



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 141 OF 2014

SAULI KALAMA MASEGE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 417 of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K.I. Orenge (Ag SPM) on 8th April 2014)

JUDGMENT

INTRODUCTION

1. The Appellant, Saudi Kalama Masege, was tried and convicted by S.M. Wahome, Senior Principal Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve fifteen (15) years' imprisonment.
2. He had also been charged with an alternative charge of the committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006 which was dismissed.
3. The particulars of the charges for the first offence were as follows :-

“On diverse dates between 29th August 2013 and 29th October 2013 within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of M M, a child aged 16 years.”

ALTERNATIVE CHARGE

“On diverse dates between 29th August 2013 and 29th October 2013 within Taita Taveta County, intentionally and unlawfully touched the vagina of M M, a child aged 16 years.”

4. Being dissatisfied with the said judgment, on 2nd September 2014, the Appellant filed a Petition of Appeal which stated:-
 1. **THAT the Learned Trial Magistrate erred in law and fact by sentencing him to serve 15 years (sic) imprisonment without noting that the provisions of section 150 C.P.C. were not summoned to testify. (sic)**
 2. **THAT the Learned Trial Magistrate erred in law and fact by sentencing him to serve 15 years (sic) imprisonment without noting that the provisions of section 8(5)(a) (sic) were not**

- adhered to.
3. **THAT the Learned Trial Magistrate erred in law and fact by not considering that the prosecution case was made up of mass (sic) contradictions.**
 4. **The Learned Trial Magistrate erred in law and fact in not considering his sworn defence which remained unshaken.**
5. On 7th March 2016, the Appellant filed Amended Grounds of Appeal. The same were as follows:-
1. **THAT the Learned Trial Magistrate erred in law and fact in admitting the evidence of the complainant without seeing that she had deceived him into believing that she was over the age of 18 years.**
 2. **THAT the Learned Trial Magistrate failed in law and fact in failing to see that the source of his arrest was not established to have had a connection with the present case and thus the sentence imposed upon him was un-safe.**
 3. **THAT the Learned Trial Magistrate erred in law and fact by failing to consider that there was no medical report (scientific report) to confirm that he was responsible for the said pregnant (sic) thus violation of Section 36 of the S.O.A No 3 of 2006.**
 4. **THAT the Learned Trial Magistrate did not consider that the matter in question was not proved to the required standard of law.**
 5. **THAT the Learned Trial Magistrate erred in law and fact in failing to see that his defence was strong to award him benefit of doubt.**
6. His Written Submissions were deemed to have duly filed on 7th March 2016. The State's Written Submissions were dated and filed on 14th March 2016.
7. When the matter came up in court on 14th March 2016, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

I. DEFENDANT'S DEFENCE AND PROOF OF PW 1'S AGE

9. From his Oral and Written Submissions that the Appellant gave in this court and the Trial Court respectively, it was not entirely clear whether he was admitting that he had had sexual relations with M M (hereinafter referred to as “PW 1”) and that the only thing he was contending was that she misled him into believing that she was aged eighteen (18) years and over.
10. In fact, the State pointed out that on one hand the Appellant was saying that he had been set up by PW 1's mother while on the other hand admitting that he had sexual relations with PW 1 save that he was led to believe that PW 1 was eighteen (18) years of age.

11. In his said oral submissions he had stated as follows:-

“I was made to believe by the complainant that she was 18 years. She was working at her mother's bar and serve (sic) other clients. She looked like an adult.”

12. In his Written Submissions, he contended as follows:-

“I am alive to the fact that under section 124 of the Evidence Act her, (sic) evidence is admitted without any corroboration but under the Sexual offences Act Section (1) as read with Section 8(5) it is a defence to a charge under this section if it is proved that such child deceived the accused person in believing that he or she was over the age of 18 years at the time of the alleged commission of the offence and the accused person reasonably believed that the child was over the age of 18 years.”

13. On her part, PW 1 stated during her Re-examination that the Appellant knew that she was going to school. The Learned Trial Magistrate termed the Appellant's assertion that he thought she was over eighteen (18) years as an afterthought as the same was not raised during the Appellant's defence but rather during his closing submissions.
14. However, in view of the Appellant's contradicting unsworn evidence, which had little or no probative value and his submissions, the court had no reason to doubt that PW 1 was aged sixteen (16) years as was evidenced in the Birth Certificate that was tendered in evidence in the Trial Court as the Appellant did not adduce any evidence to the contrary. In that regard, Ground No 5 of the Appellant's Amended Grounds of Appeal is hereby dismissed.

II. APPELLANT'S ARREST AND PROSECUTION'S CASE

15. L M (hereinafter referred to as "PW 2") was PW 1's mother. She testified that after she found out that PW 1 was pregnant, she sent her to her grandmother's place. She said that instead of going to her grandmother's house, PW 1 went to the Appellant's home at Rombo.
16. She told the Trial Court that she was informed that PW 1 had been seen at the Appellant's home. She sought and obtained a letter from the Chief and they were able to trace her at the Appellant's home. It was her evidence that they were arrested and brought to Wundanyi. She identified the Appellant as the person who was found with her daughter.
17. No 92293 PC Stella Wanjiru (hereinafter referred to as "PW 3") stated that PW 1 was found at Rombo and together with the Appellant, they were brought to Wundanyi. PW 1 told her that she had been at the Appellant's house where she was living with him as husband and wife. It was then that she charged the Appellant.
18. On its part, the State argued that PW 1 had testified that she was living with the Appellant as husband and wife at his house at Rombo and it was therefore immaterial who arrested him.
19. In his defence, the Appellant had averred that he was fixed by PW 1's mother who was his former lover. He denied ever having committed the offence. Notably, it was therefore not correct as the Learned Trial Magistrate that the Appellant never disputed the evidence on record that while PW 1 was at his home, they lived as husband and wife or that during his mitigation, the Appellant cleared stated that PW 1 was his wife and they had a child together as was contended by the State in their Written Submissions to this court.
20. The Appellant was categorical that the witnesses who witnessed his arrest were not called to testify and that the court was duty bound to summons critical witnesses as envisaged under Section 150 of the Criminal Procedure Act. He referred the court to the case of **Cr Case No 118 of 1984 John Kenga vs Republic** in support of his case. This court did not consider this case as the same was unreported and no copy was given to the court for its perusal.
21. The evidence of who told PW 2 that PW 1 was seen at Rombo, the person who directed her to the Appellant's house as she did not appear to have known him previously and the person who arrested him and took him to Wundanyi were all crucial witnesses who would have assisted this court in establishing the sequence of the events leading to the Appellant's eventual arrest.
22. This was clearly important as the Appellant had contended in his defence that he was fixed by PW 2 who was his former lover. The absence of evidence of how PW 2 traced PW 1 to the Appellant's house would raise the question as to whether she already knew his house pointing to familiarity between her and the Appellant.
23. Further, during her Cross-examination, PW 2 said that PW 1 also told her that it was Masege who was responsible for the pregnancy. If she did not know who Masege as she had contended, the question that arises then, is why did PW 1 give her the name of a person she did not know? The other question that arises is, at what point did PW 1 tell PW 2 that it was Masege who was responsible for her pregnancy because both she and PW 1 told the Trial Court that PW 1 did not

- disclose who the person was.
24. The court is not for one moment suggesting that PW 2 and the Appellant knew each other. However, the question of how she identified the Appellant's house was central to this case as Rombo appeared to be an expansive area and was not PW 1's home area.
25. In addition, the reference to "they" as the people who arrested the Appellant was clearly ambiguous. It was not clear whether PW 2 was present at the time of his arrest as she merely stated that **"I went to Rombo and was able to trace the girl and the accused. They were arrested and brought to Wundanyi."** These people, whoever they were, critical witnesses as the Appellant denied ever having been with PW 1.
26. However, the above notwithstanding, the need to have the said witnesses testify in this case was rendered irrelevant the moment the Appellant adduced haphazard evidence that made no sense at all. Evidently, in his unsworn evidence, he merely stated as follows:-

"One lady borrowed a jacket from me. I called the lady why (sic) she did not return the jacket to me."

27. What did that have to do with PW 1? It did nothing to assist his case as it was not clear whether the lady he was referring to was PW 1. In addition, his oral submission and Ground of Appeal as shown seen hereinabove that PW 1 misled him into believing that she was an adult was an admission that he had sexual relations with PW 1, a fact that the Learned Trial Magistrate addressed his mind to.
28. A DNA test would definitely have placed the Appellant as having been sexually involved with PW 1 if the same had been conducted and tested positive. However, it was not done as PW 1 was four (4) months' pregnant at the time of the trial but in any event, the same was not mandatory for the offence he was charged with to have been proven. As was rightly pointed out by the State, the Prosecution was not hinged on whether or not PW 1 was pregnant but rather that the Appellant had had unlawful sexual contact with her.
29. Having considered both the Prosecution and the Appellant's cases as given in the Trial Court, this court found that the Prosecution had proven its case to the required standard.
30. In this respect, Grounds Nos 1, 2, 3 and 4 of the Appellant's Grounds of Appeal were not merited and are hereby dismissed.

DISPOSITION

31. As the court found that the Prosecution had proved its case beyond reasonable doubt, it found the Appellant's grounds of appeal not to have been successful. The same are hereby rejected. Accordingly, this court therefore affirms the conviction herein.
32. It is so ordered.

DATED and DELIVERED at VOI this 31st day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Sauli Kalama Masege..... Appellant

Miss Mukangu.....State

Simon Tsehlo- Court Clerk

