



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO 21 OF 2015

MICHAEL WACHIRA GATUMU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in CR 140 of 2014 at Siakago

Principal Magistrate's Court by A.N. Makau - SRM on 20th March, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement imposed upon him by the court of the Senior Resident Magistrate at Siakago on 20th March 2015.
2. The respondent/state has supported both the conviction and sentence.
3. This is a first appeal. As a first appeal court according to *Peters v. R Sunday Post Ltd (1958) EA 424* I am required to re-assess the evidence upon which the appellant was convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.
4. The appellant was convicted on the basis of the direct evidence of the complainant (PW 1). PW 1 gave evidence after the trial court conducted a *voire dire* examination. The trial court allowed her to make an unsworn statement but accorded the appellant the right to cross-examine her. It was her evidence that the appellant held her by her arm and took her to his house, where he had sex with her during the material night. PW 1 testified that she felt a lot of pain during the sexual intercourse. The following day, she was released and went to her home.
5. A medical examination was carried on her by Dr. Kimani and her report was put in evidence by consent as prosecution exhibit 2. According to the medical examination report, the complainant had normal external female genitalia. It is also indicated that her hymen was not intact.
6. R M (PW 2), the mother of the complainant gave evidence and stated that she examined the private parts of her daughter. According to the mother, she saw the private parts of her daughter. They were reddish and inflamed. As a result she took her to hospital.
7. The appellant made an unsworn statement and did not call any witnesses. It was his evidence that the mother of the complainant had grudges with him. He further stated that it is the mother who told the

complainant what she told the court. That is to say, that it is the appellant who defiled her. The appellant further testified that it is the mother who caused his arrest. He concluded by testifying that he did not touch the complainant leave alone defiling her.

8. The appellant raised six grounds of appeal. In ground 1, he stated the unchallengeable fact that he did not plead guilty to the charge. In ground 2 he stated that the trial court failed to consider that the appellant was not examined by a medical doctor. There is evidence that the complainant was examined by Dr. Kimani and her report was put in evidence by consent as exhibit 3. The trial court exercised its discretion under **section 77 Evidence Act (Cap 80) Laws of Kenya** to admit into evidence the medical report with the consent of both parties. This medical report correctly found the age of the complainant as being nine years. The appellant's submission that the age of the complainant was not established is without merit. Therefore this ground of appeal is without merit and is hereby dismissed.

9. In ground 3 he has stated that the trial court erred in fact and law by relying on inconsistent and uncorroborated evidence. I find from the evidence that there are no such inconsistencies. It is true that the evidence of the complainant was not corroborated. In terms of **section 124 Evidence Act** and in the light of her evidence, she was rightly believed. I have also come to the same conclusion that she was a truthful witness, whose evidence was properly acted upon without corroboration.

10. In ground 4 the appellant has stated that the medical evidence was not consistent. In this regard I find that the evidence of the complainant and that of her mother was consistent and clearly showed that her hymen was not intact. Furthermore, the mother found that there were blood stains in the clothes worn by the complainant. For this reason, I find that this ground of appeal is without merit and I reject it.

11. In ground 5 the appellant has stated that the trial court erred in law and fact in failing to find that his fundamental rights were violated under section 72 (3) and (b) of the Independence Constitution of 1963. The provisions of that Constitution are inapplicable to this case which was filed, tried and concluded under the 2010 Constitution. In ground 6 the appellant stated that the trial court erred in law and fact by rejecting his evidence. This was a case based on the credibility of witnesses. The trial court in my own assessment correctly believed the prosecution evidence and rightly disbelieved the evidence of the defence. And for this reason, this ground of appeal also fails and is hereby dismissed.

12. I have considered the written submissions of the appellant. He has submitted that the trial court violated his right by failing to call all the witnesses. I find that the village elder and the AP police officers who arrested and took the appellant to the police station were not called as witnesses. I find that the evidence of the arrest of the appellant was not essential to prove the guilt of the appellant. Therefore the failure to call them as witnesses did not occasion a failure of justice in terms of **section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya**.

13. The appellant was sentenced to life imprisonment. In sentencing the appellant, the trial court took into account his mitigation and it also considered that the victim was a nine year old person. The trial court correctly observed that the minimum prescribed sentence was life imprisonment. I do not find any error of law or fact committed by the trial court. In the circumstances, I find that the sentence was also merited.

14. The upshot of the foregoing is that his appeal is dismissed in its entirety.

JUDGEMENT DELIVERED, DATED and SIGNED at EMBU this 26th day of APRIL, 2016.

In the presence of both the Appellant and Ms Mbae for the Respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

26.04.16