



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 222 OF 2013

JOSEPH KIPROTICH MALAKWEN APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the AG. Senior Resident Magistrate Honourable B. Kasavuli in the Eldoret Chief Magistrate's Court Criminal Case No. 2370 of 2012, dated 22nd July, 2013)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual offences Act**. It was alleged that on the 21st day of May 2012 in Wareng District of the Rift Valley province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *F.C (Name withheld)* a child aged 16 years.
2. In the alternative, the appellant was also charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in that on the same date and place, he unlawfully and indecently allowed his genital organ (Penis) to come into contact with the genital organ (vagina) of *F.C* a child aged 16 years.
3. After a full trial, the appellant was acquitted of the main charge of defilement but was convicted of the alternative charge of committing an indecent act with a minor. He was sentenced to ten years imprisonment.
4. Being aggrieved by his conviction and sentence, the appellant lodged an appeal to the High Court. In his petition of appeal which he filed in person, the appellant mainly complained that he was wrongly convicted as the learned trial magistrate relied on insufficient, uncorroborated and unreliable evidence to convict him; that the trial magistrate failed to thoroughly interrogate the evidence on record and failed to appreciate that the prosecution had failed to call independent eye witnesses to the incident in question; and finally that the learned trial magistrate erred by shifting the burden of proof to the appellant.
5. When prosecuting the appeal, the appellant entirely relied on homemade written submissions which he filed in court on 14th April, 2016. The submissions expounded on the grounds of appeal and emphasized that PW1 was not a reliable witness and her evidence ought to have been disregarded in its entirety. The appellant in a nutshell implored the court to find that the charge in the alternative count was not proved beyond reasonable doubt and that the appeal ought to be allowed.
6. The state is opposed to the appeal. Learned prosecuting counsel *Miss Karanja* in her submissions contended that the appellant was properly convicted as every element of the charge had been proved against him beyond any reasonable doubt; that the sentence of ten years imprisonment was lawful as this was the minimum mandatory sentence allowed by the law. Counsel invited the court

- to dismiss the appeal for lack of merit.
7. This being the first appeal to the High Court, I am enjoined to carefully and exhaustively re-evaluate the evidence presented before the lower court to enable me draw my own independent conclusions regarding the soundness or otherwise of the appellant's conviction. In doing so, I should be careful to remember that unlike the learned trial magistrate, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage;- See: **Pandya V Republic (1975) EA 336; Okeno V Republic (1972) EA 32; Simiyu & Another V Republic (2005) 1 KLR 192.**
 8. Briefly, the case for the prosecution was that the complainant who testified as PW1 went to the appellant's shop at around 10 a.m on 21st May, 2012 to buy shoe polish as she was preparing to go back to school. Five other customers found her in the shop. The appellant served them first and when they left, he dragged the complainant to his bed room which was separated from the shop by a piece of iron sheet. While there, he pulled and tore her underpants, threw her on his bed, removed his trousers partially and as he was penetrating her private parts with his penis, his wife walked in and thwarted his plans. She threatened to assault the complainant. To save herself, PW1 ran out of the room leaving behind her sweater and her torn underpants. According to her evidence, the appellant's wife who was armed with a panga chased her upto her home where she locked herself up in the house. The appellant's wife found her mother and reported to her what had happened. PW1 recalled that after sometime, she went back to school and while on her way, she picked her underpants on a road side near the shop. It was also her evidence that she had not engaged in any sexual activity prior to that day.
 9. PW2 (PW1's mother) on her part recalled that on the material date, she was on duty in a hotel when she saw the appellant's wife running armed with a piece of wood. She was surprised when the appellant's wife told her that her daughter had slept with her husband to get school fees. PW2 on receiving the disturbing news went home only to find that PW1 had already gone back to school. She called the school principal and requested that PW1 be allowed to go back home after four days. When she eventually went back home, PW1 reported to PW2 what had happened on 21st May, 2012. PW2 then reported the matter to the police and upon her identification, the appellant was arrested by PW4. PW1 was also issued with a P3 form which was filled by PW3, a clinical officer at Burnt Forest Hospital.
 10. When put on his defence, the appellant gave a brief sworn statement and did not call witnesses. He admitted that PW1 had gone to his shop on the date and time alleged but he denied having defiled her as alleged. He testified that when PW1 went to his shop, she only bought a piece of cake and left immediately.
 11. After analysing the evidence placed before the trial court, the learned trial magistrate in her judgment stated as follows;-

".....there is evidence on record by the complainant that the accused dragged her inside his bedroom in the shop and removed her underwear and partially inserted his penis in her vagina. However, when the clinical officer PW3 testified, he told the court that he did not find any evidence of defilement. Secondly, the complainant stated that the underwear got torn while the accused was removing it but when I carefully looked at the said underwear which was produced as exhibit 2 in this case, I noticed that the said tear was a normal wear and tear of the underwear. I say that it was a normal wear and tear because the area at which the same was torn was not at the edges but near the vagina's region. If the accused actually used force to remove the underwear, then the same should have been torn at the edges and not at the area that was torn. The complainant said that she had never had sex before the incidence of 21/5/2012 yet when the clinical officer testified, he confirmed that the complainant was sexually active. The complainant testified that she stayed in the accused's bedroom for about 20 minutes which to my mind persuades me to believe that the complainant was not forced into the bedroom as alleged. In view of this contradiction, I find that the complainant was not forced into the bedroom as alleged. In view of this contradiction, I find that the complainant was not telling the truth. The complainant even went to school without reporting the incidence to her mother who was in a hotel on the same day. If indeed the complainant was defiled, why did she find it safe to go to

school without reporting the incidence to PW2? Clearly, this to my mind confirms that she was not defiled as alleged....”

12.The trial magistrate continued to say the following;

“...PW1 said that she was in the shop for about 20 minutes before the accused’s wife ambushed them. I believe this testimony because when the accused’s wife was chasing her, she left her underwear behind and only recovered it later outside the accused’s shop as she was going back to school. This evidence became apparently clear during cross examined of PW1 by the accused. I do not believe that the complainant just bought half-cakes and went away before these allegations were raised. The accused admitted that the complainant was in his shop on the material day but he kept completely silent and fained innocence over the evidence showing that his wife caught him red handed in bed with the complainant. I believe that the complainant was telling the truth when she said that the accused partially inserted his penis in her vagina. This evidence is supported by the evidence of PW3 who said that there was no evidence of defilement...”

13.I have extensively reproduced the trial court’s findings above in order to lay a basis for the conclusion that I have arrived at in this appeal which I will state shortly. It is evident from the court record that after carefully evaluating the evidence presented before the court, the trial court made a firm finding that PW1 was not a truthful witness and must have lied when she alleged that the appellant dragged her into his room, tore her underpants and defiled her. However, shortly after making this finding, the learned trial magistrate proceeded to state that he believed PW1’s evidence that the appellant had partially inserted his penis into her vagina and this belief formed the basis of the appellant’s conviction on the alternative count.

14.In my view, the learned trial magistrate having made a finding of fact that the complainant had lied about the allegations of defilement misdirected himself when he believed her claim that the appellant had partially inserted his penis into her private parts before his wife ambushed them and chased her away. The learned trial magistrate should not have dismissed one part of PW1’s evidence as false while at the same time accepting another part of the same evidence as true. The reason for this is obvious. If PW1 had lied about the claim regarding her alleged defilement, there is no guarantee that she did not also lie about the claim that the appellant had started the process of defiling her when he was allegedly interrupted by his wife. It is not clear which criteria the learned trial magistrate used to believe one part of PW1’s evidence while discarding another as false. Having formed the impression that PW1 was not a truthful witness, the learned trial magistrate ought to have disregarded her evidence in its entirety.

15.On my part, after evaluating the evidence of PW1 and PW2, I find that the two witnesses contradicted themselves when narrating the events of the material day in a way that created reasonable doubts regarding their credibility. While PW1 claimed that the appellant’s wife chased her with a panga upto her home where she found her mother, PW2 contradicted her evidence when she testified that she was in a hotel when she saw the appellant’s wife running with a piece of wood. She did not say that she saw her running after PW1 with a panga. If indeed PW1 and PW2 were truthful witnesses, given that it was during the day, they would have seen clearly which weapon the appellant’s wife was armed with if any and would not have contradicted themselves regarding whether she was armed with a panga or a piece of wood. Secondly, PW1 could not have claimed that the appellant’s wife found PW2 at their home if the truth was that PW2 was in fact on duty in a certain hotel. These contradictions are irreconcilable. The only conclusion I can arrive at given such evidence is that either PW1 or PW2 or both of them lied to the trial court. I say so because only one of the two versions they narrated to the trial court could have been correct or truthful. It is also interesting to note that the sweater PW1 claims she left in the appellant’s shop was not recovered and the torn underpant she allegedly left inside the appellant’s shop was found on the road side. No evidence was led by the prosecution to show how the said underpant found its way from the shop to the roadside.

16.In addition, it is worth noting that PW1 had claimed in her evidence that she had not had any

sexual activity prior to the material date. This evidence was sharply contradicted by the evidence of PW3, the clinical officer who examined her after the alleged defilement. According to the evidence of PW3, he noted that PW1's hymen was torn and that she had been sexually active. This is yet another indicator that PW1 was not a truthful witness.

17. My analysis of the evidence on record leads me to the conclusion that the learned trial magistrate was correct in his earlier finding that PW1, who was the prosecution's key witness was not a credible and reliable witness. The trial court clearly erred by eventually relying on her evidence to convict the appellant on the alternative charge. It also erred in its finding that the evidence of PW3 corroborated PW1's evidence on the alternative charge because the claim by PW3 that he did not find evidence of defilement on PW1 did not have anything to do with the allegation that the appellant had indecently made contact with the complainant's private parts as alleged.
18. In view of the foregoing, I have come to the conclusion that the prosecution totally failed to discharge its burden of proof as required by the law in this case. This finding alone would have been sufficient to dispose of this appeal but there is one more thing that deserves my consideration.

The appellant had complained that the learned trial magistrate erred in shifting the burden of proof from the prosecution to him. I concur with the appellant on this point as this is borne out by the judgment of the learned trial magistrate in the passages I reproduced earlier in this judgment. The learned trial magistrate claimed that the appellant kept silent and feigned innocence over the evidence showing that his wife had caught him red handed in bed with the complainant.

19. One of the cardinal principles of criminal law is that the burden of proof in criminal cases always lies on the prosecution to prove the charges facing an accused person beyond any reasonable doubt. Subject to the provisions of **Section 111** of the **Evidence Act** which is not applicable in this case, the burden never shifts to an accused person. The Constitution and the law allows an accused person to remain completely mute and say nothing in his trial. The learned trial magistrate therefore erred in law in purporting to shift the burden of proof to the appellant in this case.
20. For all the foregoing reasons, I am satisfied that the appellant was not properly convicted. His conviction was unsafe. I therefore find merit in this appeal and I hereby allow it. I accordingly quash the appellant's conviction and set aside the sentence imposed by the trial court. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of May, 2016

In the presence of:

Appellant

No appearance by the state

Ms Naomi Chonde – Court clerk