



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 108 of 2013
GEORGE SAMUEL KIMARU KINYUA

alias SAMUEL KIMARU KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Makadara Chief Magistrate's Court at Nairobi Cr. Case 2168 of 2011 delivered by Hon,E.N.Nyongesa on 29th April, 2014).

JUDGMENT

BACKGROUND

The Appellant was charged with committing the offence of defilement of a child contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on unknown day of December 2009 at Dandora phase One Estate in [particulars withheld] Nairobi Area province, intentionally caused his penis to penetrate the vagina of S.W.W a child aged 13 years and 8 months.

In the alternative, he was charged with committing an indecent act to a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the unknown day of December 2009 at Dandora Phase 1 Estate in [particulars withheld] District within Nairobi Area Province intentionally and unlawfully committed an indecent act with S.W.W a child aged 13 years and 8 months by touching her private parts namely vagina.

He was found guilty in the main charge and sentenced to 20 years imprisonment. Being dissatisfied by the decision of the trial court the Appellant filed this appeal. In Amended Grounds of Appeal filed on 21st June, 2016 he has raised the following grounds of appeal;

- 1. That the DNA sampling was done contrary to sections 122A and 122B of the Penal code.**
- 2. That the learned magistrate erred by relying on the doubtful evidence of PW1 and PW2 as the basis of his conviction.**
- 3. That the learned magistrate erred in relying on scanty, inconsistent and contradictory evidence from the prosecution contrary to section 163(1)(c) of the Evidence Act.**

4. That the learned magistrate erred in showing an open bias for the prosecution case.
5. That the learned magistrate erred by not observing that his mode of arrest did not point to his guilt.
6. That the learned magistrate erred in convicting on a fatally defective charge sheet.
7. That the learned magistrate erred in failing to note that crucial witnesses were never called contrary to section 144 of the Criminal procedure as read with section 150 of the same act.
8. That the learned magistrate erred in failing to consider that comprehensive investigations were never conducted in the case to his detriment.
9. That the learned magistrate erred in failing to observe that the Appellant was never charged with threatening witnesses and destroying evidence as averred in court and no formal proof to affirm the same was offered and this was prejudicial to his cause.
10. That the learned magistrate erred in finding that the prosecution had established its case beyond reasonable doubt as required by section 107(1) and section 111(1) of the Evidence Act.
11. That the trial magistrate erred in dismissing his sworn defense contrary to the rules of natural justice and section 169(1) of the Criminal procedure Code.
12. That the learned trial magistrate erred in shifting the burden of proof to the defence contrary to sections 212 and 309 of the Criminal Procedure Code.
13. That the learned trial magistrate erred by relying on her theories and conjectures as evidence supporting a conviction.

SUBMISSIONS

The Appellant tendered in written submissions by which he argued the grounds of appeal collectively. He submitted that the DNA evidence that was adduced against him was not conclusive and further that it was obtained contrary to Sections 122A(1)(2)(a)(b)(c)(d) and 122(b) of the Penal Code. He stated that the blood samples were handed over by the investigating officer, PC Everlyne Kemunto whereas Section 122A is clear that an officer of or above the rank of inspector may by order in writing require a person suspected of having admitted a serious offence undergo a DNA sampling. He contends that the investigating officer did not fall within the specified category.

He submitted that on 6th June, 2012 he had asked the court to recall the complainant. The court granted his request but the witness was never recalled and this led to a serious miscarriage of justice which was unconstitutional as it contravened Article 25(c) as read with Article 50(2) of the Constitution. He cited the case of **Peter Kariuki Wanjiku & Another V Republic[2016]eKLR**. He therefore urged that the appeal be allowed.

The Respondent canvassed the Appeal by way of oral submissions made by learned State Counsel, Ms. Nyauncho. She submitted that the case had been proven beyond a reasonable doubt. She submitted that the Appellant's assertion that the charge sheet was defective was baseless. She further stated that the DNA sequencing was good and adhered to the procedure provided under Section 122A of the Penal Code since the investigating officer obtained an order from the court for the samples to be collected from the Appellant. Further that the Appellant's blood was analysed by the Government Chemist in his presence. Again, PW4 who was a chief inspector ordered for the DNA test only after the Appellant had refused to give samples voluntarily and pursuant to the court order. She further submitted that the evidence was consistent. On identification, she submitted that the complainant knew the Appellant as he was a family member. Further that the age of the complainant was proved by the Birth Certificate produced by PW3

which showed 13 years old. She prayed that the appeal be dismissed.

EVIDENCE

The prosecution's case was that the Appellant had defiled S.W.W his step-daughter at their Dandora home on an unknown day of December 2009. The Appellant had used a knife to compel the complainant and had threatened her with death if she told anyone what had transpired. The complainant had kept mum but a month later she realized that she was pregnant and she informed the Appellant. The Appellant had once again warned her against telling anyone about the incident and had threatened to kill her and her mother if she defied his order. She never spoke about it but when the pregnancy was about to come to term the complainant collapsed in school and when a pregnancy test was carried out on her it was positive. The school therefore summoned the mother to go to the school but the Appellant offered to go himself. Since the complainant's mother needed to work she acquiesced. The Appellant told the complainant not to divulge the true source of the pregnancy but to instead state it was from another boy who she could no longer trace. She still did not disclose the truth but after she gave birth her mother kept pestering her to disclose who was responsible for the pregnancy. She was overwhelmed and while still at the maternity ward her resolve finally broke and she informed her mother, PW2, that it was her step-father. They then went home and when PW2 confronted her husband as to the allegation he supposedly stated that he was now married to the complainant given the fact she had carried his child. They stayed together for a while but the Appellant finally chased S.W.W and the mother and remained with his two biological children.

PW2 went to the police to report assault against her by the Appellant. In the process she reported the defilement case. The police carried out the relevant investigations. DNA evidence confirmed that the Appellant was the father of the child sired by PW1 and he was charged accordingly.

PW1, S.W.W, testified that she dropped out of school in 2011 and was then 16 years old (she produced a birth certificate No. 43069 to the effect). She stated that she lived with her mother, step-father, brother and step-brother.

She testified that sometime in December 2009 at night while her mother was working in a night shift, she was at home in the company of her brother waiting for the step-father, Appellant, so as to serve him food. At around 11.00 pm while her brother was asleep in the other room and while she was at the sitting room the Appellant entered the house and then left. He said nothing and in a short while later he came in and went straight to the kitchen where he picked a knife. He proceeded to where she was and threatened her by informing her she would know he was Mungiki. She was frightened and just stood there in fear. He then shut her mouth with his hand and proceeded to push her to the ground. He then used his free hand to unclothe her. She was unable to resist as he used too much force. At this point in time the knife lay beside her on the ground.

The Appellant then proceeded to defile her as he held her tightly and she could not scream as he was lying on top of her. She became unconscious. Later that night the Appellant left and she did not see him again. She woke up in so much pain she could not walk properly. She took a shower before proceeding to sleep. The Appellant threatened to kill her and her mother if she told anyone about it. She never told anyone.

After a month she realized she had missed her monthly periods and she therefore informed the Appellant. He told her to say the pregnancy belonged to another man. After 3 months she told the Appellant that her mother had to know but the Appellant preempted the same and he broke the news to the PW2. PW2 enquired from PW1 what had happened but as she tried to tell her about it the Appellant asked the mother to get as much information as she could. This cowed the complainant from speaking the truth.

During the last days of the pregnancy she collapsed while in school and when tests were conducted they positively proved she was pregnant. She was asked to call her mother but when she got home she found the Appellant who escorted her back to school and told the teacher the pregnancy was of another boy.

She delivered the child in August 2010. On the day of her discharge she informed her mother that the Appellant was responsible for her pregnancy. Her mother was surprised. When they went home her mother enquired from the Appellant whether she had defiled the complainant to which he replied that the complainant had become his wife since she already had his kid.

Thereafter there were many disagreements in the house. On 14th March, 2011 he evicted them forcefully from the house after beating up PW2. They went to Kinyago Police Station to report. The police officers there asked them to bring the Appellant to the station but out of fear they could not do it and they therefore went to stay at her aunt's place. PW2 and an aunt to PW1 were enraged and they went and reported the matter at Ruaraka Police Station where they were referred to Dandora Police Station. The officer's from Dandora however arrested the Appellant on 11th May 2011 based on the identification by PW2.

The police directed that a DNA test be carried out to establish if the child was born by the Appellant. The test was carried out at Government Chemist and the same confirmed that the Appellant had sired the child.

PW2 GW M, the mother to PW1 entirely corroborated the evidence PW1. She added that PW1 gave birth on 24th August, 2010. She also identified PW1's Birth Certificate issued on 7th September, 2010 which showed that PW1 was born on 10th April, 1996. She further testified that the DNA test showed that at 99.99% the Appellant was the father of the child sired by PW1.

PW3, PC EVERLYNE KEMUNTO, of Dandora Police Station was the investigating officer. She testified that PW2 had earlier complained to her of being assaulted by her husband, Appellant. She testified that the defilement case was reported to the Police Station by PW2. PW2 informed her that the Appellant had impregnated her daughter, PW1, who had subsequently delivered a baby boy who was then aged 7 months. She also informed her that the Appellant had been arrested by Ruaraka Police Station. During her investigations she decided to amend the charge to defilement since the Appellant was not the biological father of the complainant.

At the beginning of the case she asked for the complainant to be brought to her. She was brought to her and she interrogated her upon which she concluded that the Appellant was culpable. In the course of her investigations she visited the locus in quo and she found that it was a two bedroomed house in Dandora phase 1. She also got an order from the court to conduct a DNA test which was subsequently granted on 18th May, 2011. The OCS Pangani Police Station C.I Richard Ngotho officially informed the Appellant of the order via a letter dated 18th May, 2011 but the Appellant refused to acknowledge the receipt of the notification letter. Pursuant to the court order PC Ogamba, Onari, Maina and herself took the Appellant, complainant, her mother and her son to the police doctor where blood samples were taken from them. These samples were then analyzed by the government chemist/ analyst, Mr. Kangethe. A report was prepared to that effect and she produced the same. She then charged the Appellant.

PW4, C.I RICHARD KIOKO, was the then OCS Dandora Police Station. He recalled that on 11th May, 2011 the Appellant was arrested by officers from Baba Dogo Police Station and they were notified of the same. They were interested in him as they were investigating him for the offence of assault. On 13th May, 2011 he sent his officers to go collect him from Baba Dogo Police Station and on 16th May, 2011 he was arraigned in court. He was later brought to his office so that he could take him for a medical examination. The Appellant refused to have blood sample taken which prompted the police to obtain a court order. PW4 then prepared a notification in the presence of the investigating officer but the Appellant refused to sign it. He produced the notification in court.

PW5, PC NGUNU MUTHIANI, was stationed at Ruaraka Police Station. He recalled that on 11th May, 2011 at about 9.00 pm he was at the Police Station when a certain lady came from Dandora with a letter requesting the arrest of a certain person who had committed incest in Dandora but moved to Ruaraka area. PW5, duty officer CPL Muchiri and two other officers accompanied the lady to the house and they found the Appellant sleeping. The lady identified him as the suspect. The suspect gave his names as

Samwel Kimaru Kinyua. They arrested and escorted him to Ruaraka Police Station where they booked him pending his collection to Dandora Police Station.

The witness then identified the Appellant on the dock.

PW6, PAUL WAWERU KANGETHE, was a Government Chemist/Analyst. He recalled that on 19th May 2011 he received items from PC Everlyne Kemunto from Dandora Police Station. The items were; (a) blood sample indicated to be from George Samwel Kimaru Kinyua (b) blood sample from S W and (c) blood sample from a child named h m. These were sent with a request to determine the paternity of the child. He thus carried out the analysis which confirmed that at 99.99% chance George Samuel kimaru kinyua(Appellant) was the biological father to the child H M whose mother was S W. He produced the DNA analyst report in court.

The court then ruled that a prima facie case had been established and that the Appellant was put on his defence. He chose to give a sworn defence with no witnesses. He testified as **DW1**, He stated that the charges against him were not true. He stated that initially the charge indicated that the complainant was 15 years but was later amended to read 13 years and 8 months. He further stated that he did not know the complainant in the case and further that he had his own family, a wife called S K K with whom he had a child called H M and that neither of them had ever come to court. He stated that he had only learnt of case on 11th May, 2011 at Ruaraka Police Station and had seen the complainant for the first time in court when he was taking the plea.

He further stated that the charges against him were malicious and drummed up by police officers who he reported at Vigilance House for their illegal actions of giving away their uniforms and weapons to criminals. Also there was a dispute between his late father and some of the police officers at Dandora Police Station over a piece of land and as such the case was brought about to punish him.

DETERMINATION.

I have summarized the issues for determination as follows;

1. Whether the charge sheet was fatally defective.
2. Whether the DNA sequencing was properly done and above board.
3. Whether the evidence at had supported the charge.
4. Whether the failure to recall witnesses was contrary to the tenets of a fair trial.

The first issue that this court must deal with involves the DNA sequencing procedure. Sections 122A and 122B of the Penal Code set out the procedure to be followed with regard to DNA sequencing. They provide as follows:

“ 122A. (1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

(2) In this section -

“DNA sampling procedure” means a procedure, carried out by a medical practitioner, consisting of -

(a) the taking of a sample of saliva or a sample by buccal swab;

(b) the taking of a sample of blood;

(c) the taking of a sample of hair from the head or underarm; or

(d) the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

“serious offence” means an offence punishable by imprisonment for a term of twelve months or more.

122B. Where a suspect in respect of whom an order has been made under section 122A resists compliance with the order, members of the police force, under supervision of an officer of or above the rank of inspector, shall be entitled to use reasonable force in restraining the suspect for the purpose of effecting the procedure. Senior police officer may order DNA sampling procedure on suspect.”

The Appellant contended that his blood was taken against his wishes. It is necessary to evaluate the background of what transpired before the sample was taken so as to understand whether or not the proper procedure was followed. PW4, No. 219555 C.I Richard Ngotho who was the OCS, Dandora Police Station testified that the Appellant had refused to give a blood sample and they had to take him to court and request an order for the same. The investigating officer, No. 88711 PC Everlyne Kemunto obtained a court order in the trial file. She produced the order of the court as exhibit Number 3. The Appellant was then informed of the order by a notification letter from the OCS, Pangani Police Station, C.I Richard Ngotho on the same day. The Appellant refused to acknowledge the letter, MFI 4, and the investigating officer, PC Ogamba, PC Onari and PC Maina took him, the complainant, the child and PW2 to the police doctor where blood samples from each of them were taken and forwarded to the Government Chemist. The record appears to show an error on who communicated the court order to the Appellant through a notification letter requiring him to give a sample for DNA examination. The typed proceedings seem to indicate that the notification was made by Richard Ngotho but handwritten the proceedings refer to PW4 as Richard Kioko. The court has established that this is just but a typographical error on the name of PW4 which did not affect the credibility of the court order.

I must now interrogate whether a DNA sampling can be done pursuant to a court order or that mandate is squarely with a police officer of the rank of inspector or higher pursuant to the Section 122 of the Penal Code. Section 36 of the Sexual offences Act provides that:

“36.(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

The Provision is very clear as to the power a court has in sexual offences to direct for the appropriate tests to be undertaken. The learned Magistrate therefore acted within the law in ordering that a DNA test be carried out.

On the submission that the charge sheet was defective, the Appellant raised a few issues. First, he stated that he was charged under the name Samuel Kamaru Kinyua which was not his name. His submission is however based on the original charge sheet. The same was substituted on 6th June, 2012 and his name indicated as George Samuel Kimaru Kinyua alias Samuel Kimaru Kinyua. He in fact was re-examined by the trial court and he confirmed that his name was Samuel Kimaru Kinyua and not George. The name George Samuel Kimaru Kinyua is the name he gave during his arrest. This ground of appeal thus has no merit.

His next contention is that PW2, G W was not her real name as indicated in her identity card. The Appellant had an opportunity of cross-examining the witness and at no time did he question her about her

name. What is important is whether PW2's evidence was credible. The worthiness of her evidence was not challenged. She also in her evidence in chief clarified the different names she used. She introduced herself as G W M but clarified that before she married she was known as G K, K being her father's name. That ground of appeal also has no merit in the circumstances.

He further submitted that according to the charge sheet he was arrested on 13th May, 2011 whereas the evidence of PW2 stated that he was arrested on 12th May, 2011 and that of the arresting officer, PW5, was that he was arrested on 11th May, 2015. It is clear from PW2's evidence that she reported to the Police Station on 11th May, 2011. This is corroborated by the arresting officer who testified that she went to the Police Station on 11th May, 2011 at around 9:00 pm and they left thereafter to arrest the Appellant. He was first held at Ruaraka Police Station as a person of interest and when the Police there informed Dandora Police Station of his arrest, he was picked up on 13th May, 2011 as directed by PW4. He was arraigned in court on 16th May, 2011. There was therefore no evidence contradicting the charge sheet or the evidence on record as alluded to by the Appellant.

The Appellant further submitted that one of the key ingredients of the offence of defilement was not adequately proven and was riddled with material contradictions. This regarded the age of PW1. He submitted that the complainant said she was 13 years old when the offence occurred whereas she was 13 years and 8 months old. In her introductory testimony, S.W.W stated that she was 16 years old. However, when she was cross examined by the Appellant she said, "(the incident occurred in 2009. I was 14 years old then." In any case, a Birth Certificate was adduced in court which established her age as 14 years as at the time of the incident.

He further stated that the birth certificate indicated he was the child's father whereas the complainant had testified that he was the step-father. He therefore contended that the birth certificate had been created so that he could be 'fixed'. At this juncture it important to revisit the evidence of PW2. She testified that she married to the Appellant sometime in the year 2005. At that time, she already had given birth to the complainant herein. Thereafter, the two were blessed with two sons. She acquired PW1's Birth Certificate on 6th September, 2010 which indicated that the Appellant was the father of PW1. Although practically the Appellant was a step father to PW1, once he married PW2, he became the father of PW1. There was therefore no contradiction in the reference of the two alternate titles to him by both PW1 and PW2.

Further it is important to note that there were two birth certificates adduced as evidence in this case. The first was No. 43069 that was produced but was later lost from the court file. Since a copy of the same could not be certified by the Principal Civil Registrar of Births a new birth certificate Number 0132515 had to be issued. The court has looked at the record where a copy of the old birth certificate was also produced. The first was issued on 7th September, 2010. A replacement was quickly sourced and tendered as evidence. The details available in both certificates indicate Samuel Kimaru Kinyua as the father to the child. There is no doubt that S.W.W gave birth on 24th August, 2010 and according to PW2 she spent 3 weeks in the hospital before being discharged. The first certificate was therefore granted 14 days after PW1 gave birth. The more important issue is that when the initial certificate was acquired the complainant and her mother had not filed any charges or complaints with the police and that they were still all living together in Dandora. There is therefore no evidence that PW1's Birth Certificate was obtained with a view to frame the Appellant. Be that as it may, what is more crucial is whether the Appellant sired the child in issue and therefore defiled PW1. It is an issue this court has already addressed.

Finally, he contended that the failure to recall PW2 violated his right to a fair trial. The court has examined the evidence and it is clear that the Appellant's request to recall PW2 was granted by the learned trial magistrate but she was never recalled. It must be noted that the Appellant had earlier had a chance to cross examine PW2 and he did so at length but that he wanted another chance to cross examine her. However, when the court and the prosecution did not follow up this issue, the Appellant too seemed to have lost interest. This lapse notwithstanding, I note that the Appellant did not state the exact issues he wanted to cross-examine PW2 on. And having intensely done it before, I conclude that no prejudice was occasioned to him by PW2 not having been recalled. After all, other evidence other than that of PW2,

particularly the medical evidence was sufficient in proving the case against him.

After re-evaluating the evidence I find that the prosecution proved its case beyond all reasonable doubt with regard to the offence of defilement. I find the appeal without merit and the same is accordingly dismissed.

Both the conviction and sentence are upheld. It is so ordered.

Dated and Delivered at Nairobi this 20th Day of July, 2016

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

Appellant in person.

M/s Kimiri for the Respondent.