



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT CRIMINAL APPEAL NO. 22 OF 2015
FORMERLY MERU HIGH COURT CR APPEAL
NO.83 OF 2011

NICHOLAS MAWIRAAPPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(An appeal from the Judgment of Hon. N. N. MURAGE Resident Magistrate made on 26th May, 2011 in Chuka Principal Magistrate's Court Criminal Case

No. 718 of 2009)

JUDGMENT

1. Nicholas Mawira, the Appellant, was on 2nd June, 2009 arraigned before the Principal Magistrate's Court at Chuka with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 30th May, 2009, the Appellant defiled J. K a child aged 6 years at Kaare Sub Location [*particulars withheld*] village in Kiera location in Maara District within Eastern Province. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. After trial, the Appellant was found guilty of the offence of defilement, was convicted and sentenced to life imprisonment. Aggrieved by that decision, the Appellant has now appealed to this court against both the conviction and sentence. He has raised eight (8) grounds of appeal in his Petition which can be summarized as follows:-
 - a. that the trial court erred in failing to find that the investigation officer pressed on the charges as a result of being bribed;
 - b. that the trial court erred in failing to consider that vital evidence, torn clothes, was not tendered in court;
 - c. that the trial court erred in failing to consider that there was a grudge between the Appellant's father and PW3, the guardian of the complainant;
 - d. that the trial court erred in convicting the Appellant or inconclusive medical evidence; and

- e. that the trial court erred in convicting the Appellant on contradictory evidence.
3. This being a first appeal, this court must re-evaluate the evidence afresh and re-examine the same and come to its own independent findings and conclusions. But in so doing, the court must bear in mind that it did not have the advantage of seeing the witnesses testify and therefore gauge their demeanour. See **Okeno – VS- Republic (1973) EA.**
 4. The evidence in the trial court was that on 30th May, 2009 at around 10.00am, (PW1) a six (6) year old girl child was in her grandfather’s farm chasing away birds from eating the millet. The Appellant came, held PW1, removed her clothes and panties, laid her on her back and did to her what she termed as “tabia mbaya”. She felt pain and screamed. Peter Mutwiri (PW2) responded to the screams whereby the Appellant ran away. PW1 narrated to PW2 what the Appellant had done to her. PW2 went to John Mugira (PW3) to report the incident. According to PW1, this is the first time the Appellant did the act to her. She threw away her panties because they were torn. She was then taken to hospital for medical examination. On cross examination, PW1 reiterated that she had known the Appellant before that date.
 5. PW2 told the court that on the material day, he was on his way from Kaare. That while on the way, he heard PW1 screaming from the farm. When he went to find out why, he found the Appellant lying on top of PW1. PW1 was lying on her back. She had no clothes and the Appellant’s zip was open. On seeing PW2, the Appellant got up and ran away. PW2 then went and reported the incident to PW3. On being informed of what had transpired, PW3 came to PW1’s home to confirm. On asking PW1 what had transpired, she explained to him but cried about it. PW1 was unable to walk properly. PW3 then took PW1 to Magutuni hospital where she was examined. On cross – examination, PW3 denied having any grudge with the Appellant. He confirmed that he had never heard the Appellant being accused of a similar offence. He also denied owing the Appellant any money. He further denied ever having been arrested by the Appellant’s father for stealing iron sheets.
 6. On his part the investigating officer (PW4) narrated to court how the accused was brought to Magutuni Police Station on 30.5.2009 under arrest by PW3 who was the sub area. Accompanying them was PW1 who although did not have any physical injuries could not walk properly. Then he issued her with a P3 form and her relatives took her to hospital. On cross-examination, PW4 denied that he had been bribed in order to press on the charges against the Appellant. PW5, the clinical officer from Chuka District Hospital told the court that he is the one who filled the P3 form. That on PW1 being examined, she was found to have slight laceration on her outer genitalia and her hymen was broken. She also had a foul smelling vaginal discharge. On cross examination, PW5 told the court that it was hard to tell if PW1’s hymen was broken on the day she was examined or not. He confirmed that the foul vaginal discharge could have been as a result of poor hygiene as there were no antibiotics given to her by way of treatment.
 7. When called upon to defend himself, the Appellant gave sworn testimony. He told the court that on the material day, he was at his homestead building a house with a friend of his up to 4pm in the evening. That the Appellant then decided to accompany his friend to the market to get a change for Kshs.1,000/= so that he could pay his friend Kshs.200/= which was the day’s pay. On reaching a place called Thuntu, PW3 caught up with him and asked him if he had been with PW1. He denied that fact and told him that he had been at his home throughout. PW3 then took him together with PW1 to Magutuni Police Station. He stayed at the police station for four (4) days. He was beaten and asked to agree to the charges facing him. He stated that he had been framed because his father had arrested PW3 for stealing the school iron sheets. That on the 10th May, 2009 PW3 had threatened the Appellant with undisclosed consequences. On cross examination, he reiterated that he had been at his home throughout the 30.5.2009 with someone else; that he did not know PW1 before the court case. The Appellant then closed his defence without calling a witness he had indicated would testify on his behalf.
 8. At the hearing of the Appeal, the Appellant relied on his written submissions. The submissions rehearsed the grounds of appeal contained in his petition. The Appellant complained that crucial

exhibits, PW1's torn clothes were not produced in evidence; that the investigations officer had admitted that he had pressed on the charges because he had been bribed to do so; that the trial court failed to consider the grudge held by PW3 because he had been arrested and sentenced to 7 years at the instance of the Appellant's father; that there was no conclusive medical evidence to prove defilement and that the prosecution evidence was contradictory. Mr Ongige Learned Counsel for the state opposed the Appeal. He submitted that PW1's torn clothes were never recovered; that the court should confirm the evidence of the investigating officer from the original record about the admission of being bribed; that there was no grudge established on the part of PW3; and that the medical evidence produced proved the act of defilement. Counsel also submitted that the prosecution evidence was consistent and not contradictory as contended by the Appellant. He urged that the Appeal be dismissed.

9. The first complaint by the Appellant is that the trial court failed to consider that the investigating officer PW4 had admitted that he had been bribed in order to press on the charges. This court has looked at the record. Reading the typed record one will agree with the Appellant as the investigating officer is recorded to have said ***"I have been bribed to bring this case to court."*** However, having perused the original record, this court has confirmed that the word "not" has been left out when typing the record. The witness clearly denied having been bribed to press on the charges. That ground fails.
10. The second complaint is that the trial court failed to consider that vital evidence, i.e. PW1's torn clothes were not tendered in court. The record shows that PW1 told the court that she threw away her panties because they were torn. When being cross examined, PW3 stated that he did not find any clothes at the scene. He also denied ever indicating anything about clothes in his statement to the police. There was no evidence to show that these clothes were recovered for it to be argued that failure to produce them was fatal to the prosecution case. In the circumstances, I think that ground lacks merit and the same is rejected.
11. The other complaint is that the trial court failed to consider the existence of a grudge between the families of the Appellant and the complainant through PW3. In his defence, the Appellant indicated that there was a grudge by PW3 because the latter had been arrested by the Appellant's father for stealing school iron sheets and sentenced to seven (7) years. The trial court found that that allegation was not established. This court has noted that when PW3 was questioned about this fact, he denied it. The Appellant did not produce any evidence to show that there had been any such theft in respect of which his father implicated PW3 and for which the latter was jailed. It was easy for him to have called his father to testify on that aspect but he chose not to call him. There was no evidence that was tendered to show when the incident occurred or the name of the school which was involved. In view thereof, this court finds that the trial court did not err when it held that no grudge had been proved to have existed between the Appellant and the complainant's family on the basis of that allegation. That ground also fails.
12. The last complaints were that the trial court erred in convicting the Appellant on contradictory evidence of the prosecution and on inclusive medical evidence. That the evidence of PW1, PW2 and PW3 when they were recalled contradicted what they had told the court earlier on and that the P3 form showed that the examination of PW1 took place on 26.6.09 whilst the form was itself filled on 2009.
13. I have carefully looked at the record. On 18.2.2010, the matter came up before Hon. Murage and upon the provisions of section 200 of the Criminal Procedure Code being explained to the Appellant, he demanded that the trial do start afresh. The court therefore ordered that the matter start denovo. As at that time, PW1, PW2 and PW3 had already testified before Hon. Ndubi. After the matter started denovo, the Appellant seem to have sharpened his cross examination skills as he cross – examined the witnesses at length unlike before. In my view, once the matter was ordered to begin afresh, the court abandoned the previous evidence and was bound to go with the evidence adduced afresh. As regards, the complaint of contradictions in the testimonies of PW1, PW2 and PW3, there is no evidence that the Appellant raised it during their long cross examination. In any

event, the Appellant did not point out any such contradictions that would be material to affect the prosecution's case.

14. As regards the medical evidence produced, the P3 form (PEXh 1) shows that it was dated on 30.05.09 when the Appellant and PW1 were taken to Magutuni Police Station. PW4 stated that he issued PW1 with the P3 form and her guardians took her to hospital. Curiously the P3 form shows that PW1 was sent to hospital on 26.06.09 under the escort of P.C Mwaniki. On the other hand, PW5 testified that he filled, signed and stamped the P3 form on 3rd June, 2009. At the section of the approximate age of injuries, the officer indicated that it was hours old. He also failed to make a remark or a conclusion as to what his findings were. With the foregoing discrepancies, the Appellant is right in contending that the medical evidence may have been useless. Firstly the confusion as to the date PW1 was escorted to hospital, the date of her examination vis a vis when the P3 form was filled makes it suspect. Secondly, if she was examined on 26.6.2009 and the injuries were just hours, can those injuries be attributed to the Appellant? From the evidence of PW3, PW4 and PW5 that PW1 was taken to hospital on 30.5.2009 for examination, I find it to be mischievous that either the police officer who issued the P3 form or some other unknown person filled the P3 form so as to indicate that PW1 was referred to hospital on 26th June, 2009 under the escort of some PC Mwaniki. That entry in part 1 of the P3 form contradicts the sworn evidence of PW1, PW3, PW4 and PW5 as to the date PW1 was taken to hospital and examined.
15. Is the incompleteness of the medical evidence fatal to the prosecution case? Medical evidence is very vital in sexual offences. It is such evidence that proves whether or not there has been penetration or not. However, such evidence is in my view only corroborative in nature. If there be other independent and material evidence of commission of a sexual offence, a conviction will still hold.
16. In the instant case, PW1 was firm that the Appellant removed her clothes, made her lie on her back, he lay on her and did "bad things" to her. She was a child of six (6) years. She felt a lot of pain on her private parts. To demonstrate this, she pointed to the court her vaginal area as the place she suffered pain as a result of the "bad things" the Appellant committed on her. PW2 heard PW1's screaming from the farm. When he rushed to see what was happening, he found PW1 without clothes, she was lying on her back and the Appellant lying on her. The Appellant's zip was open. When the Appellant saw PW2, he ran away. PW3 and PW4 told the court that when they saw PW1 later on that day, she could not walk properly. That may have been as a result of the pain she had testified on.
17. On the foregoing, the questions that beg are, what would a young energetic man like the Appellant be doing lying on top of a naked girl? Why would his zip be open when lying on top of such a girl who says she experienced pain? Was his actions to permit oxygen or fresh air to permeate to his other parts of his body that was desirous of the same? I think not. The evidence of PW1, PW2 and PW3 corroborated each other. Their evidence was consistent and firm. The Appellant clearly committed an act of defilement on PW1, the medical evidence notwithstanding.
18. In the circumstances, I find the appeal to be without merit and dismiss the same.

Dated and delivered at Chuka this 22nd day of January, 2016

A.MABEYA

JUDGE