



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 107 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 142 OF 2014)

(Being an appeal against conviction and sentence in Narok Criminal Case No. 1149/2013 – A. K. ITHUKU SPM)

SHADRACK KIPKORIR RONOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with Defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. In that on 28th August 2013 at [particulars withheld] Narok, committed an act that caused penetration of his penis into the vagina of **M.K** a child aged six years.
2. Following a full trial, the Appellant was convicted on the main count and sentenced to life imprisonment. He has appealed to this court against both conviction and sentence. There are five grounds listed in the amended grounds of appeal.
3. In the first ground, the Appellant takes issue with the sentence, asserting that it is unconstitutional. The 2nd ground is that the Appellant was aged under 18 years during the trial. In ground 3, the Appellant describes his trial as a mistrial for being conducted by an unqualified prosecutor. Ground 4 attacks the quality of the prosecution evidence while in ground 5 the Appellant contends that his defence was not considered.
4. In his written submissions, the Appellant argues that the sentence imposed on him was in violation of Article 24 of the Constitution. He asserts that he was a minor at the time of the trial and should have been provided with an advocate at state expense, pursuant to Article 50 of the Constitution. Citing Sections 85 and 88 of the Criminal Procedure Code, he contends that the prosecutor, one PC Ihaji was not qualified to prosecute the case.
5. Highlighting what he claims are discrepancies between the testimony given by **PW1** and **PW2** during the first and second trial, the Appellant argued that the prosecution evidence was riddled with inconsistencies. He challenges the medical evidence tendered and the competence of the clinical officer **PW4**, asserting that the P3 form was in respect of a different person from the Complainant in this case. He further complains that his alibi defence was not given consideration and reiterated that as a minor, he should have been accorded legal representation at state expense.

6. The appeal was opposed by Ms Waweru on behalf of the DPP. Miss Waweru reiterated the prosecution evidence adduced at the trial contending that the charge was duly proved.
7. The duty of the first appellate court was stated in **Okeno vs Republic [1973] EA 32** as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala – Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.”
8. The prosecution evidence at the trial was that in the material period **M.K**, the complainant (**PW1**) was six years old, residing with her mother **N.M.K (PW3)**, father and brother **S.K.K (PW2)** at [particulars withheld]. On 28/8/13 the complainant was at home while her mother was tending her shamba some distance from the home. **PW2** was herding livestock close to the homestead. At 5.00pm, the Appellant who worked for a neighbor, approached **PW1** asking for a cup of water. **PW1** complied. The Appellant then offered some green maize from the farm he guarded to **PW1**. He asked her to get a paper bag for carrying the maize and led her inside the maize crop.
9. In the maize field, he cupped **PW1’s** mouth threatening the minor with death. He removed her dress and under wear and then penetrated her. **PW2** who had watched **PW1** enter the maize crop accompanied by the Appellant raised an alarm when he heard **PW1** screaming. He rushed to inform his mother and on the way back ran ahead to find the Appellant lying on top of the minor. The Appellant fled the scene but was later apprehended.
10. The complainant was treated at the local dispensary and referred to Olololunga hospital where **Samuel Seno (PW4)**, a Clinical Officer saw her. He noted injuries to the vagina and the anal region as well as a whitish discharge. There were traces of pus and blood in the minor’s urine. The minor had bruises on the thighs and her hymen had been broken. The accused was arrested and handed over to **PC Rose Kamau** of Olololunga police station on 29/8/13. She also recovered the minor’s black dress and under wear which she produced at the trial.
11. In his evidence, the appellant gave a sworn statement to the effect that he worked at a flour mill and resided at Oloregeny. He denied the offence and said that on the material day, he harvested potatoes before proceeding to the flour mill. He said he was arrested at the mill by the complainant’s father. He confirmed that he knew **PW1’s** mother and brother.
12. Undeniably, the incident described by **PW1** happened in day time. She knew the Appellant. **PW2** also knew the Appellant. They testified that he worked at a neighbour’s farm as a guard. Both witnesses identified the Appellant as the person who defiled **PW1** in the maize shamba. **PW1** and **PW2** gave consistent testimony of the episode starting with the Appellant asking **PW1** for water and later luring her inside the maize plantation under the guise of giving her some maize.
13. It is true as stated in the Appellant’s submissions that the Complainant told the first trial that she was alone at home but from the evidence **PW2** was in the vicinity by the house. That is clear from his testimony both at the first and second trial. That **PW2** stated that **PW1** was “alone in the house”, that does not mean nobody else was in the homestead.
14. The evidence of the actual defilement of **PW1** is confirmed by her mother **PW3** who rushed home upon being called by **PW2**. She stated:

“PW2 came running and said that PW1 was screaming inside a maize farm. That she had been taken there by the accused. We went to the scene. PW2 ran ahead of us. I found PW1 lying on the ground. She could not stand properly. She was bleeding from her vagina and anus. She was badly torn.”

15. The injuries are confirmed by **PW4** who examined the complainant at Ololulunga District hospital. The Appellant has objected to the competence of **PW4** to assess injuries on the Complainant. The objection is without merit. In an appeal where a similar objection had been raised based on Section 48 of the Evidence Act, the Court of Appeal stated in **Fappyton Mutuku Ngui -vs- Republic (2014) eKLR** that:

“PW5 is a clinical officer who testified on behalf of his colleague..... who examined and treated PW2 at Matuu District Hospital. In our opinion, a clinical officer is qualified to fill a P3 form. This is an areas of his competence (See Raphael Kavoi Kiilu -Vs- Republic Criminal Application No. 198/2008; Section 2 of the Clinical Officers (Training, Registration and Licencing) Act, Cap 260.....”

16. Contrary to the assertions of the Appellant, the name of the Complainant in the P3 form tallies with the charge sheet and evidence of key witnesses. The findings therein confirm that the Complainant was injured during the assault both on the vagina and anus. Although she had testified regarding sexual assault leading to anal and vaginal penetration during the first trial, in the second trial **PW1** only talked of the latter. However, this does not detract from her credibility as the P3 form also confirms injuries to the anal area.

17. It may well be also that **PW2** did not actually see the Appellant in the actual sexual act with **PW1** but his evidence places him so close to the scene that there can be no dispute that he was the first to arrive at the scene or at least to hear **PW1**'s cry for help in the course of the assault. It is **PW2** who called his mother **PW3** to the scene. It seems that the situation was in flux and things happened very quickly, hence **PW2** can be forgiven for slight discrepancies in his evidence.

18. The Court of Appeal in the case of **Sango Mohamed Sango and Another Vs Republic [2015] eKLR** quoted with approval from the decision of the Ugandan Supreme Court in the case of **Twehangane Alfred -Vs- Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA**, where it was observed:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate un truthfulness or if they do not affect the main substance of the prosecution’s case.”

19. The main thrust of the evidence by **PW1** and **PW2** remains solid and points to the Appellant as the assailant. There can be no possible reason to cause **PW1** and **PW2** to make up such a torrid accusation against the Appellant whom they knew well and seemingly had no issue with. **PW2** was about 13 years old at the material time while **PW1** was only six years old. Her age was confirmed through the oral testimony of **PW3**, the immunization card and assessment by **PW5**.

20. The trial court after seeking guidance from legal authorities concluded with regard to identification that:

“In the case before me, the accused person was somebody known by PW1 and PW2. He used to work for a neighbor. There was evidence of identification by recognition. The offence occurred at 5.00pm. At such time there is still broad day light. I did not see a chance for mistaken identity. I am aware that the evidence on identification is by two minors. I am alive to the provision to Section 124 (of the Evidence Act)... I find the two minors truthful, full of candor and consistent even after cross-

examination. It is my finding that they positively identified the accused person as the person who defiled the complainant. I did not find any reasons for them to lie.”

In the case of **Anjononi -Vs- Republic [1980] KLR 59** the Court of Appeal held that evidence of recognition of a suspect is more reliable as it is based on a witness' familiarity with a suspect.

21. On my part, reviewing the prosecution evidence and particularly the testimony of **PW1** and **PW2**, I do agree with the findings of the trial court. The evidence by **PW1** and **2** effectively dislodged the Appellant's alibi, placing him at the scene of the offence. The defence was therefore properly dismissed by the trial court.
22. The objection concerning the competence of the police prosecutor has no basis as Sections 85 and 88 of the Criminal Procedure Code were amended in 2007. There is therefore no merit in grounds 3, 4 and 5.
23. The Appellant claims in ground number 2 that he was a minor at the time of the trial. The Appellant was tried before two different courts but never raised this matter. Not even during mitigation. It is most unlikely that two courts failed to notice that he was a minor and therefore deserving of the services of an advocate at state expense.
24. Before me, the Appellant appeared to be a mature person. Be that as it may, this court, in order to assure itself on the merits of ground 2, will order that the Appellant be escorted to hospital for purposes of age assessment. This assessment will also enable the court to make a finding in respect of the sentence. The age assessment report in respect of the Appellant is to be filed in court before the 14th July, 2016 when the case will next be mentioned.

Delivered and signed at Naivasha on this **23rd** day of **June, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For Appellant : Present in person

Court clerk : Barasa

C. MEOLI

JUDGE