



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 59 OF 2014

J M N.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Chief Magistrate's Court ((Andayi W.F.) at Kerugoya, Criminal Case No. 210 of 2013 delivered on 22nd October, 2014)

JUDGMENT

1. The appellant **J M N** was charged with attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offences Act** before the **Senior Resident Magistrate's Court** at Kerugoya in Criminal Case No. 210 of 2013. It was alleged that on 16th May, 2013 within Kirinyaga County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of E.N.M a girl aged fifteen years.

2. The Appellant denied the charge. After a full trial, the Appellant was found guilty, convicted and sentenced to serve ten (10) years imprisonment. He was aggrieved by the conviction and sentence and filed this appeal.

3. The appeal raises the following grounds:

(i) That I pleaded guilty.

(ii) That the learned trial magistrate erred in both law and facts by not considering that the aunt to P.W. 1 who had first hand information was not a witness in this case yet P.W. 1 said she ran for safety to the aunt.

(iii) That the learned trial magistrate erred in both law and facts by failing to consider that the prosecution failed to avail the birth certificate of the complainant in court to confirm her age.

(iv) That the learned magistrate erred in both law and facts by failing to accord me a chance to cross-examine P.W. 2.

(v) That the learned trial magistrate failed to consider my defense which was not challenged by the prosecution.

He prays that:

- ***Appeal be allowed;***
- ***The conviction quashed;***
- ***Sentence set aside; and***
- ***He be set at liberty***

4. The Court gave directions that the appeal proceeds by way of written submissions. The Appellant filed submissions. He filed additional grounds together with the submissions without leave of the Court. The additional grounds are not signed and are undated. The additional grounds are not properly on record as they are filed without leave and are not signed. I strike them out.

5. The State opposed the appeal and filed submissions through the prosecution counsel Mr. E.P.O. Omooria. They urge the Court to dismiss

the appeal and uphold the conviction and sentence.

6. The brief facts of the case are that the complainant in this case E.N.M. was at the time of this offence a minor aged fifteen years. On 16th May, 2013 the complainant E.M.M. went to sleep. She used to share a bed with P.W. 2 who was her younger brother. Her step father J M who is the Appellant in this case approached her and told her to give him “a little bit”. The Appellant had gone on to the bed and he was naked. The complainant understood that he was desirous of having sexual intercourse with her. The Appellant was already between her thighs and indecently touching her breasts. The Complainant resisted. She managed to flee to the house of one J N. The complainant’s mother was not at home that particular night. The matter was reported to the Police and the Appellant was arrested and charged.

7. This being a first appeal this Court has a duty to evaluate the evidence which was adduced before the trial magistrate and come up with its own independent finding. This as was held in the case of **Okeno V R (1972) E.A. 132**. The Court to leave room for the fact that it did not have the chance to see the witness and to observe their demeanor.

8. The Complainant testified that on the material night she went to bed at about 11.00 p.m. when her step father, the Appellant herein went home and asked them if they had made evening meal. They had not so the Appellant made a meal and invited them to eat. They declined. The Complainant was sleeping with her sibling R.M. aged ten years and D.M. aged nine years. The Appellant went onto the bed where the Complainant was sleeping while he was naked. He touched her breasts indecently and told her to give him “a little bit”. She understood it to mean that he wanted to have sex with her as he was already between her thighs. The complainant resisted. Her brothers woke up. The Complainant managed to flee to the house of her aunt J N and narrated to her what took place.

9. The evidence of the Complainant remained intact as she was not cross-examined. When the Appellant was given a chance to cross-examine her he said he had no questions. There is nothing to prevent the Court from relying on her testimony. Her description of what the Appellant did on that night shows that he wanted to defile her. That is the reason why he told her to give her “a little bit” while very indecently touching her breasts, he was stark naked and was in between her legs. Her testimony is credible and reliable.

10. **P.W. 2 A.W.** was the wife of the Appellant who Court found that she was privileged. She was not a competent and compellable witness for the prosecution as provided under **Section 127** of the **Evidence Act**. Though the Court allowed her to address the Court, what she stated is of no consequence as it cannot be used against the Appellant.

11. **P.W. 3** was **R.M.** testified that he was asleep in the same room with the Complainant when he heard her sister who is the Complainant cry out. He did not know why she cried out. The complainant opened the door and left. Later the Complainant told him it is the Appellant who had gone to her bed. The evidence of the P.W. 3 was not shaken as he was not cross-examined. It shows that indeed the Complainant cried out and fled the house. I have no reason to doubt P.W. 3. His testimony shows that this was happening after the Appellant went home. His testimony corroborates that of the Complainant.

12. **P.W. 4 Police Constable Morris Kimotho** is the Police officer who received the report and arrested the Appellant.

13. The Appellant did not give any defence, he chose to remain silent. His first ground of appeal is that the prosecution failed to call one witness who was the aunt of the Complainant, J N and the brother of the victim D.M. The State in opposing this ground submits that this being a case involving a minor, a single witness evidence is sufficient to secure a conviction as long as the evidence is appreciated by the trial magistrate who is convinced that an offence took place and proof established as to whom the assailant was. It is trite law that no particular number of witnesses is sufficient to prove the case.

14. In this case the Appellant is the step-father of the complainant whom she must have known very well as they were living together. She had no difficulty to realize who the person who was demanding to be given a little bit was. It is well established that in sexual offences, the evidence of a single witness who is the victim of the offence is admissible and sufficient to convict. All what the Court is required to do is to give reasons that it is satisfied that the Complainant is telling the truth. **Section 124 of the Evidence Act** provides:

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.”

15. The trial magistrate analysed the evidence and gave reasons for believing the complainant. In the case of **Benjamin Mbugua Gitau (2011) eKLR**. The Court of Appeal dealt with a similar issue in a binding decision and stated as follows while dismissing the appeal:

“The learned Judge also dismissed the appellant’s contention that there was no corroboration of the complainant’s evidence stating that corroboration was not a requirement of the law as it was removed by the proviso to section 124 of the Evidence Act, and even if there was such requirement, it was declared unconstitutional in the case of Mukungu v R Cr. App. No. 277/02, as it would be discriminatory of women and girls.....

The central and crucial part of the prosecution case was the complainant’s evidence that she knew the appellant who was from the same village and that he did penetrate her genital organ with his.....

This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the

law so requires – see section 143 Evidence Act.

16. It is also clear from the judgment of the trial magistrate that he considered the evidence of identification by recognition in convicting the accused. Recognition is more reliable than identification. The Appellant talked in his design to defile the Complainant giving her material to recognize him. In the case of Peter Musau Mwanzia V R (2008) eKLR in the Court of appeal, the Court stated:

“In the well known case of R vs Turnbull (1976) 3 ALL ER 549 at page 552, it was stated: “Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger.....

Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”

The Complainant recognized the Appellant’s voice. He was her step father whom she was living with in the same house and had met her that same evening before she went to bed. There was no need for a voice identification parade. The trial magistrate had the opportunity to see the complainant, he properly addressed his mind to the evidence of the Complainant and cannot therefore be faulted for holding that she recognized the Appellant. The trial Magistrate was satisfied that the Complainant was credible. Under Section 124 of the Evidence Act (supra) the Court was right to convict the Appellant after being satisfied that she was telling the truth.

17. The Appellant faults the conviction on the ground that crucial witnesses were not called. He submits that D M the complainant’s brother and J N the complainant’s aunt were not called. In this case, failure to call the witnesses was not fatal as this was a sexual offence. In the case of Erick Onyango Ondeng’ -V- R (2014) eKLR the Court of Appeal held:

“In Bukenya & Others Vs Uganda (supra), 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; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;.....

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well. Section 143 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of P.W.2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened to pass by when the appellant was with P.W. 2 on a different occasion”.

The prosecution needs not to call all the persons who have information on a fact. Section 143 of the Evidence Act is clear that no particular number of witnesses is required to prove a fact. It provides:

“In the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.”

18. Though the two possible witnesses were not called, the evidence of the Complainant was consistent and as observed above was not challenged. There was no need to call other witnesses to prove the fact. A 15 year old girl was old enough, though a minor, to know what the Appellant was up to. Where a witness in a sexual offence has satisfactorily impressed the Court on her credibility, the State cannot be faulted for failing to call other witnesses to prove the issue.

19. The Appellant faults the trial Court on the ground that the age of the Complainant was not proved. Age of the victim in a sexual offence is a key ingredient that requires proof as it determines the provision under which the accused is to be charged and the sentence to be meted out. In dealing with this issue the High Court in the case of Joseph Kieti Seet Vs Republic (2014) eKLR it was held as follows:

“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.....”

The foregoing holdings are applicable in the instant case in various ways. At the trial, P.W. 2, the complainant herein stated that she was 12 years old. Both P.W. 3 and P.W. 4 who were the complainant’s biological parents stated that the complainant was aged 12. On the other hand the charge sheet indicated that the complainant was aged 12 as well as the P3 form that was produced in court as P. Exhibit 1.”

Furthermore, the trial court which had the opportunity of seeing P.W. 2 did not doubt her age. P.W. 2’s age was also not set on a borderline. I would have no reason to doubt that that was her age.”

20. In this case the trial magistrate considered the age of the applicant based on the fact that she was in form one at the time and that is the

standard age at which normal children join secondary school unless there are extenuating circumstances. The sentence for attempted defilement under **Section 9 (1) and (2) of the Sexual Offences Act** is general as it gives a minimum sentence. The only proof required is that the victim was a minor which was satisfactorily proved in this case. No doubts were cast on the age of the complainant as her evidence was not challenged on any aspect including age. The trial magistrate had the opportunity to see the witness and assess her age. He cannot be faulted in the absence of any evidence to the contrary. I find that there was no doubt that the complainant was aged 15 years. Her age was proved to the required standard.

21. The Appellant faults the Court for not considering the conditions in the evidence adduced. The Appellant claims the prosecution's evidence had the following contradictions:-

- a) The investigating officer testified that the appellant slapped P.W.3 but P.W. 3 did not testify on this.
- b) P.W. 2 the mother of the complainant went to report to the Police but during trial she stated that she did not know whether the allegation was correct.
- c) The complainant testified that they were three in number but P.W. 3 stated they were four.

The above contradictions are very minor and do not in any way change the fact that the appellant attempted to defile the complainant. In the case of **Erick Onyango Ondeng' V Republic [2014] eKLR** the Court of Appeal held:-

“Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at “about 7 p.m” in accordance with the evidence of P.W. 2. As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No. 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

22. The Appellant alleged that he was not given a chance to cross-examine P.W. 2. As already stated earlier, evidence of this witness was of no consequence. The Court found that she was a privileged witness. The Appellant did not allow her to testify against him and he could therefore not cross-examine her. This ground is a sham and must fail.

23. The Appellant submits that his defence was not considered. From the record, the Appellant chose to keep silent which was within his right to do so. The Court can only consider a defence which is offered but not something imaginary.

24. Finally the Appellant submits that the charge sheet was defective. His contention is that **Section 9 (1) and (2)** does not exist in the **Sexual Offences Act No. 3 of 2006**. **Section 9 (1) and (2)** provides:

- 1) ***“ A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
- 2) ***A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”***

The Section exists with the offence stated and the punishment provided disclosed as required under **Section 134 Criminal Procedure Code**.

In Conclusion:

The Appellant has submitted that the case was not proved beyond any reasonable doubts. In the case of **Stephene Nguti Mulili -V- R (2014) eKLR** before Court of Appeal it was stated:

“On the issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English Common Law” is that it is the duty of the prosecution to prove its case.....In reference to this Lord Denning in MILLER V MINISTRY OF PENSIONS, [1947] 2 ALL ER 372 stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

Having considered all the evidence adduced before the trial magistrate and for the reasons I have stated above, this is a case which was proved beyond any reasonable doubts. The Appellant attempted to defile the complainant by his action, deeds and verbal expression of his intention. The criminal liability of the Appellant was proved with the evidence tendered. The appeal is without merits and is dismissed.

Dated and delivered at Kerugoya this 21st day of December, 2017.

L. W. GITARI

JUDGE