



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 21 OF 2015

JOHN MUTHAMA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence by Hon. M.O. Okuche (PM) in a judgement delivered on 13/2/2015 in Criminal Case No. 34 of 2014 at Kajiado)

JUDGEMENT

JOHN MUTHAMA, hereinafter referred as the appellant was tried and convicted by the magistrate court at Kajiado of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to life imprisonment in a judgement delivered on 13/2/2015.

Being dissatisfied with both conviction and sentence appellant has appealed to this court against the decision of the trial court.

Background:

The particulars of the offence as set out in the trial court were that on the 5th day of January 2014 in Loitokitok District within Kajiado County appellant unlawfully used his penis to penetrate the vagina of one A.M. (PW1) a child aged 10 years.

At the trial, the prosecution called five (5) witnesses in support of the charge and the appellant gave unsworn statement in answer to the charge.

It's on this basis that the appellant was convicted and sentenced accordingly under Section 215 of the Criminal Procedure Code.

Grounds of Appeal:

The appellant has appealed on the amended grounds of appeal crafted as follows:

(1) That the learned trial magistrate made an error in both law and facts, and misdirected himself by failing to apply the principles applicable in cases of circumstantial evidence, having noted in the course of his judgement that the evidence was of circumstantial nature.

(2) That the case for the prosecution was not proved to the required standard needed in law.

(3) That the learned trial magistrate made an error in both law and facts by failing to observe that the alleged blood stained shirt exhibit 3 was recovered in my absence hence not accountable for the same.

(4) That, the ownership of the alleged house was not established.

(5) That, none of the members of the public who were involved in my arrest were summoned to clear this fact and this violated Section 150 of the Criminal Procedure Code.

(6) That the issue of a grudge between the appellant and the victim's mother was not adequately considered as per the provisions of Section 169 (1) of the Criminal Procedure Code.

On the strength of these grounds the appellant prayed that the appeal on conviction and sentence be allowed and the trial court's judgement be set aside.

The appellant argued his appeal in person, while the respondent was represented by Mr. Akula Senior Prosecution Counsel.

Submissions by the Appellant:

The appellant submitted that the trial magistrate erred in applying the principles of circumstantial evidence to infer that he committed the offence of defilement against the complainant. The appellant took issue with the testimony of PW1 and PW2 regarding the house linking him with the offence but whose ownership was not proved. The appellant further contended that the blood stained shirt was not conclusively analysed to establish whether the blood stains matched that of the complainant PW1.

It was also the contention of the appellant that the trial magistrate failed to consider the major contradictions and inconsistencies in the prosecution's case. He also referred to the contradictions in the evidence of PW1, PW2 and PW4. He referred to the alleged contradictions on record associated with PW2 reporting the incident to Isinet Police Station.

According to PW2 the incident occurred at around 7.00 pm. PW4, a police officer at Isinet Police Post, testified that he received the complainant at 8.00 pm. The appellant contested the flow of events whereby he was not arrested by the police immediately after the incident took place. The appellant further submitted that the local chief was informed that complainant was defiled but prosecution never called him as a witness.

The appellant further argued that the trial magistrate failed to consider his defence that prior to the incident he had been employed by PW2. That during his employment with PW2 he was never paid his dues despite several demands.

As a result appellant submitted that the inconsistencies and contradictions provided a co-existing factor(s) which weakened or/and destroyed the inference of guilt against him. He relied on the following cases to buttress his arguments on legal principles of circumstantial evidence and the applicable test before court places relevance on such evidence.

(a) MWANGI v REPUBLIC [1983] KLR pg 522.

(b) REPUBLIC v TAYLOR WEAVER & DOWIRAN [19, 28] 21 CR. APPEAL R20

(c) DHALANY v REPUBLIC [1995 – 1998] EA 29

In his plea appellant contended that the prosecution failed to discharge the burden of proof on the charge he was indicted of at the trial court. He urged this court to allow the appeal on both conviction and sentence.

Submissions by the Respondent:

Learned Senior Prosecution Counsel Mr. Akula on his part opposed the appeal on both conviction and sentence. He reiterated the pieces of evidence by PW1 – PW5 and the defence by the appellant.

According to the respondent counsel, weighing the evidence it does establish that PW1 was defiled and a report made to PW2. The police on receipt of the complaint investigated the case; the complainant was examined by PW3. The respondent counsel further argued that the evidence of PW1 and that of PW3 confirmed the element of defilement.

On the issue of identification, learned counsel for the respondent submitted that PW1 properly identified the appellant as the perpetrator of the crime. That evidence was not rebutted by the appellant testimony at the trial. The learned respondent counsel further submitted that the prosecution led evidence on the age of the complainant PW1.

On the issue of lack of medical examination of the appellant, learned respondent counsel argued that there is no mandatory provision for such an examination. Learned respondent counsel further submitted that the contradictions and inconsistencies mentioned by the appellant did not weaken the prosecution case in any manner to warrant the decision by the trial court to be quashed. He prayed to this court to affirm the judgement of the trial magistrate on both conviction and sentence.

This being the first appellate court it's duty bound to re-evaluate the evidence adduced at the trial and draw its own conclusions, bearing in mind that I did not have the advantage of seeing and hearing the witnesses like the trial court. See **(OKELLO v REPUBLIC [1972] EA, PETERS v SUNDAY POST [1958] EA 424)**.

Evidence at the trial:

PW1 testified that on 5/1/2014 at around 1.00 pm she had been sent by her mother PW2 to go to the posho mill. On her way it is her evidence that someone ran after her and forcibly took her to the house nearby, and later a hill side. It was in that particular house and hill side that the person undressed her and had sexual intercourse several times.

PW2 the mother of PW1 became suspicious that since 1.00 pm the complainant had not turned up from the posho mill. PW2 further adduced evidence that she decided to follow up and find out the cause of the delay. PW2 testified that on the way she discovered the complainant lying down on the roadside with her torn inner wear and biker next to her.

PW1 and PW2 in their evidence reported the matter to Isinet Police Post where PW4 booked the report and referred them to Kimana Health Centre for examination and treatment. PW4 confirmed that pursuant to the complaint of defilement by PW1 and PW2 members of the public came in with a suspect whom he identified as the appellant.

According to the evidence on the record PW1 was examined by PW3 a medical doctor based at Loitokitok Hospital. On examination PW3 found the victim PW1 to be aged ten (10) years. The medical examination revealed she had pain in the chest, stomach and waist. It was PW3's testimony that PW1 also had blood stains on the waist. The doctor also said he found blood on PW1's vagina, her hymen was broken, and injuries to the vagina and anal were confirmed. The P3 form and post rape care form was produced as exhibit 4 & 5.

PW5, the investigating officer, adduced evidence on how she compiled the evidence, issued the P3 and took possession of relevant materials in support of the charge of defilement. In her testimony PW5 stated that the evidence linked the commission of the offence to the appellant. The appellant had earlier been arrested in the same farm where he lived.

In his unsworn statement in court the appellant denied the charge. He alluded the charges to fabrication

by PW2 who was his employer in October 2013. The appellant stated that PW2 never paid him for work done despite him making demands. In his defence, he never touched on the prosecution evidence by PW1, PW2, PW4 and PW5.

At the conclusion of the evidence the trial magistrate believed the prosecution case and disbelieved the appellant case regarding a grudge and non-payment of his dues. The learned trial magistrate on evaluation of the evidence convicted and sentenced the appellant to life imprisonment.

Analysis and determination:

The key issue to determine this appeal is whether the trial court was right to hold that the prosecution proved its case against the appellant beyond reasonable doubt to sustain the conviction and sentence of life imprisonment for the offence of defilement. The standard of proof required in criminal cases is proof beyond reasonable doubt.

The meaning of this phrase was delved into by none other than **Lord Denning** way back in 1947 in the case of **MILLER v MINISTRY OF PENSIONS [1947] 2 ALLER 372**. He stated thus:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the continuity if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

Section 107 of the Evidence Act provides that:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”

The burden of proof beyond reasonable doubt in criminal cases is to be discharged by the prosecution save in exceptional circumstances i.e. where an accused can be called upon to give a rebuttal. i.e. under the doctrine of recent possession.

In the instant case in order to sustain a charge of defilement against the appellant the prosecution must prove the following ingredients:

- (a) The age of the complainant.**
- (b) Proof of penetration.**
- (c) It is the appellant who subjected the complainant to the act(s) of defilement.**

The appellant’s contention on appeal as raised in the memorandum and grounds of appeal revolve around the circumstantial evidence and failure to prove the case beyond reasonable doubt by the respondent. I find difficult evidence to prove penetration.

Ingredient No.1: Act of Penetration:

PW1 told the trial court that on 5/1/2014, the appellant pursued her as she walked to the posho mill. The appellant got hold of her and dragged her into the house and forcibly undressed her. The appellant who also undressed inserted his penis into her vagina. It was also her testimony that besides the house she was also taken to a nearby farm and defiled further by the appellant. She reported to her mother PW2. PW2 reported the incident to the police on the same day. PW4 a police officer referred them to the Health Centre.

PW3, the doctor who carried out the medical examination, confirmed that PW1 had suffered injuries to the genitalia and anus. The doctor concluded that PW1 had been sexually defiled.

Under Section 2 of the Sexual Offences Act to constitute penetration the slightest penetration will do. To that definition implies that even the rupture of the hymen or injuries to the genitalia are not necessary for one to prove penetration. However, in the instant case prosecution led evidence from PW1 and the medical examination by PW3 of the complainant within a few hours were indicative of defilement. PW3 adduced evidence that PW1 suffered rupture of the hymen injuries to the genitalia; presence of blood in her private parts.

Ingredient No.2: Age of the complainant:

Under the Sexual Offences Act age is a key element of the charge of defilement. One of the key determinant to establish the age has been supported by the provisions of law on punishment.

The statutory categories of penalties provided for under Section 8(2), (3) & (4) of the Sexual Offences Act are anchored on the age of the victim of the offence of defilement. For example, an accused is liable to imprisonment for life for defilement of a child aged under 11 years. In the case of **HILARY NYONGESA v REPUBLIC CR. APPEAL No. 123 of 2009** Mwilu J as she then was held on this issue as follows:

“Age is such a critical aspect in sexual offences that it has to be conclusively proved and this becomes more important because punishment under the Sexual Offences Act is determined by the age of the victim.”

Secondly the court has held that age of the child can be proved by various methods. In the case of **KAINGU ELIAS KASOMO v REPUBLIC CA NO. 504 OF 2010 at MALINDI** the court held as follows:

“The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence, documents such as baptism cards, school leaving certificates. In my view would also be useful in this regard since the passage of the Sexual Offences Act, the practice has been that age of the defilement victim is carried out by dentists. The said assessment while useful and in defilement cases is just that in this case, the minor appeared before qualified medical officer who estimated the age to 15 years old, the same age was given by the minor and her mother. The trial court heard the minor’s evidence and saw her. The court was convinced that she spoke the truth.”

It was the learned respondent counsel contention that there was sufficient evidence from PW1 and PW2 to prove that the complainant was aged 10 years at the time of the defilement.

The prosecution further subjected PW1 to a medical assessment to ascertain the age. This was done at Loitokitok District Hospital by medical officer and the assessment report presented as evidence by PW5 under Section 77 (2) of the Evidence Act. The trial court had the best evidence of the biological mother PW2 which was further confirmed on assessment by the medical doctor. That evidence was never challenged nor controverted at the trial.

The appellant had the opportunity to cross examine the witnesses and challenge their credibility. The trial magistrate also had the opportunity to observe the demeanor of the witnesses and on evaluation made a finding on credibility as to her testimony. From the record the learned trial magistrate finding on age cannot be doubted, as the fact was proved by sufficient evidence. The legal principles in the case of **KAINGU ELIAS v REPUBLIC (Supra)** and **HILARY NYONGESA v REPUBLIC (Supra)** apply to the facts of this case.

I agree with the learned respondent counsel that prosecution established the age of the victim in this case to be ten years.

Ingredient No. 3: Whether the evidence by the prosecution places the appellant at the scene of the crime.

The trial court relied on the evidence of PW1. According to the learned trial magistrate in his judgement on pg. 26 line 10 observes as follows:

“The complainant though a minor aged 10 years struck this court with her intelligence and amble memories, where she recalled minor details of what transpired on the material day. Her evidence is that the accused defiled her at two places.”

It is obvious from the record that PW1 gave the description of the appellant to PW2. The record and testimony of PW1 and PW2 reveals that the time of alleged incident was about 1.00 pm in the afternoon. The appellant was not a stranger to the PW1 nor PW2 as he was earlier employed in the farm of PW2 as a casual labourer. In relation to identification it was the appellant person whose physical features (PW1) was familiar with and recognized. The conditions as to time the defilement occurred are such that no mistake of error could have occurred as who the complainant alleged to have committed acts of defilement.

In my judgement, PW1 testimony falls within the test laid down in the case of **REPUBLIC v TURNBULL [1976] 3 ALL ER 551** on factors to be taken into account in a case of a single identifying witness. In this case I bear in mind the time and length of acquaintance complainant had with the appellant. The appellant in his defence never controverted that piece of evidence on recognition. The appellant contended that he used to be an employee of PW2. He was never paid his dues for work done hence the reason the offence was a fabrication from the mother of the complainant.

The trial learned magistrate weighed the prosecution case viza viz the defence by the appellant and arrived at a conclusion that the prosecution evidence established the case against appellant beyond reasonable doubt.

I agree with the trial magistrate that the issue of non-payment of dues was not the cause of the charge and that the evidence presented by the prosecution was sufficient to prove complainant was defiled by the appellant. The evidence of PW1 placed the appellant at the scene of the crime.

The appellant in his memorandum submitted that the prosecution failed to call witnesses to prove ownership of the house, medical evidence of a blood stained shirt and the members of the public who effected arrest against him.

In dealing with this ground I rely on the celebrated case of **BUKENYA & OTHERS v UGANDA [1972] EA 549**. It is well established that the Director (in this case the Director of Public Prosecutions under Article 157 of the Constitution) has discretion as to who are the material witnesses to call. In exercising this discretion the director is not to call quantity but quality of evidence to prove existence of facts in existence; an issue under Section 107, 108 and 111 of the Evidence Act. Weight and value of the evidence which the prosecution can solely rely on to conclusively prove their case beyond reasonable doubt is their responsibility.

The only exception provided for in the **BUKENYA Case (Supra)** is where witnesses not called are of a nature in the circumstances of the case that an adverse inference can be drawn in favour of the appellant's case.

There can be no doubt that the appellant has not presented any material evidence that failure to call the members of the public or owner of the house weakened the prosecution case in any way. The grounds 3, 4 and 5 therefore fails.

In my view, from the overwhelming evidence from the complainant the trial court could as well have relied on the proviso of Section 124 of the Evidence Act to convict the appellant.

“The proviso of Section 124 of the Evidence Act states that where in a criminal case involving 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.”

Fortunately in this appeal not only did the prosecution tendered evidence of PW1 the complainant but also of PW2. PW2 gave consistent evidence based on what she saw on the complainant when she found her on the road side. According to PW2 the complainant was unconscious and in distressed condition. All this was sufficient evidence to corroborate the testimony of PW1.

Corroboration could also be found on PW3’s evidence of his findings and the injuries confirmed on examination at Loitokitok Hospital. The injuries to the genitalia, anus discharge over the vulva, blood stains in the same region and rupture of the hymen are indications of sexual assault which corroborate the complainant’s evidence on defilement.

This appeal on scrutiny and evaluation rests on both direct and circumstantial evidence, the testimony by the complainant falls within the category of direct evidence in stating the chain of events on how the offence was committed. The rest of the witnesses PW2, PW3, PW4 and PW5 build on that foundation by PW1 to provide a sequence of events which nails the appellant as the perpetrator of the crime.

The Court of Appeal in the case of **ABANGA alias ONYANGO v REPUBLIC CR. APPEAL NO. 32 OF 1990** stated the principles as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.**
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.**
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

In the instance case the prosecution placed before the trial court evidence of PW1. The incident of defilement allegedly took place at 1.00pm in the afternoon. The complainant had the opportunity to capture the physical features of the appellant. The appellant after the ordeal was unconscious. She was later traced by her at the roadside. It was not far from the actual scene of the offence. The complainant had blood stained clothes and also in her private parts. The appellant was pursued soon thereafter and arrested with the checked shirt with blood stains. That fact though not investigated further by having aforesaid analysis it did not weaken the prosecution’s case.

The basis of that conclusion being that there was other positive evidence supporting identifications of the appellant as the defiler. The claim of circumstantial evidence from the distressed condition of the complainant.

Secondly the complainants mother, who receipt of the report; called in the police. The investigating officer conducted the investigations which in totality linked the appellant with the crime. This sequence was not dislodged by the appellant that on the material day and time he was not at the scene described by the complainant. I am therefore satisfied that the prosecution at the trial proved all the ingredients of the offence of defilement beyond reasonable doubt against the appellant.

SENTENCE

As regards sentence I am guided by the case of **OGOLLA S/O OWUOR v REPUBLIC EACA 175 of 1954**. The East African Court of Appeal held as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES v REPUBLIC [1950] 18 EACA 114, it is evident that the judge has acted upon wrong principle, or overlooked some critical factor. To this we would also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case.”

In the instant case the appellant was charged of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The penalty section 8(2) provides for a sentence for a child aged 11 years or less. The victim in this appeal was confirmed as aged 10 years old as established from the prosecution case. The learned trial magistrate appropriately applied the law by sentencing the appellant to life imprisonment.

In dealing with appeals against sentence the appellate court should ask itself the following questions:

- (1) Has the trial court acted on wrong principle(s)?**
- (2) Has the trial court overlooked some material factor?**
- (3) Is the sentence manifestly excessive in view of the circumstances of the case?**

In this appeal on analysing the record of the lower court and memorandum of appeal, no valuable evidence to persuade me to answer the above questions in the affirmative. I bear in mind that in exercising discretion as an appellate court compliance with the constitutional principles and values under Article 10 (2), the Sentencing Policy Guidelines of the Judiciary and statutory provisions should be taken into account in order to alter or review a sentence of a trial court.

In all these considerations the objective is to answer the question, whether there exist in a judgement of the trial court exceptional circumstances which would render a sentence unjust or occasion injustice if it is not reduced or enhanced. No legal issues arise out of that finding of the lower court. The sentence of life imprisonment though severe was perfectly lawful under Section 8(2) of the Sexual Offences Act.

I am also of the considered view that in exercising discretion and in compliance with the constitution and the sentencing policy guidelines an appellate court should take into account whether there are any exceptional circumstances which would render a sentence unjust or occasion injustice if it is not reduced or enhance. On my part no such circumstances presented themselves to warrant action on the sentence by the trial court. I find no reasons to interfere with the sentences imposed by the trial magistrate.

DECISION

Having appraised the evidence, considered the case at the trial court visa viz the grounds of appeal by the appellant, I was able to come to only one conclusion. That in accordance with the law and reasons advanced in deciding this appeal, the appellant was properly convicted and sentenced by the learned trial magistrate. Accordingly the judgement of the lower court delivered on 13/2/2015 is hereby affirmed.

Dated, delivered in open court at Kajiado on 24th day of May, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Appellant - present

Mr. Akula for Director of Public Prosecutions

Mateli Court Assistant