REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.93 OF 2014

BETWEEN

JAMES BARASA NGALA……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(An appeal arising from the conviction and sentence of Kakamega CM's Court. cr. Case no.1158 of 2013 delivered on the 17/07/2014 by P. ACHIENG AG P.M

J U D G M E N T

Background

1. James Barasa Ngala the appellant herein was charged at Kakamega Chief Magistrate's Court with attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence are that on the 10th June 2013 in Navakholo district within Kakamega County intentionally attempted to cause his penis to penetrate the vagina of G.N.K a girl aged 17 ½ years.

2. In the alternative charge the appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act no.3 of 2006. The particulars of the offence were that on the 10th June 2013 in Navakholo district within Kakamega County he unlawfully and intentionally did commit an indecent act by causing his genital organ namely penis to come in contact with genital organ namely vagina of G.N.K a girl aged 17 ½ years old.

3. The appellant denied the charges before the trial Court and the case proceeded to a full trial.

Prosecution Case

4. The Prosecution called four (4) witnesses PW1 G.N.K. told the trial Court that as she was leaving school on the 10th June 2013 at about 7.00p.m the appellant held her and threw her down. She struggled with the appellant as she screamed. In the course of the struggle the appellant tore her uniform, petty coat and biker. As all this was happening PW2 the brother to PW1 came to the scene and helped PW1. PW2 had an exchange with the appellant who then fled. PW1 and PW2 reported the incident to and their father PW3, and thereafter they reported the incident to Navakholo Police Station where they met PW4 No.48921 who recorded the report in the O.B and who also investigated the incident.

5. The appellant was thereafter arrested. PW4 produced the exhibits and told the trial Court that he took the complainant for age assessment and the report showed that PW1's age was between 17 and 18 years.

Defence Case

6. In his defence the appellant stated that on the 10th June 2013 as he went to fetch firewood at about 6.30p.m he was attacked from behind by Bonny Makokha Khaoya and Aoron Khaoya who are his neighbours. He then went to the village elder to report but was referred to the assistant chief who referred him to Navakholo District Hospital for treatment. He was treated and as he went to report the matter to the Navakholo Police Station he was arrested. He claimed to have seen PW1 in Court and that he did not know her. He also stated that he was charged with an offence he knew nothing about.

7. At the conclusion of the case, and after carefully considering the evidence on record, the trial Magistrate convicted the appellant and sentenced him to serve ten (10) years imprisonment.

The Appeal

8. The appellant was aggrieved by both conviction and sentence and filed this appeal on the following grounds:-

1. THAT I did not plead guilty to the above appended charge.
2. THAT the trial Court convicted me on the evidence that was not corroborated, that was fabricated, malicious and inconsistent and lacked probative value.
3. THAT there was no medical document produced to confirm the same.
4. THAT there was no proof of age produced.
5. THAT the trial Court did not consider that I was a complainant in an assault case against the siblings of PW1 and had made my report to the Police before the PW1 and her family's afterthought.
6. THAT the evidence produced was from the same family members.
7. THAT the trial Court did not consider that it was alleged the offence was committed within the village but there was no independent witness to confirm that indeed the offence happened.
8. THAT the trial Court did not consider my defence which created reasonable amount of doubt in the Prosecution's case.

9. During the hearing of the appeal, the Appellant relied on his written submissions. The submissions by the appellant centered around the age of the victim which he submitted was not proved by the Prosecution witnesses and that the Prosecution did not call crucial witnesses.

1. The appeal was opposed by the State. The learned Counsel for the State submitted on the sufficiency of the Prosecution evidence. Being a 1st appeal this Court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inference, only bearing in mind it was not there when the witnesses were giving their evidence. See **Okeno –vs- Republic [1972] E.A 32.**

Analysis and Findings

11. The complainant G.N.K PW1 was coming from school on the day she was attacked from behind by the appellant. She made a distress call which attracted PW2, her brother, who ran to her rescue. PW2 found the appellant was holding PW1 who was on the ground. PW2 assisted her but during the struggle the appellant managed to escape. The two PW1 and PW2 went home and told their father what had happened. The matter was reported to the Police and the appellant was arrested. PW4 investigated the matter, visited the scene and came up with the conclusion that the appellant attempted to defile PW1. He went ahead and preferred the charges before the trial Court.

12. In his defence the appellant claimed to have been assaulted by two persons who were brothers to PW1 and that as he went to report the same he was instead arrested. Putting the Prosecution and defence evidence side by side, I find it hard to believe the evidence by the appellant due to the strong evidence by the Prosecution witnesses. There is also no suggestion by the appellant that there was bad blood between him and the family of PW1.

13. It is my finding that appellant was caught red handed by PW2 as he was trying to defile PW1. PW1's age was assessed and an age assessment report produced. There was no need for a medical report in this instant case as PW1 was not defiled. Evidence of a struggle was shown as the Prosecution produced exhibits of torn clothes including a biker.

14. The evidence by the Prosecution was steadfast and I see no contradictions in the same as alleged by the appellant. On whether the Prosecution failed to call crucial witnesses the answer is found in the dictum in the case of **Bukenya & Others –vs- Uganda [1972] E.A 549** at page 550 where the Court of Appeal for East Africa stated:-

> "It is well established that the Director has a discretion to decide who are the material witnesses and whom to call ……."

15. PW4 had the discretion to call anybody as he was the one who investigated this case. There must have been more than one person who witnessed the incident when PW1 screamed. However, it was not for the appellant to choose which persons would testify against him. That was the prerogative of the Police who carried out the investigations. In any event the appellant has not suggested that the evidence of the "missing" witnesses would have been prejudicial to the Prosecution case if it had been given..

16. Lastly Section 124 of the Evidence Act is clear as to proceedings in Sexual Offences especially on corroboration. The proviso thereof states "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."

17. Thus in this case the trial Court would have convicted the appellant even if PW1 was the only one who testified so long as it was satisfied that she was telling the truth. It does not matter whether the family members are the only ones who testified. Though there is no record of what view the trial Court had of PW1 before she testified, the trial Court noted in its judgment that PW1 and PW2 gave truthful and consistent evidence.

Conclusion

18. Having evaluated the evidence afresh and for the above reasons I find no ground to differ with the findings of the trial Magistrate who had the benefit of seeing the witnesses testify and observing their demeanor.

19. The appeal is found to have no merit and the same id dismissed in its entirety. I confirm both conviction and sentence of the learned trial Magistrate. Right of Appeal within 14 days.

20. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 25th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant