REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 30 OF 2015

TOBIAS KIOKO…….. APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 461 of 2014 in the Principal Magistrate's Court at Taveta delivered by Hon R. K. Ondieki (PM) on 31st March 2013)

JUDGMENT

INTRODUCTION

1. The Appellant, Tobias Kioko, was tried and convicted by Hon R. K. Ondieki, Principal Magistrate for the offence of defilement of a girl 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 twenty (20) years' imprisonment.
2. The particulars of the charge were that :-

On the 14th day of September 2014 at about 1830hrs at [particulars withheld] within Taita Taveta County, unlawfully and intentionally caused your penis to penetrate the vagina of N M a child aged 16 years.

3. The alternative charge was for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-
4. **On the 14th day of September 2014 at about 1830hrs at [particulars withheld] within Taita Taveta County, unlawfully and intentionally touched the vagina of N M a child aged 16 years with your penis.**
5. Being dissatisfied with the said judgment, on 15th April 2015, the Appellant filed Grounds Appeal. The grounds of appeal could be summarised as follows:-

1. **THAT the Learned judge** (sic) **erred in law and fact when he convicted him on uncorroborated evidence thereby occasioning miscarriage of justice.**
2. **THAT the Learned judge** (sic) **also erred in law and fact when he failed to properly evaluate the evidence this arriving at a wrong decision thus occasioning miscarriage of justice.**
3. **THAT he was the sole breadwinner of his brother, sister and elderly parent** (sic)**.**
4. **THAT he was a first offender with no criminal records whatsoever.**

6. His Amended Grounds of Appeal and his Written Submissions were filed on 7th March 2016. He listed the following grounds of appeal which could be summarised as shown hereunder:-

1. **THAT the Learned Trial Magistrate erred in law and fact when he relied on contradictory evidence that was adduced by the Prosecution witnesses, PW 1's evidence that was uncorroborated, PW 2's evidence that was hearsay, insufficient evidence of both PW 3 and the P3 Form necessitating a thorough investigation.**
2. **THAT the Learned Trial Magistrate erred in law and fact when he convicted him when all key witnesses were not summoned to give their testimony.**

7. The State's Written Submissions were dated and filed on 14th March 2016.
8. When the matter came up in court on 14th March 2016, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety. The Judgment herein was therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. In its Written Submission, the State conceded to the Appeal on the following grounds:-
    a. **Failure by the Prosecution to call the Appellant's sister who saw the Appellant and the Complainant (hereinafter referred to as "PW1") where the act was said to have occurred;**
    b. **Both the Appellant and PW 1 were tested at the hospital and it was found that whereas the latter was infected with a sexually transmitted disease, the former was not and it was therefore not clear whether the former used protection that prevented him from being infected;**
    c. **It was not clear from the record how PW 2 came to know of the incident or which role he played.**
10. The State therefore sought a retrial of the Appellant on the ground that he would not suffer any prejudice. As the State did not concede to the Appellant's acquittal but rather argued that there should be a Re-trial, this court was 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".**

11. In establishing whether or not the Appellant's guilt was proven in the charge of defilement of the Complainant (hereinafter referred to as "PW 1") that allegedly occurred on 14th September 2014, the court identified the question of whether or not the Prosecution proved its case beyond reasonable doubt to have really been the only pertinent issue for determination by this court.

PROOF OF THE PROSECUTION CASE

12. In her evidence, PW 1 stated she met the Appellant, who was her neighbour. She did not say where they met only stating that she was at a shop to buy paraffin at Moya Moya Centre. She averred that he grabbed and dragged her in a banana plantation where he defiled her. She said that she did not raise an alarm but that she told her mother what had happened when she got home.
13. It was her testimony that the matter was reported to the Village Elder and they were taken to the police station. It was not clear whether "they" referred to both herself and the Appellant herein. She, however, stated that she was taken to hospital where she was treated and issued with a P3 Form. She said that the Appellant was also examined at the hospital.
14. D M, who was PW 1's father (hereinafter referred to as PW 2) told the Trial Court that PW 1 came home at about 7.00 pm and that the Appellant's sister saw him dragging PW 1 to the banana plantation. He did not say how he came to know of this fact.
15. On his part, Patterson Mwapulu, a Clinical Officer (hereinafter referred to as "PW 3") testified that PW 1 had a greyish discharge. He, however, did not find the Appellant to have had any injuries to his penis or bacteria in his urine. She opined that PW 1 had had habitual sex for a long

time. It was not clear from her evidence whether PW 1 had had habitual sex with the Appellant herein.

16. On his part, No 69969 PC David Mutugi stated that witnesses told him what had happened and he recorded their statements. Other than that he did not tell the Trial Court what investigations he carried out before the Appellant was charged with the offences herein.

17. The court took cognisance of the provisions of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that stipulate as follows:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.

18. Indeed, the Court of Appeal did pronounce itself on the question of corroboration of evidence of children of minor years in the case of **Mohamed v Republic [2006] 2 KLR 138** where it stated that:-

"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

19. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

20. It was therefore clear from the foregoing that it was not necessary for PW 1's evidence to have been corroborated even where there were no eye witnesses and all that the Learned Trial Magistrate was required to do was to be satisfied that PW 1 was telling the truth.

21. However, being a case of the victim's word against his or her perpetrator, it is incumbent upon a trial court to pronounce itself in clear terms why it accepts uncorroborated evidence of a victim or a child to give an appellate court opportunity to consider if indeed, such evidence is sufficient by itself to sustain a charge against an accused person.

22. In his judgment, the Learned Trial Magistrate gave the reason why the Appellant defiled PW 1 as having been that he had tricked her that he would marry her and that the Appellant's wife and sister knew about this incident. The Learned Trial Magistrate went further and said that it was the Appellant's sister who informed PW 2 about the incident.

23. As was rightly pointed out by both the Appellant and the State, despite the Appellant's sister being a crucial witness who saw the Appellant dragging PW 1 to the banana plantation, she was not called to testify. No plausible reason was given to explain why she was not called as a witness in the Trial Court.

24. It was also not clear what role PW 2 played in proving that PW 1 was actually defiled by the Appellant. His evidence merely appeared to have been to confirm that he had sent PW 1 to the Shopping Centre to purchase paraffin. In fact, he did not say what PW 1 told him about the incident. PW 1's mother was also not called to testify although PW 1 stated that she told her about the incident immediately she got home.

25. It was evident that the Learned Trial Magistrate erred in both law and fact when he made assumptions about the Appellant's wife and sister's knowledge about this incident and that it was the Appellant's sister who informed PW 2 about the incident when they had in fact not being called to testify. He was very authoritative on this issue. He seemed to adduce evidence that was clearly not on record and further relied on such facts to convict the Appellant herein.

26. The Appellant's unsworn evidence had little or no probative value. However, the burden of proof was not upon him to prove that he did not defile PW 1. Rather, it was incumbent upon the Prosecution to present a water tight case against the Appellant to demonstrate that he had in fact defiled PW 1 as she had contended.
27. The court noted the submissions by the State that a Re-trial in this matter ought to be ordered and the case of **Alex Mungai Waweru vs Republic (2014) eKLR** it relied upon in which the Court of Appeal ordered a re-trial as the evidence of the complainant therein was a nullity, the *voire dire* enquiry not having been conducted properly.
28. Evidently, courts must at all times administer justice without undue regard without procedural technicalities as has been provided under the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010. Evidently, the nullity of the complainant's evidence in that case was technical issue that could be addressed in a re-trial.
29. On the other hand, the circumstances of that case were clearly distinguishable from the facts of the said case as there were no technicalities in this matter. Instead, there were serious flaws by the Prosecution which failed to adduce sufficient evidence that would have been adequate to sustain the charge against the Appellant herein.
30. Indeed, the objective of a re-trial must never be to beef up a prosecution's case. Allowing a re-trial on such a ground would ideally mean that the prosecution would be taking a second bite of the cherry by re-opening its case to fill up gaps which would be accomplished by calling witnesses who ought to have been called initially but were never called or to recall witnesses who had added no value to a trial in the first instance to give them a second chance to tell their story once again but in greater detail.
31. In addition, a re-trial ought not to be permitted if it will be prejudicial to an appellant. It was the view of this court that a Re-Trial would definitely prejudice the Appellant herein as it would have the effect of regularising what the Prosecution failed to do. The Prosecution must therefore be blamed for the outcome of this Appeal for having conducted a trial that way below what was required in such circumstances.
32. Accordingly, having carefully considered the submissions by the Appellant and the State and the case law that was relied upon by the State, the court came to the firm conclusion that the evidence that was adduced in the Trial Court was not to the standard required which in criminal cases, has to be proved beyond reasonable doubt and was not sufficient to sustain a conviction of the Appellant on the charges that had been preferred against him.
33. Indeed, great injustice will be occasioned to the Appellant herein if this court were to uphold the conviction and sentence that was meted on him based on the evidence that was presented before the trial court.
34. It was incumbent upon the Prosecution to have adduced sufficient and cogent evidence and presented its case diligently to prove that the Appellant herein had actually committed the alleged offence as had been contended by PW 1. In the mind of this court, the case against the Appellant herein was determined on a balance of probability.
35. In view of the seriousness of the sentences imposed on those convicted of having committed defilement cases and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.
36. In conclusion, as an obiter, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

37. For the foregoing reasons, in view of the fact that the evidence that was adduced before the Trial Court created doubt in mind of this court as to the real circumstances of the said case, that benefit of doubt leads it to quash the conviction and set aside sentence that was meted upon the Appellant

by the Trial Court. It would be clearly unsafe to confirm the same.

38. In this regard, this court hereby orders that the Appellant herein be set free forthwith unless held or detained for any other lawful reason.

39. It is so ordered.

DATED and DELIVERED at VOI this 15th day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Tobias Kioko…….. Appellant

Sirima…….. State

Simon Tsehlo– Court Clerk