



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 40 OF 2015

MUCHOMBA NYAKI KIAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of L.N. MESA - SRM made on 8/7/2014 in Marimanti Principal Magistrate's Court Criminal Case No. 543 of 2013).

J U D G M E N T

1. On 24th September, 2013, Muchomba Nyaki Kiao, (“the Appellant”) was arraigned before the Principal Magistrate’s Court, Marimanti charged with the Offence of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 2nd June, 2013 at Kathuura Sub-location, Turima Location within Tharaka Nithi County, the Appellant caused his penis to penetrate the vagina of “A K” a child aged 14 years. The Appellant denied the charge but after trial, he was found guilty, convicted of the offence and sentenced to 20 years imprisonment.

2. Aggrieved by that decision, the Appellant has preferred an appeal to this court. In his Petition of Appeal, the Appellant set out seven (7) grounds which can be summarized as follows:- that the trial court erred in convicting him on circumstantial evidence and without considering that no exhibit was produced; that vital and independent witnesses were not called and his name was never mentioned in the initial report; that the grudge between him and the complainant’s family was not considered and finally that his defence was disregarded. This being a first appellate court, it behoves the court to review and re-evaluate the facts afresh with a view to arrive at its own conclusions and independent findings. See **Okeno-V-Republic [1972] EA 32**. However, in so doing, the court must bear in mind that it did not see the witnesses testify.

3. The prosecution case was that “A K”, the complainant (PW1) was on 2nd June 2013 herding cows at Kiaa Hills. Her cows went missing and she met one J K and the Appellant whereby the latter offered to assist her in looking for the cows. However, when going up the hill, the Appellant grabbed her neck, laid her down, removed her inner wear and had sex with her. She felt pain and saw blood come out of her vagina. The Appellant threatened her that if she screamed, he would take her up the hill and cut her throat. The two later found the cows and left the scene. On the way home, they met with the complainant’s mother (PW2) who was also going to look for the complainant. When they reached home, the complainant narrated to her mother what had happened which prompted PW2 to report the incident at Marimanti Police Station. Later the complainant was examined at Marimanti hospital. The complainant admitted having had sex previously with one of her school mates. In cross-examination, the complainant told the court that she had known the Appellant for a long time as a son to her grandmother, one K.

4. On her part, J K K (PW2) told the court how she returned home on the 2nd June, 2013 at about 5.30 p.m. and found that her daughter (PW1) had not returned from herding. She decided to go to the hills to look for her. On the way a woman by the name of G informed her that she had seen the Appellant with the complainant. That the complainant informed her that the Appellant had defiled her. She reported to the chief and took complainant to Marimanti hospital where she was treated and a P3 form filled. That the Appellant thereafter disappeared for three (3) months until he was apprehended on 23rd September, 2013.

5. PW3, Clement Nkoroi the Clinical Officer from Tharaka District Hospital produced the P3 form (PEXh 1) for the complainant which showed that her hymen was broken and there was abrasions on the vaginal walls. Spermatozoa was also seen on the vulva. He concluded that there had been peno-vaginal penetration without a condom. Corporal Alfred Maritime (PW4) investigated the case. He told the court how a report of defilement was made at Marimanti Police Station on 3rd June, 2013. He referred the complainant for medical examination and a P3 form was filled. He produced a Birth Certificate (PEXh 2) which showed that the complainant was born on 30th October, 1998.

6. In his defence, the Appellant told the court that he was not the one who committed the offence. That the person who committed the offence was one M K. That he never saw the complainant on the material day as he spent the whole day at home taking care of his children. That the case was about a land dispute he had with the complainant's mother. That he is an old man incapable of having sex.

7. At the hearing of the appeal the Appellant relied on his written submissions, which the court has carefully considered. He submitted that J K, one G and an administration police officer by the name Peterson were crucial witnesses who were not called to testify. That the evidence of the complainant and PW2 should not be believed as the former did not inform PW2 of the alleged defilement at the time they met but waited until they reached home. That according to PW3, the clinical officer, the child who was examined was of 4 years while the complainant was 14 years; that the charge sheet was in respect of one M K and not the Appellant. That the Appellant was not examined to confirm if the spermatozoa found in the complainant's vulva were his. He urged that the appeal be allowed. Ms Njagi for the state opposed the Appeal. She submitted that the P3 form proved peno-vaginal penetration; that all the important witnesses were called and they testified. That the alleged grudge was not proved and that the evidence of the complainant was direct and satisfied the provisions of section 63 of the Evidence Act.

8. The court has considered the entire record and the submissions of the Appellant and learned counsel for the state. The first ground was that the trial court erred in convicting the Appellant on circumstantial evidence and that no exhibit was produced. The complainant told the court that on the material day, after the cattle she was herding went missing, she was on her way home when the Appellant offered to help her look for the cows. A short distance up the hill, the Appellant grabbed her neck, laid her down, removed her panties and defiled her. She felt pain. Blood mixed with water came out of her vagina. That the Appellant threatened to take her up the hill and cut her throat if she screamed. She told her mother (PW2) what had transpired who took her to hospital where she was examined and the P3 form (PEXh 1) was filled. PEXh 1 showed that her vaginal walls had abrasions and that there were spermatozoa in the vulva. A birth certificate was produced as PEXh 2, to prove her age as being 14 years. From the foregoing, this court finds that the evidence of the complainant was direct and not circumstantial. Further, the P3 form and Birth Certificate were produced as exhibits (PEXh 1 and PEXh 2 respectively) to support the charge. This is part of the evidence the trial court relied on in convicting the Appellant. It is therefore not correct to allege that the court convicted the Appellant on circumstantial evidence or that there were no exhibits produced to prove the charge. Accordingly, this court is satisfied that that evidence satisfied the provisions of section 63 of the Evidence Act. The first ground is therefore rejected.

9. The Appellant submitted that the complainant had admitted having had sex with someone else and that the medical evidence did not point towards him as the one who had committed the offence. The record shows that the testimony of the complainant was that before the material day, she had had sex once with a schoolmate whom she named. She was firm that on the material day, 2nd June, 2013, the person who had sex with her was the Appellant whom she had known for a long time as the son of K, her

grandmother. The medical examination undertaken on 3rd June, 2013 related to the recent sexual encounter which the complainant had and not the previous one with her schoolmate. The latest sexual encounter according to her was with the Appellant. In this regard, the Appellants said submissions can not hold.

10. The second ground was that vital and independent witnesses were not called to testify. The Appellant listed these as being J K, one G and an A.P officer by the name Peterson. The complainant had told the court that when she met the Appellant, he was with J K but it is not clear where J K was left when the Appellant offered to help the complainant look for the cows. There was no allegation that J K witnessed the act of defilement. This court does not see how her evidence would have assisted or affected the prosecution's case. As regards G, she was the woman whom PW2 said had told her that she had seen the Appellant with the complainant on the material day. This court does not think that that witness was material for the reason that, the evidence of the complainant which was not challenged was that when she and the Appellant were going home they met PW2 on her way going to the hills to look for the complainant. As regards AP. officer Peterson, PW4 told the court that after he completed his investigations, he started looking for the Appellant who disappeared for over three (3) months. That the Appellant was arrested by the said AP officer Peterson. Whilst the testimony of an arresting officer in a criminal trial, in my view, is crucial, the significance of such evidence is only meant to prove that an accused person was actually apprehended for the offence he is being charged with and not otherwise. In the present case, there was evidence that a report had been made at Marimanti Police Station of defilement, the Appellant had disappeared from the locality and that when he showed up he was promptly apprehended and charged. There was no doubt that he was apprehended for the offence he was charged with. He never contended that he had been apprehended for a different offence than the one he faced before the trial court Accordingly, this court finds that ground to be without merit.

11. The third and fourth grounds are intertwined. These were that the trial court failed to consider that there was a grudge between the Appellant and the complainant's mother and that his defence was not considered. The record shows that, in its judgment, the trial court considered the Appellant's defence that he had no sexual urge because of his age; that the complainant's family wanted to buy the land which the Appellant ultimately bought giving rise to the grudge. The court considered that since the Appellant had no wife he would have sexual urge and the possibility of seeking relief elsewhere are high. That there was no medical evidence to prove lack of sexual urge on his part. The court further rejected the allegation of the alleged grudge. On its part, this court has considered the defence. When the Appellant cross-examined PW2, he never raised the issue of any existing land dispute between the two.

12. In the defence, it was not clear which parcel of land had a dispute and for what length of time such alleged dispute had existed. The Appellant's defence that the perpetrator of the offence was one M K and not himself was found to be hollow. The complainant and PW2 told the court that after the Appellant had purchased land from PW1's grandmother, he started to refer to himself as K's son and the people, PW1 included, started to regard him as such. Indeed, both the charge sheet and the testimonies of the complainant and PW2 pointed towards Peter Muchomba Nyaki Kiao as the perpetrator of the offence. The Appellant himself admitted that he did not know anyone by the name of Muchomba Kivendu yet he is the one, who introduced such a name. Those grounds also fail.

13. One other issue, the Appellant submitted that the clinical officer PW3 testified of a child of 4 years and not 14 years. This court has reviewed the record and noted that the original handwritten record indicates that PW3 told the court that the child that was examined on 3rd June, 2013 was aged 14 years and not 4 years as the typed record shows.

14. Accordingly, the appeal is without merit and the same is dismissed.

DATED and DELIVERED at Chuka this 9th day of June 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all parties. Right of Appeal 14 days explained.

A.MABEYA

JUDGE

9/6/2016