



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 5 OF 2015

NTOOKI LOLONTARE.....APPELLANT

-Versus-

REPUBLICRESPONDENT

(Being an appeal against both conviction and sentence in Criminal Case No. 561 of 2013 before Hon. E. Mbicha (RM))

JUDGEMENT

The appellant NTOOKI LOLONTARE was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The appellant further faced an alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

Briefly the facts were that on 14th day of July 2013 at Mile 46 in Kajiado District within Kajiado County, intentionally and unlawfully cause his genital organ – penis to penetrate genital organ/vagina of NK a girl aged 15 years. In the alternative the appellant on the alleged date and place unlawfully caused his genital organ – penis to come into contact with the genital organ of NK a girl aged 15 years.

After full trial he was convicted on 1.1.2014 on the charge of defilement and sentenced to 20 years imprisonment. On 28th May, 2014 he lodged an appeal against the judgement, conviction and sentence.

Being aggrieved by the conviction and sentence he filed this appeal setting out the following grounds;

(1) That the learned trial magistrate erred in both law and facts in convicting me on incurably defective charges contrary to Section 214 of the Criminal Procedure Code and Sexual Offences Act No. 3 of 2006 hence a miscarriage of justice.

(2) That the learned trial magistrate erred in law in failing to appreciate the fact that the appellant was not fully informed of all his rights as enshrined in the Constitution of Kenya 2010 contrary to Section 49 (1) (a) and 50 (1), (2), (a), (b), (c), (g), (h), (j) and 3 of the Constitution occasioning a serious dereliction of justice.

(3) That the learned trial magistrate erred in law and fact in convicting me on overly contradicting, uncorroborated and unreliable evidence in breach of Section 163 (1), (2) hence insufficient and inconclusive to sustain the conviction occasioning miscarriage of justice.

(4) The prosecution failed to prove its case beyond reasonable doubt and shifted the burden of

proof on the appellant contravening the law.

(5) That the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant and failed to consider the appellant's defence contrary to the rules of natural justice contrary to Section 169 of the C.P.C.

DUTY OF THE COURT

This is the first appeal and being a first appellate court it is my duty to re-evaluate all the evidence and come up with my own conclusion. When doing so I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. These basic principles are fortified in the case of OKENO Vs. REPUBLIC [1973] EA 32 where the court of appeal set out the duty of the first appellate court in the following terms:

“An appellate court on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. See PANDYA Vs. REPUBLIC [19757] EA 336 and to the appellate court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw it's own conclusion. SHANLLAH M. RUWALA Vs. REPUBLIC [1957] EA 570. It is not the function of the first appellate court merely to support the lower court findings and conclusions. It must make its own findings and draw it is own conclusions. Only when can it decide whether the magistrate's findings should be supported in doing so. It should make allowance for the face that the trial court has had the advantage of hearing and seeing the witnesses. See PETER Vs. SUNDAY PORT [1958] EA 424”.

APPELLANT'S SUBMISSIONS

The appellant filed written submissions and highlighted them orally. In his submissions he argued that the magistrate erred in admitting the medical evidence that had no examination from himself. He further submitted that the prosecution did not call vital witnesses; nor was he given an opportunity to call his own witnesses for the defence.

It was his contention that in the proceedings at the trial court there was contravention of Article 49 and 50 of the Constitution. He further submitted and argued that he was never given assistance of an advocate nor informed his rights. He also challenged the failure of not being provided with an advocate occasioned a miscarriage of justice.

It was his contention that in the court of the trial he did not know or understand his case for failure to be provided with witness statements. The appellant urged the court to find that the evidence by the prosecution witnesses was contradictory, inconsistent and inconclusive. It was in his highlight and reference to the complainant testimony that no birth certificate was presented to prove her age.

He further submitted and took issue to the medical evidence in regard to the broken hymen as proof of sexual intercourse. He supported his submissions with various authorities whose citations and holdings will refer to at analysis of the evidence and determination. The appellant urged this court to find that the prosecution did not establish their case beyond reasonable doubt.

RESPONDENT SUBMISSIONS

Mr. Akula Senior Counsel for the Director of Public Prosecutions submitted the evidence by prosecution witnesses presented water light evidence against the appellant. He further submitted in opposing the appeal that the charge of defilement was proved by medical evidence, that the complainant was a girl aged 15 years. He further submitted that the appellant from the evidence of PW1 was placed at the scene of the crime. As regards sentencing Mr. Akula argued that the learned trial magistrate imposed a minimum sentence of twenty years provided for under Section 8(3) of the Sexual Offences Act. He urged this court to uphold both conviction and sentence.

Briefly, the prosecution case was based on 5 witnesses as follows:

PW1 N.K. a female child in her sworn evidence aged 15 years was on 12.7.2013 at the grazing field looking after their goats. The appellant went to the field and held a conversation remarking that PW1 was beautiful these days. PW1 further stated that on 13.7.2013 appellant again approached her with a request that she makes tea for him which he turned down. According to her testimony appellant continued to pursue her again in the grazing field. That on the 14.7.2013 while in the field appellant went to the field at about 11.00 am. She stated that the appellant held her hands, pushed her to the ground. It was her testimony that appellant undressed her by removing the panty and biker. The appellant on his part removed his trouser, lay on top and inserted his penis to PW1's vagina. It was in her evidence that she did not report the incident immediately. The appellant also seduced her with Ksh.50 which she did not take but threw it in the field.

PW2 N L K testified that she sent PW1 who is her younger sister to go and look after goats in the field. PW1 refused and on further interrogation she narrated on how appellant had sexual intercourse with her in the field previous day. She further stated that PW3 (S S K) was informed on what happened to PW1 by the appellant. It was their testimony PW2 and PW3 that they reported the matter to the Children's Department and the police. The complainant was examined at Kajiado District Hospital.

PW4 DR. CECILY KANYURU a medical doctor who examined the complainant and filled the p3. She testified that the complainant visited the hospital five days after the alleged incident. On examination of the genital, it was normal, there were no tears and no bruises noted. However she further testified that the complainant had a broken hymen. She formed the opinion that the complainant had been defiled.

PW5 P.C. (W) LUCY OKUMU the investigating officer in this case testified that on 19.7.2013 while at Kajiado Police Station PW1, PW2 and PW3 made a complaint to her office on defilement. She investigated the case and referred PW1 to the hospital for examination and age assessment. The medical doctor assessed (PW1) age as 15 years. The medical examination by PW4 revealed that PW1 had been defiled. This led her to trace the appellant and effected arrest in connection with the present charges.

The appellant was placed on his defence. He gave unsworn testimony. He denied the charges as presented regarding defilement of PW1. He attributed the charges as a fabrication by one K an uncle to the complainant. He further testified that at one time he had refused to take care of K's goats hence the development of a grudge between them.

I have considered the submissions by appellant and the authorities relied upon by the appellant and grounds of appeal. The record and evidence by both prosecution and defence re-evaluated. The submissions by the learned Senior Prosecution Counsel considered.

The appellant in this case faced a charge of defilement contrary to Section 8(1) of the Sexual Offences Act. The conviction was based on evidence of PW1 and PW4. In the instance case the offence is that of sexual assault on the minor. The direct evidence from the record is that of PW1 the alleged victim of the offence of defilement. The prosecution adduced evidence of a medical doctor who examined PW1 and filled the p3 form. The p3 form was produced as exhibit 1.

THE MAIN ISSUE FOR DETERMINATION

I need to address my mind to is whether the conviction of the appellant 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 was proved by prosecution to sustain a charge of defilement.

The critical ingredients forming the offence of defilement are:

(a) Proof of penetration of a female.

(b) That the complainant was under the age of 18 years.

(c) That it was the appellant who had sexual intercourse or defiled the complainant.

The appellant contentions were that there was no proof to sustain the offence of defilement. However in my view there is direct evidence of PW1 which showed how the appellant held her, undressed the underwear and pushed his penis into her vagina. The complainant was induced with Ksh.50 by the appellant not to reveal the incident to anybody. It was her testimony that she later told PW2 after inquiry and action not to go to the grazing field. The complainant told the court that she did not have sexual intercourse before the date appellant did it. Her testimony was corroborated by the evidence of medical doctor PW4 who examined the five days after the offence took place on 14.7.2013 and PW1 was seen at Kajiado Hospital on 19.7.13. The report from the doctor PW3 confirmed that PW1 had been defiled. The hymen was ruptured as a sign of vagina penetration.

In my view there is overwhelming evidence to show that the act of penetration took place against the complainant. The appellant contended that the prosecution evidence was full of contradictions and inconsistency. I have evaluated the testimony of PW1, PW2, PW3, PW4 and PW5 to establish any clear inconsistency as submitted by the appellant. I am of the holding that each prosecution witness gave evidence on the role played, and witnessed on the alleged complaint of defilement.

I find that the evidence of prosecution witnesses created no doubt that should have been resolved in favour of the appellant. The appellant prompted no such contradictions to this court which was to negative or weaken the case at the trial court.

The other point of contention is whether the appellant was responsible for the offence. According to the learned trial magistrate, he concluded thus in convicting the appellant.

“I have carefully considered the complainant evidence and her demeanor in court. It has been consistent and reliable. Even the dates and events stated have been consistent with the days of the week she stated. The accused defence does not hold water.”

The learned trial magistrate appears to have been convinced of her truth and reliability and accordingly he convicted the appellant. The magistrate seems to have invoked the provisions of Section 124 of the Evidence Act. It provides as follows:

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration 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 decision 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 cases involving a sexual offence the only evidence is that 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.”

The trial magistrate in my view took into account the provisions of Section 124 of the Evidence Act Cap 80 particularly the provisions on sexual offences in reaching a determination in the matter.

It is also the contention by the appellant that the age of the complainant was not proved. The issue has been considered in many authorities by the High Court. In the case of **HILARY NYANGESA Vs. REPUBLIC CRIMINAL APPEAL NO. 123 OF 2009 MWILU J.** as then was held as this:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved and this becomes more important because punishment under the Sexual Offences Act is determined by the victim. I agree and add that while the court may in certain circumstances rely on evidence other than age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

The issue was also considered in the case of **JOSEPH KITHI SELF Vs. REPUBLIC 2014 eKLR HIGH COURT AT MACHAKOS MUTENDE J.** held as follows:

“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence.”

This holding was buttressed in the case of **FRANCIS OMUROUI Vs. UGANDA Court of Appeal CR. APPEAL NO. 2 OF 2000.** The court of appeal 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 my other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardians and by observation and common sense.”

Considering the evidence on record PW1 stated that she was aged 15 years. She relied on the clinical card used at the time of initial vaccination. More importantly the prosecution assessed PW1 age at Kajiado District Hospital. The medical assessment report was admitted in evidence as exhibit 2. The age of the complainant was assessed at 15 years. In the foregoing there is no dispute as to the age of the complainant.

The appellant in his defence and appeal raised the issue of grudge to the uncle to the complainant. The issues of a grudge were considered by the trial magistrate in the judgement. From perusal of the record and evaluation of the evidence I find no circumstances to make me disagree with the trial magistrate. I agree with the trial magistrate in absence of any cogent evidence from the appellant that the issue of existing of a grudge was a figment of appellant imagination. There is no indicative evidence that the uncle of the complainant conspired to tarnish the name of the appellant. Accordingly in this case that remains a non-issue. I find the appellant’s defence to have been evaluated and rejected in view of the prosecution evidence by PW1, PW2, PW3, PW4 and PW5.

The second contention by the appellant was in respect of non compliance with Section 214 of the Criminal Procedure Code. The appellant submitted that the charge relied upon by the learned trial magistrate was defective and contravened Section 8(1) of the Sexual Offences Act. That the occurrence of the offence was said to have occurred on 25/9/2012 yet the charge reads on 14/7/2013. In his argument there was variance between the charge and evidence presented.

I now turn to consider these grounds:

Section 214(1) of the Criminal Procedure Code provides as follows;

“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make and order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case provided that:

(i) where a charge is altered, the court shall thereupon call upon the accused person to plead to the altered charge.

(ii) where a charge is altered under this sub-section, the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and in the last mention event, the prosecution shall have the right to re-examination the witnesses on matters arising one of further cross examination.”

In the instant case the appellant was charged on 25/7/2013 with two counts namely:

The first count of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act.

The second count of indecent act with a child contrary to Section 11 as read with section 11(1) of the Sexual Offences Act.

The particulars of charges indicated that the offences were committed on 14/7/2013 at Mile 46 Kajiado County. The complainant was N.K. aged 15 years. The trial was set down for hearing on 23/9/2013. The record shows that on the material day an application to amend the charge was made by the prosecution. The trial magistrate allowed the amendment and appellant called upon to plead to the altered charge. At this stage of the amendment no witness had testified.

I do not therefore agree with the appellant that there was non compliance with Section 214 (1) (i) or (ii) of the Criminal Procedure Code.

A scrutiny of the particulars of original charge as amended has no variance as to the particulars and date alleged offence was committed. The evidence by prosecution witnesses focused on the day of 14/7/2013 when the alleged defilement occurred against the complainant. The defects pointed out by the appellant and non compliance with Section 214 of Criminal Procedure Code holds no issue for this court to consider. This ground of appeal fails.

Thirdly the appellant argued that his rights to a fair trial which is guaranteed in Article 49(1) (a) and 50(1), 2(a) (b) (c) (g) (h) (j) and 3 of the Constitution was violated occasioning a serious direction of justice.

The appellant argued and submitted before this court that he was not informed of his constitutional rights as envisaged under Article 49(1) especially subsection (c).

Section (c) provides for the appellant to be given a chance or a assistance to communicate with an advocate or other person whose assistance was necessary.

The appellant further submitted that the provisions of Article 50 were violated which provide for a variety of rights. He particularly singled out Article 50(2) which envisages the right to be presumed innocent until proven guilty was infringed.

Clause (h) provides that if substantial injustice would otherwise result, the appellant to be assigned an advocate at state expense.

Clause (j) which provides that the appellant be duly informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

In dealing with this ground of appeal, the following questions thus have to be answered.

(1) Does the appeal deal with a constitutional issue?

(2) Did an irregularity occur in the magistrate court proceedings?

(3) If so, did it result in a failure of justice and render the trial unfair and should the conviction and sentence therefore be set aside?

In order to answer these questions, the meaning of the guarantee of a fair trial under Article 50 of the Constitution has to be analysed. This court also has to answer and analyse the contents of the provisions of the Criminal Procedure Code regarding appeals and then applied to this case.

On whether this is a constitutional matter. I have the view that the appellant is simply seeking to attack the factual findings of the trial court. He avers that **right to be presumed innocent, right to not be**

assigned an advocate at state expense and right to be informed in advance of the evidence resulted in a failure of justice, and the violation of his right to a fair trial.

Questions about presumption of innocence, assignment of an advocate at state expense and right to be informed in advance of the evidence are constitutional matters.

However on perusal of the lower court record, there is evidence that appellant was supplied with witness statements and all documentary evidence in support of the prosecution case.

On 23/9/2013 before the commencement of the trial a court order was issued by the learned trial magistrate for accused to be issued with all statements and documentary evidence. This was to enable appellant prepare for his defence. There was no infringement of right to access to evidence in advance by the appellant.

I have analysed and evaluated the record and judgement of the learned trial magistrate. The same has been weighed alongside the concept of substantive fairness and justice.

I am of the conceded view that there has been no irregularity or illegality detected, that is a departure from the formalities, rules and principles of procedures according to which our law requires a criminal trial to be initiated or conducted.

The Criminal Procedure Code is the key legislation which regulates the process of criminal trials. The trial courts are bound to apply its provisions and interpret them to promote the spirit and purport/objects of Chapter 4 of the Constitution on the Bill of Rights.

It cannot be said that a failure of justice occurred and that the appellant did not have a fair trial due to the state failure not assigning an advocate. The state presented evidence of witnesses whom the record reveals were cross-examined by appellant to test their credibility. I find no special circumstances existed or issues raised by the appellant at the trial in the case to warrant an advocate to be appointed by the state.

For the state to promote and fulfill right to legal representation for every accused person charged with a criminal offence resources are required.

Thus the question that a violation of Article 49 and 50 of the Constitution in respect of the trial at the lower court does not arise.

The appellant further raised non compliance of Section 169(1) (2) of CPC by the trial magistrate.

Section 169 (1) (2) states

“Every such judgement shall, except as otherwise expressly provided by the court be written by a court. The direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of conviction the judgement shall specify the offence of which and the section of the penal code or other law under which the accused person is convicted and punishment to which he is sentenced.”

In the instant case the trial court record and evidence has been evaluated. The question which begs for an answer is whether the trial magistrate complied with the provisions of Section 169 of Criminal Procedure Code.

The judgment of the trial court was dated, signed and read to the appellant. The judgement bears analysis of the evidence, sets out issues and points for determination. The appellant was charged and committed

under Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

In view of the foregoing I find the learned trial magistrate complied with the provisions of Section 169 of the Criminal Procedure Code. I find no merit on this ground of appeal. The ground that prosecution failed to prove its case beyond reasonable doubt fails.

DECISION

Keeping in view the aforesaid position of law and the statement of the complainant aged 15 years only at the time of the incident, and the medical evidence on record. This court is of the opinion that the trial court below committed no error in convicting the appellant under Section 8(1) as read together with Section 8(3) of the Sexual Offences Act.

After analyzing and evaluating the evidence it can be said that the appellant was properly found guilty of the offence as punishable under Section 8(3) of the said Act.

In view of this the appeal filed by the appellant is dismissed on both conviction and sentence.

Dated, signed and delivered this 14th day of January, 2016.

R. NYAKUNDI

JUDGE

Representation

Mr. Akula Senior Prosecution Counsel

Appellant

Mateli – Court Assistant