



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 109 OF 2015

JACKSON KUBAI.....APPELLANT.

VERSUS

REPUBLICRESPONDENT.

(Being an appeal from the origin conviction and sentence in the Chief Magistrate's Court at Kiambu Criminal Case No. 957 of 2015 delivered by Hon. J. N. Onyiego, C.M. on 26th June, 2015)

JUDGMENT

Background.

The Appellant was charged with defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars were that on diverse dates between 2011 and 9th March, 2014 at [particulars withheld], Kiambu County, the Appellant, intentionally and unlawfully caused his penis to penetrate the vagina of A.N, the complainant, a girl aged 13^{1/2} years.

The alternate charge was one of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on diverse dates between 2011 and 9th March, 2014, the Appellant, intentionally and unlawfully touched the vagina of A.N a child aged 13^{1/2} years with his penis.

He was arraigned at the Chief Magistrate's Court at Kiambu where a conviction was entered against him on the alternative charge and he was consequently sentenced to 10 years imprisonment. Being dissatisfied with the decision of that court has appealed in this court. In a Supplementary Grounds of Appeal dated 24th February, 2016 he has raised eleven grounds of appeal which I have summarized as under;

- a) That there was no sufficient evidence to link him to the offence of indecent act against the complainant.***
- b) That the evidence on record was inconsistent, hearsay and a fabrication against him.***
- c) That the trial court erred in holding that the complainant was a truthful witness.***
- d) That the medical evidence did not support the offence for which he was convicted.***

e) That the learned magistrate failed to take into account the fact that there existed hostilities between the warring families which were the cause of the fabricated charges.

f) That the case was not proved beyond a reasonable doubt.

Submissions.

The appeal was canvassed by way of filing written submissions. The Appellant's submissions were that the learned magistrate erred in relying on uncorroborated, inconsistent and insufficient evidence by the prosecution. In this regard, it was submitted that the evidence was primarily hearsay and based on suspicion, personal opinion and preferences thus making it prejudicial. The Appellant submitted that this was informed by the assumption that because he was living alone he had an opportunity to defile PW1. Further that it was wrong for the trial magistrate to proceed and convict him after making an observation that the medical evidence was unreliable. He submitted that PW1 was clear that she was experiencing her menses and that therefore the blood on her biker could not have been as a result of defilement or any other form of sexual assault. Moreover, since she was allegedly defiled a day before the medical examination, the examination ought to have revealed the presence of spermatozoa which was not the case. Again, the doctor who first examined her was unable to confirm if her hymen was freshly broken. On this, the magistrate imported his own opinion that it was freshly broken. That then would mean that the appellant was not the culprit on other dates that PW1 alleged she was defiled.

Secondly, it was submitted that the learned magistrate erred when he disregarded the Appellant's defence as imaginary and fabricated. And that he also failed to give credence to the existence of a rift between the families of the parties involved which fact gave credence that the charges were brought about as part of personal vendetta. Thirdly, the Appellant contended that the learned magistrate had erred in convicting on the alternative charge when it was neither supported by the evidence on record nor proved beyond a reasonable doubt. Finally, the Appellant submitted that on the whole the evidence adduced did not prove the charges beyond a reasonable doubt.

The Respondents were represented by Ms. Aluda. She conceded to the appeal mainly on the ground that the medical evidence was not sufficient to support the charges. She stated that the blood stains in question may have been as a result of her menses. Secondly, she stated that the medical evidence on record was contradictory with regard to the age of hymenal tear. Finally, she conceded that the evidence of the key witnesses being PW1 and PW2 was not sufficient to prove the offences.

Evidence.

The prosecution's case was that the Appellant had approached the complainant in 2011 when she was in class 4 starting out with light fondling at his house and later turning into a sexual relationship. The complainant was given small tokens usually money and other novelty items as a way of keeping her quiet. The setup was quite elaborate with the Appellant notifying the complainant that there was no one spying on them to show up in his house by hooting the car horn. Their rendezvous used to occur mostly on Sundays when the Appellant was usually home.

On 9th March, 2014 the Appellant notified the complainant of his presence in the usual manner of his car horn. When she showed up she was offered yoghurt and cakes before being ushered into the bedroom where they proceeded to have sexual intercourse. After they were done he went out and made sure the surrounding was clear before letting her leave.

When she got outside she realized that her mother had been shouting her name in an effort to locate her. She therefore proceeded to where her mother was and upon inquiry on where she had been, she alluded from her friend's place and later changed the story that she had been at her grandmother's. The mother had also searched there and it was at this point she noticed her daughter's zipper was open. She slapped her and asked her to be straightforward with her. The daughter opened up and explained everything. The mother then proceeded to do a body check up on her daughter when she discovered blood on her biker. She called a taxi that took them to Kiambu District Hospital where she was examined before being

referred to Nairobi Women's Hospital where she was treated and a Post Rape Care Form prepared.

PW3, Dr. KAMANDE SIMIDEI, testified that he was a doctor practicing at Kiambu District Hospital. He produced the medical examination form on behalf of Doctor Mwangi who had prepared it. The P3 form showed that A.N had been sexually assaulted by a person known to her and she had been examined and referred to Nairobi Women's Hospital. It was discovered that she had a blood stained biker (short) in the perennial area (private parts) but she was generally in good condition. The age of the injury was approximately one(1) day, the type of weapon used was sexual and the nature of the injury was harm. Her hymen was also perforated, although it was not clear whether it was a fresh tear, and she had a vaginal discharge. A swab was taken and specimen taken to Nairobi Women's Hospital. From their laboratory tests they found that her urine had blood and pus cells and she was also HIV and Hepatitis negative. The labia minora and majora were found to be intact. It was also stated that she had an unspecified vaginal disease.

PW4, KINUTHIA EDWARD MBUGUA, was a Clinical Officer working at Nairobi Women's Hospital who the prosecution had called upon in a bid to have him produce documents made by Dr. Kevin Lemi. The Appellant's advocate objected to the same and the court agreed that summons issue to compel the appearance of the doctor who performed the medical examination. The said Doctor Kevin testified as PW5.

PW5, Dr. KEVIN LIME, testified that he was a medical doctor who had on 10th March, 2014 seen the complainant who claimed to have been sexually assaulted by a person known to her on 9th March, 2014. The complainant was yet to take a bath. He looked at her clothes before carrying out a full body physical examination. There were no abnormal findings with the outer genitalia looking normal. The vagina had mild vaginal discharge and was bleeding. The hymen was also missing. It seemed to have been broken recently within 3-7 days before. He recorded his findings in the Post Rape Care form. He sent her to the laboratory and the results were that she was HIV and Hepatitis negative. There were blood and pus cells in her urine. She was started on post exposure drugs for HIV and pregnancy and referred to a police station. He concluded that **“as per the evidence, there was penetration.”** He did not however carry out a vaginal swab. The court observed his demeanor as dishonest and quite evasive.

PW6, ANN WANGECHI NDERITU, testified that she worked at the Govern- ment Chemist and that on 19th March, 2014 and 28th March, 2014 she received exhibits from No. 93919 Police Consatable Joan Manyango of Kiambu Police Station. The items were; a biker indicated to belong to the complainant A.N, a blood sample from the complainant and a blood sample from Jackson Kubai, Appellant. She examined them for the presence of semen, spermatozoa and blood stains. The findings were that the biker was not stained with semen or spermatozoa but it was slightly stained with human blood. She also produced DNA profiles from the samples and they found that the blood sample from the biker was that of the complainant alone. The profile in respect of the appellant was negative.

PW7, NO. 93919 JOAN MANGAYO, she testified that on 9th March 2014, at around 10 pm, she received a report of defilement from the complainant. It was alleged that A.N, who was 13^{1/2} years old, was defiled by her neighbour by the name of Kubai. She recorded the statements and received a blood stained biker from the complainant's mother. She took it to the Government Chemist for analysis. She visited the scene although she could not gain entry to the Appellant's house. Appellant was arrested by Sergeant A. Mburu on 26th March, 2014.

At the close of the prosecution's case, the court ruled that a prima facie case had been established and put the Appellant on his defence. He chose to give a sworn statement and called one witness.

DW1, JACKSON KUBAI MURAYA, the Appellant himself testified that he knew the case before the court and that it was all fabricated. He said that the case emanated near where his second wife resides. He said that he had problems from that village about five years ago when a young boy killed his daughter. The villagers had also pushed his car into the river a while back. He also had a few land disputes in the area. The series of unfortunate events continued with a stabbing after he blocked a

neighbour's gate. He said all the issues emanates from the fact that he is not a local and moved there after buying land. He had also been threatened by the illegal sect Mungiki members.

He stated he was separated from his second wife for about 4 years and is a very close friend with the mother to the complainant. He said that the estranged wife could have instigated the charges. He asserted that he did not sleep with the complainant and it was all a frame up. He knew about the offence for the first time from Joan, PW7. He said he went to the police station and was released but when he went back two weeks later a doctor came and took his blood sample and he was later charged in court.

He further stated that he was never at home during the day as he used to carry out his milk and fodder selling business leaving home in the morning and returning late at night.

DW 2, JOSEPH NJUGUNA MUHIA, testified that he was employed by his uncle to take care of his cows and pigs when he was not studying. He stated that he was the only one who lived with the Appellant as he was estranged from his wives. He also stated that he had never seen the complainant in their compound and that further the appellant never let people into the compound. He stated that the children used to pick fruits from the Appellant's car which he used to bring home for the pigs. The vehicle is usually parked outside the gate giving them ample opportunity to pick the fruit. He stated that the complainant is one of the children who come to pick fruit from the car. He also stated that his uncle did not allow children into the compound.

I now summarize the issues for determination as follows;

1. **Whether evidence at hand supported the elements of the charges for which the appellant was convicted.**
2. **Whether the Appellant received a fair trial.**
3. **Whether the charges were proven beyond reasonable doubt.**

Determination.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion.

On whether the Appellant received a fair trial, it was his submission that the learned magistrate erred in failing to consider his defence and he dismissed it 'as a creation of his imagination crafted to escape liability.' The Appellant stated that this was prejudicial to his case as he had raised a competent and reliable defence of an ongoing feud between him and his neighbours. As stated in his testimony he had suffered a series of unfortunate events in that village but the vendetta, he alleged, did not specifically touch on the complainant. For this court to accede to his assertion that the complainant had set him of committing a sexual offence against her due to a friendship that existed between her mother and one of his estranged wives goes against logic given the stigma that is associated with sexual offences. That being the case though this court must still re-evaluate the evidence at hand and come up with its own independent decision.

The second issue that this court must look at is whether the evidence at hand was enough to support a conviction for each of the offences. The elements that must be met to support a charge of defilement under section 8(1) as read with Section 8(3) of the Sexual Offences Act are; age, identity and penetration. The first element is that of age, this was adequately proven by the production of the complainant's Birth Certificate number [particulars withheld] that sufficiently proved that the complainant was born in July 2000 and as such was aged 11 years when the offence was first perpetrated and 14 at the time of the Appellant's arrest.

The issue of identification is not in question as both the appellant and the complainant were neighbours. What is in issue is whether it is the appellant who perpetrated the sexual assault against PW1. I make this observation on bearing in mind that there was evidence of penetration. The evidence of PW3 was that

PW1's hymen was missing which was suggestive of penetration. The evidence of PW1 was that prior to the 9th March, 2014, the Appellant had severally had sex with her, which evidence the trial magistrate believed. But the conviction on the alternative count was based on the fact of lack of concrete medical evidence to support the main charge. I am of a different view to the effect that the evidence available supported the charge of defilement. But again, the defilement must be linked to the appellant. In the present case, PW1 testified that she had severally visited the appellant for purposes of having sex with him. On all these dates no one ever knew whether that fact existed. The closest to unraveling the mystery was when PW1 adduced that she revealed to her friends who asked her where she used to go and she told them that it was at the appellant's house. The said friends were not prosecution witnesses. It also emerged that the teacher to whom PW1 confided about her relationship with the appellant was not called to testify, and no reason was given for this. This then left a huge gap in proving that PW1 indeed used to visit the appellant, and therefore difficult to establish any of the offences prior to the 9th March, 2014.

Flowing from the above, the evidence that the prosecution relied on was the medical evidence particularly of PW3 who was a doctor from Kiambu District Hospital. This is the evidence that would have hammered the appellant. I poke shortfalls in it in that; first, PW3 could not tell whether the hymen of PW1 was freshly broken or not. This was a crucial aspect of evidence which the prosecution could not wish away. PW1 having been defiled on 9th March, 2014 and the P3 form having been filled on 11th March, 2014 meant that if indeed she had been defiled on the 9th, it would have been pretty easy to state that the hymen was freshly broken.

Second, was the evidence by the prosecution that defilement was so fresh as at the time of examination owing to the presence of blood in PW1's biker. However, the evidence of PW1 was that she was experiencing the commencement of her menses which explained the presence of blood. Further, in her lengthy evidence she narrated that before 11th March, 2014 she had had sex severally and therefore the issue of blood on her biker after an intercourse on 9th March, 2014 could not have arisen.

Third, and more importantly, was the DNA test carried out on PW1's biker by PW6, a Government Analyst, Ann Wangeci Nderitu. She did not find any positive DNA profiling of the appellant on the biker of PW1, including spermatozoa and blood. All that was found was Pw1's blood, yet that of the appellant too had been extracted for profiling. That leads me to conclude that there was no possibility that the appellant had come into contact with PW1 on the alleged date of 11th March, 2014.

I am minded that under Section 124 of the Evidence Act, a court may convict an accused based solely on the evidence of the complainant if it believes such evidence. However, in the present case, for the foregoing reasons, it is difficult to uphold PW1's evidence; more so when the medical evidence exonerated the appellant as having had a contact with her.

For these reasons I strongly hold that a conviction for defilement against the appellant was not possible. Having made the above observation, I am in the circumstances unable to hold that the appellant indecently assaulted PW1; for the very reason that the appellant could not be linked to the sexual assault against PW1. A positive finding in the alternative could only be based on failure to establish concrete evidence for the main offence. I am informed in this finding by the fact that when an accused is charged with a main count and an alternative one, if the main charge is not proved, but the evidence proves the minor or cognate offence charged as an alternative, then the accused ought to be convicted for the alternative offence. In this case, the medical evidence exonerated the appellant from having had a contact with PW1. It is that contact that could have linked any sexual assault perpetrated against PW1. In the absence of the contact, I also hold that the ingredients for the alternative charge could also not stand.

It is also trite to note that during the canvassing of the appeal both the appellant and the Respondent argued the appeal on the offence of defilement yet the appellant was acquitted on it. Under Section 354(3) (a)(i) and (ii) of the Criminal Procedure Code, an appellant court can only interfere with a finding of the trial court if the latter had made a finding on a conviction. The same read as follows;

“The court may then, if it finds that there is no sufficient ground for interfering, dismiss the

appeal or may-

a. In an appeal from conviction;-

(i)reverse the finding and sentence, and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence.”

For the foregoing reasons, it is the finding of this court that the prosecution did not prove its case to the required standard; beyond all reasonable doubt. I find the appeal meritorious. I quash the conviction and set aside the sentence. I order that the appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST MAY, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Mr. Mathenge for the Appellant.

Miss Aluda for the Respondent.