 50 (2) (j) were violated?

69. The complainant testified that while at home with appellant, she ate supper and went to bed. She woke up later and found appellant on her bed wearing only vest. She found her pant which she was wearing had slimy substance on it. She reported to a neighbour mama Nzisa.

70. PW2 and PW3 went to the scene and found PW1 outside the house. PW3 assistant chief ordered for appellant arrest.

71. PW4 who examined PW1 found hymen intact and external genitalia normal and thus formed opinion that the PW1 was not defiled but opined that there was possible attempt. PW1 stated that she did not feel like she had been defiled.

72. The investigation officer who recorded statements stated that most of the witnesses who recorded statement declined to testify.

73. The appellant denied the allegation and stated that on the material night he slept in his cousin's home when he heard people making noise outside alleging that he had defiled a child. He called his cousin who came and called officers. He was arrested and taken to the police station.

74. Court observes that due to the evidence of PW1 that she felt she was not defiled and the doctor PW4 stated that there were no injuries or evidence of penetration, the police decided to charge the appellant with an offence of attempt of defilement.

75. The decision to charge the appellant was informed by the opinion of the doctor PW4 that "*there was possibly an attempt.*" It was not known where upon what facts that opinion was based.

76. The girl alleged to have found slimy substance on her pant which she was wearing. What was the slimy substance? None of the witnesses including the police and the doctor PW4 talked about it.

77. The pant was not produced as an exhibit nor was the alleged slimy substance tested to confirm its content. The girl alleges that when she woke up she found appellant on top of her and that he never threatened her or tear her clothes. On another breath she says when she woke up she found appellant in the bedroom.

78. The only evidence which is alleged founded the attempted defilement was the alleged act of appellant being on top of the girl and the alleged presence of the slimy substance on the girl's pant.

79. In this case the court wonders why pant was not taken for testing of the slimy substance. Nor produced to show same? Why did several witnesses refuse to testify?

80. The court finds that the evidence on record did not meet the threshold of attempted defilement and same offence was not thus proved beyond reasonable doubt and thus makes the following orders:-

1) The appeal is allowed, conviction quashed and the appellant is to be set at liberty unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 21ST DAY OF AUGUST, 2017.

C. KARIUKI

JUDGE

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