REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 79 OF 2015

(From the original conviction and sentence in criminal case No. 73 of 2013 of the PM Magistrate's court at Kyuso – B. M. Mararo PM).

J M M ..... APPELLANT

V E R S U S

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant was charged in the Magistrate's court at Kyuso with defilement contrary to section 8(1) as read with (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 23rd February 2013 at [particulars withheld] village in Tseikuru District within Kitui County intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of MMM a child aged 17 years.

In the alternative he was charged with indecent act with a child contrary to section 11(6) of the Sexual Offences Act of 2006. The particulars of the offence were that on the same day and place intentionally and unlawfully committed indecent act by causing his male genital organ to contact the female genital organ of MMM a child aged 17 years.

He denied both offences. After a full trial, he was convicted of the main count of defilement and sentenced to serve 17 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on several grounds which I summarize as follows:-

1. That the learned trial magistrate erred in convicting him on contradictory evidence.
2. That the trial magistrate erred in convicting him while there was no DNA test conducted to confirm the pregnancy of the complainant.
3. That key witnesses including the doctor were not called to testify.
4. That the learned magistrate erred in convicting him while there was a grudge existing between him and PW3.
5. The learned magistrate erred in displaying bias against the appellant’s family, and even imprisoning the wife of the appellant in the course of the criminal proceedings.
6. That the magistrate erred in not considering his defence.

During the hearing of the appeal the appellant relied on written submissions which he filed. I have perused and considered the said written submissions. The appellant elected not to make oral highlights of his submissions.

The learned Prosecuting Counsel Mr. Okemwa submitted that the prosecution case was that the appellant had engaged in sexual intercourse with a minor aged 17 years who was his biological daughter. Counsel submitted that it was obvious that this was an alleged case of incest. Though the magistrate noted this fact, the court did not substitute a charge of incest under Section 184 of the Criminal Procedure Code (Cap. 75), which was a mistake on the part of the trial court.

In addition to the above, counsel submitted that the evidence of PW2 the wife of the appellant and PW3 and 4 was contradictory with regard to the person who reported the defilement.

Further, the allegation of the prosecution was that penetration occurred and a pregnancy resulted. However, DNA test was conducted on the appellant and that though the Magistrate mentioned in the judgment that a boy was responsible for the pregnancy, he proceeded to convict the appellant.

Counsel asked this court to use his discretion in deciding this appeal.

In response to the Prosecuting Counsel's submissions, the appellant stated that D M (his wife) was forced to admit her statement in court and, when she declined, she was fined which was wrong. In addition, the complainant who testified as PWI said that she did not record a statement but that the same was recorded by her teacher PW3. The appellant emphasized that PWI the complainant, did not at any point in her evidence state that he had sexual intercourse with her.

He stated further that it was after he was put in cells that he learnt that his daughter the complainant was pregnant. He stated that though he raised the issue that no DNA test was conducted on him, the magistrate refused to consider that point.

In summary the facts of the prosecution case are that on 23rd February 2013 the appellant came back home when his wife was absent, the two having disagreed, and ordered some of his children to go to fetch water from the river, leaving behind the complainant PWI and two other small children. The complainant was a primary school going Std 8 pupil at [particulars withheld] Primary school.

The appellant then proceeded to the bed where the complainant was lying and removed his short trousers and had sexual intercourse with her resulting in the pregnancy.

The complainant failed to go to school the next day and PW3 C N S the Head Teacher sent for her because she was a candidate. When PW3 tried to find out the reason of the absence from school of PW1, she discovered that the cause of the none attendance in school was the fact that she had sexual intercourse with her father and was already pregnant.

A report was made to Kyuso Police Station. The appellant was then arrested and the complainant taken to hospital where she was found to be 16 weeks or 4 months pregnant on 20th May 2013. The appellant was thus charged with the offence.

In his defence, the appellant denied committing the offence and stated that he was framed up by PW3 C N S the Head Teacher who, on having been transferred to [particulars withheld] Primary School in 2013 befriended him and they became lovers, but later disagreed and according to him that was the reason he was framed up.

This is a first appeal. As a first appellate court, I am required to evaluate the evidence on the record afresh and come to my own conclusions. In this I rely on the case of ***Okeno -vs- Republic [1972] EA 32*** at page 36 wherein the Court of Appeal for East Africa stated as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be re-submitted to fresh and exhaustive examination (Pandya -vs- R 1957 EA 336) and to the appellate court's on decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantillal M Luwara -vs- R) it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support***

the lower courts 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 so doing it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses see (Peter's -vs- Sunday Post 1958 EA 424)".

I have re-evaluated the evidence on record herein. I have perused the judgment of the trial court. I have considered the submissions of the appellant and the submissions of the prosecuting counsel. The prosecuting counsel does not appear to support the conviction, but has elected to leave the matter to the decision of this court.

The burden is always on the prosecution to prove a criminal case against an accused person. In the case of ***Macharia -vs- Republic [2001] KLR 155,*** at page 158, the Court of Appeal stated as follows:-

"We would state here that when the appellant put forth an alibi as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused person remains on the prosecution throughout the trial."

The standard of proof that the prosecution is required to discharge in a criminal case is beyond reasonable doubt. See the English case of ***Woolimngton -vs- DPP 1932 AC 462.***

In the present case, the evidence was that two children or brothers of the complainant were sent away to the river by the appellant on the fateful day in order to have the opportunity to have sexual intercourse with the complainant PWI. None of the two boys were called by the prosecution to testify in court. No explanation whatsoever was given for the failure of the prosecution to do so. This creates a sufficient doubt in the prosecution case, which may result in an acquittal. See the case of ***Bukenya -vs- Uganda [1972] EA 549.*** The prosecution in my view was hiding something by not calling any of the two boys.

The complainant PWI and her mother PW2, were all stood down initially because they were not supportive of the prosecution evidence. The mother PW2 was even fined by the court and did not tender evidence at the trial. A person called Corporal Kimeri Ronoh testified on 30th July 2013 in court without being made a prosecution witness which was also a mistake on the magistrate. This is the witness who testified about the complainant and PW2 having recorded statements in support of the prosecution case.

His evidence was no evidence at all as he was not a prosecution witness. It was improper for the magistrate to have allowed Corporal Kimeri Ronoh to testify without him being called a witness. This action of the magistrate rendered the whole trial irregular, and the proceedings and conviction fatally defective.

There were also wide gaps in the prosecution evidence. The offence is said to have been committed on 23rd February 2013. The evidence by PW3 Colletta Ngute Syengo the Head Teacher of [particulars withheld] Primary School however, was that the complainant did not attend school on 7th and 8th of May 2013 after the school had opened on 7th of May 2013.

In effect therefore the failure of the complainant to attend school on 7th and 8th of May could not possibly be connected with the alleged sexual intercourse on 23rd of February 2013 between the appellant and the complainant.

In addition to the above, though the complainant stated very specifically that this was her first sexual intercourse which resulted in her pregnancy, no DNA test was conducted on the appellant to show a connection between him and the child.

The investigating officer PW4 PC Joshua Nyanje also stated that the report to the police station was made on the 20th May 2013 that report was made by Colleta Ngute Syengo the teacher who went to the station

with the girl but the same Investigating Officer did not state that the mother of the complainant reported defilement or that the complainant confirmed that she was sexually assaulted by the appellant. Even in cross examination the Investigating Officer did not add any other details.

All the above gaps in the prosecution case operated in favour of the appellant, because it meant that the prosecution did not prove their case against him beyond any reasonable doubt.

With regard to the consideration of the appellants defence, the learned magistrate in my view wrongly shifting the burden of proof to the appellant which was a mistake. The shift of the burden of proof was evident in the following remarks made by the trial magistrate in the judgment -

> ***"He admitted that PW1 had ran away and knew that she was pregnant but claimed that he did not know who was responsible but upon cross examination claimed that a boy from Nyamanzei was responsible. I find the accused attitude as a father to be strange as a prudent father would have pursued the matter of his daughter's pregnancy more aggressively as it has lifelong implications. His casual attitude maybe as a result of knowing who the real culprit was beforehand. All in all I am not convinced by his defence which I proceed to dismiss."***

It is of note that what was in issue at the trial, was not the pursuit of the alleged boy who impregnated PW1. It was the issue of whether the appellant had sexual intercourse with the complainant who was his daughter. The burden was on prosecution to prove the occurrences. It was not on the appellant to prove his innocence.

In making presuppositions because of an alleged conduct of the appellant which was not part of the case, the learned magistrate misdirected himself and shifted the burden of proof on the appellant.

When the appellant says that his defence was not considered, that was not true. However the consideration of the defence of the appellant by the learned magistrate were erroneous as the magistrate shifted the burden of proof to the appellant. On that account also this appeal will succeed.

Consequently and in view of the above findings, this appeal will succeed. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 16th day of August 2016.

GEORGE DULU

JUDGE