



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 50 OF 2015
BETWEEN
STEPHEN ABABU MBANDU.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. T.K. Kwambai R.M. in Butali SRM
Cr. Case No. 539 of 2014)

JUDGMENT

The Charge

[1] On the 25.08.2014, the appellant herein, Stephen Ababu Mbandu was arraigned before the Senior Resident Magistrate Court in Butali on one Count of defilement contrary to Section 8(1) [as read with Section 8](3) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence are that on the 19th day of August, 2014 at [particulars withheld] in Kakamega North District within Kakamega County, intentionally caused his penis to penetrate the vagina of P.W, a child aged 14 years. The appellant pleaded not guilty. The case therefore went to full hearing during which the prosecution called 5 witnesses. At the close of the prosecution case, the appellant was found to have a case to answer and he was accordingly put on his defence. He gave sworn evidence but called no witnesses.

Judgment of the Learned Trial Magistrate

[2] After carefully considering the evidence on record, including documentary medical evidence, the trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was found guilty as charged, convicted and sentenced to 20 years imprisonment as by law provided.

The Appeal

[3] The appellant, being aggrieved by both conviction and sentence filed the instant appeal seeking to have the conviction quashed and sentence of 20 years imprisonment set aside and to be set at liberty. The appellant set out the following grounds of appeal(rephrased)

(1) That the learned trial Magistrate erred both in law and fact when he convicted the appellant on the basis of malicious uncorroborated, fabricated, inconsistent and discredited evidence.

- (2) That the learned trial Magistrate erred in law and fact by relying on evidence that was shoddily gathered to convict him and by failing to visit the scene of the crime to verify the truth of the allegations made against the appellant.
- (3) That the learned trial Magistrate erred both in law and fact in failing to appreciate that there was malice in charging the appellant with a case that was preplanned and fabricated.
- (4) That the learned trial Magistrate erred in law and fact when he failed to appreciate that the charge sheet was defective.
- (5) That the learned trial Magistrate erred in both law and fact when he failed to consider the appellant's defence which was sufficient to exonerate the appellant from the prosecution's allegations.
- (6) That the learned trial Magistrate erred in both law and fact when he failed to consider the fact that the appellant was not medically examined after the alleged commission of the offence of defilement.
- (7) That the learned trial Magistrate erred in law and fact when he failed to appreciate that the complainant's age was not proved.
- (8) That the sentence meted out to the appellant was harsh in the circumstances.
- (9) That the learned trial Magistrate erred in both law and fact when he failed to appreciate that no police officer was called to testify against him.
- (10) The appeal was vehemently opposed on grounds that the appellant's complaints have no substance.

The Duty of this Honourable Court.

[4] This is a first appeal, and as such this court is expected to rehear the appellant's case and to come up with its own conclusions, only remembering that it had no opportunity of seeing and hearing witnesses who gave evidence during the trial. In the case of **Ngui – vs – Republic [1984] KLR 729**, the Court of Appeal held, inter alia that “the first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusions in order to satisfy itself that there was no failure of justice; it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.’

[5] In **Patrick & Another – vs. – Republic [2005] 2KLR 162** the Court of Appeal expressed itself thus on the role of a first appellate court; “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.”

[6] The above stated prepositions still apply today and I now proceed to reconsider and evaluate the evidence afresh before I come to the conclusion as to whether or not the findings of the learned trial court can be upheld.

The Prosecution's Case.

[7] From the five (5) prosecution witnesses, the case against the appellant is as follows; - On the 19.08.2014 at about 7.00pm, the complainant herein who testified as PW1, left the home together with some of her siblings for a haircut. The appellant followed them and when PW1 and her siblings reached a sugarcane plantation, the appellant caught up with them, got hold of PW1's hand and dragged her into

the sugarcane plantation as PW1's siblings ran home screaming. Once inside the sugarcane plantation, the appellant tore off PW1's underpant and warned her not to scream. The appellant then put his penis into PW1's vagina and started having sex with her. Meanwhile, the screams by PW1's siblings reached the ears of I M M , PW2 (I) and A M who testified as PW3 (A). On hearing the screams I took his torch and together with A, ran towards the direction of the screams. On arrival at the sugar cane plantation, I and A found the appellant in the act. Both I and A saw the appellant who was only 2 meters away from them using the torch light. On sensing danger, the appellant quickly escaped and was not apprehended until 22.08.2014.

[8] I, who was an uncle to PW1, contacted the area chief who advised him to take PW1 to see a doctor. On 20.08.2014, I took PW1 to Bushiri Health Centre and also reported the incident to Shamberere police post where he was issued with a P3 form before taking Pw1 to Malava District Hospital for examination and treatment. Later, I took witnesses to Shamberere Police post for recording of statements.

[9] At the Malava Sub-County Hospital, PW1 was seen, examined and treated by Kizito Sifuna, a clinical Officer at the said facility who testified as PW5. According to PW5, the physical examination of PW1's private parts revealed an open hymen that allowed entry of 2 phalanges. PW5 also carried out an HIV test which was not reactive. He did high vaginal swab but there was no infection. A pregnancy test was negative. PW1 was put on post exposure drugs for HIV. PW5 told the court that PW1 had taken 12 hours to reach Bushiri Health Centre and 19 hours to Malava Sub-County Hospital. The P3 form was produced as Pexhibit 1. According to PW5, PW1 told him that she had been defiled by a person who was known to her.

[10] I have noted from the record that no police officer whether an arresting or investigating officer was called to testify. After PW5 testified the prosecution closed its case without offering any explanation as to why the police could not testify.

The Defence Case

[11] The appellant gave sworn evidence and stated that he was a casual worker. On 25.08.2014, he was arrested by a group of about 18 people who descended on his home and took him to Shamberere Police Post. At the police post, he was forced to admit certain things which he knew nothing about. Later, police from Malava Police Station were called and when the police from Malava arrived at Shamberere police post, they took him with them and on the Monday following the weekend, he was arraigned before court.

[12] During cross examination, the appellant denied any knowledge of PW4 who is father to the complainant, pw1. He also denied that he lived in the same area with PW4. He also denied knowledge of any of the 18 people who arrested him. The appellant did not call any witnesses.

Issues of determination

[13] After carefully reconsidering and evaluating the evidence afresh, and further after considering the judgment of the learned trial Magistrate together with the submissions by both the appellant and the prosecution and upon considering the law the following issues arise for determination.

- (a) Was the charge sheet defective?
- (b) Whether the age of the complainant was proved
- (c) If the answer to (b) above is yes, whether there was penetration;
- (d) Whether the prosecution proved that it was the appellant who caused the penetration
- (e) Whether failure by prosecution to call police witnesses was fatal to its case;

(f) Whether the learned trial Court failed to consider the appellant's defence.

Determination

(a) Whether the charge sheet was defective

[14] The applicant complained under ground 4 that the charge sheet was defective, and that in the circumstances, he ought not to have been convicted. I have myself carefully examined the charge sheet which states the offence and the section of the law under which the appellant was charged. The only issue with the charge is that it does not clearly state that the offence committed was contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. This omission however does not make the charge sheet defective for the reason that the particulars give the date and the place where the alleged offence took place. The particulars also give the name of the appellant as well as the name and age of the complainant.

[15] With all the above stated details, it cannot be said that the charge sheet was defective. In any event even if there was such a defect, like the one pointed out earlier, the same is curable by dint of the provisions of section 382 of the Criminal Procedure Code, Cap 75 of the laws of Kenya. It is also worth noting that the appellant did not raise this complaint during the trial. The appellant's ground number 4 therefore lacks merit and is accordingly dismissed.

(b) Whether age of the complainant was proved

[16] For offences committed under the Sexual Offences Act No. 3 of 2006, age of the complainant is of utmost importance because of the strict sentences prescribed under the Act. In this case, the charge sheet gives the age of the complainant as 14 years. During the hearing of the case, and before PW1 testified, she was taken through a voir dire examination during which she told the court that she was a standard 7 pupil and that she usually goes to church and was ready to state the truth. The trial court then wrote; "Upon conducting voir dire exam and bearing the age of the minor(sic) I am satisfied that she knew the meaning of taking oath hence she can swear"

[17] When PW1 testified on 09.02.2015 she stated that she was 15 years old but added. "Last year I was in class 6 and I was aged 14 years" Though she identified both her birth certificate (PMFI 2) and her baptismal card (PMFI 3) PW4, PW1's father W also stated that his daughter PW1 was born on 05.03.2000 as per Birth Certificate number [...] which was produced as Pexhibit 2. From all the above evidence, there is no doubt that the age of the complainant in this case was proved beyond reasonable doubt. I therefore find and hold that the appellant's complaint set out in ground 7 of appeal that the age of the complainant was not proved lacks merit and the same is dismissed.

(c) Whether there was penetration

[18] According to the evidence of PW1, there was penetration. She stated in part of her evidence in chief. "He took me to the sugar plantation and my uncle found us at the sugar plantation. He then tore my underpant and told me not to scream. He then started having sex with me. He put his penis in my vagina once." It is accepted by the courts that because perpetrators of sexual crimes of either rape or defilement are usually in hurry, they usually do not have sufficient time to achieve full penetration or even ejaculate. So, partial penetration is still penetration. Section 2 of the Act also defines "Penetration" in the following terms "penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person." PW1 told the Court that the appellant put his penis into her vagina once. My understanding of the law is that insertion of the appellant's penis into the complainant's vagina amounted to penetration.

[19] The evidence of PW5, the clinical officer one Kizito Sifuna also clearly shows that there was penetration. He testified that when he examined the complainant's private parts, he found that the hymen was open and that 2 fingers could get into her vagina. The P3 form which was produced as Pexhibit 1 confirms these facts alluded to by PW5. I am therefore fully satisfied that there was penetration.

(d) Whether it was the appellant who caused the penetration in other words was the appellant properly identified as the perpetrator of the alleged crime

[20] From the evidence, the alleged crime took place at about 7.00pm in a sugar cane plantation; so it important to establish that there was no mistaken identity of the complainant's assailant. In the case of **Joseph Ngumbao Nzaro –vrs – Republic [1991] 2KAR 212**, the court of Appeal emphasized the need for careful direction regarding visual identification of an assailant, especially if such identification forms the basis for a conviction. The Court underscored the need for the trial court to be satisfied with the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, for as was held in **R-Vs- Turnbull[1976] 3 all ER 549**, witnesses can sometimes make mistakes in identifying even close relatives or other persons they may have known for some time.

[21] In the instant case, the complainant stated that as she walked along with her siblings, the appellant who was following them followed them. When the appellant reached where complainant and her siblings were, he pulled the complainant into the nearby sugar cane plantation and defiled her after ripping away her underpant. The complainant stated she knew the appellant before PW2, I stated that when he heard the screams, he ran out together with PW3. I testified in part. "..... I was able to identify you with the torch. You were at the sugarcane plantation but near the road. You had a black T-Shirt and black trouser. Many people can wear black clothes. You were near me and the torch was bright..... I have known you for about 5 years."

[22] PW3, A stated the following regarding identification of the appellant. ".....we went with I who spotted him with a torch and I saw the accused. He then escaped there in the sugar plantation He had a black T-shirt and a black trouser. The accused is the one in the dock." In his further evidence during cross examination. PW3 stated;- "I know your name as we were training on football pitch. You were at the sugar plantation. On 19.08.2014, I saw you at the sugar plantation and I was able to identify you since I had met you on several times.I even witnessed you while running. I was with I PW2 herein..... I was with PW2 when we used the torch and you escaped."

[23] From the evidence of the complainant I and A, I am satisfied beyond any doubt that the appellant was properly and positively identified on the material evening as the person who dragged the complainant into the sugar case plantation and defiled her. He was found in the act by both I and A and when he realized he had been found out, he took off, but not before both I and A had made a mental note of the clothes he was wearing; a black T-shirt and a black trouser. I told the court that the torch light was bright. Further both I and A had known the appellant for about 5 years. For the above reasons, the appellant's complaint that he was not properly identified has no merit and the same is hereby dismissed.

(e) whether the learned trial Magistrate failed to consider the appellant's defence

[24] I have carefully considered the judgment of the learned trial Magistrate. At page 28 of the proceedings and in part of the first paragraph on that page (the paragraph overflowing from page 27), the learned trial Magistrate stated;. "From the court record, it also shows that the accused was arraigned in court on the 25.8.2014, this is clearly contradictory of the accused. His evidence therefore cannot be said to be true. The accused never stated where he was on the alleged date of 19.8.2014 or what transpired." Clearly the trial court considered the appellant's defence and concluded that it could not be true. I hasten to add that I have myself carefully considered the appellant's defence which concentrates on the events of the day of his arrest. My considered view of the said evidence is that it offers no challenge to the overwhelming prosecution evidence against him. The appellant's complaint is therefore without merit and the same is accordingly dismissed.

(f) whether the prosecution's failure to call police witnesses was fatal to the case against the appellant.

[25] From the record, no police officer was called to testify in this case. No reason for the omission appears on the record. The practice is that it is always desirable for the prosecution to avail police

witnesses to testify before courts, lest it be construed that the evidence they would give would be adverse to the prosecution case. However, in the instant case, there is no suggestion that the evidence that would have been given by the police witness (es) if he/they had been called would have been adverse to the prosecution case. The appellant stated underground number 3 that there was malice on the part of the complainant's family and that the case against him was fabricated. The record shows that no evidence was given during cross examination to support such allegations, so that even in the absence of police witnesses, no prejudice was suffered by the appellant.

a) whether the sentence meted out by the trial court was harsh in the circumstances;

[26] From the evidence on record and from a reading of Section 8(1) and (3) of the sexual offences Act, No.3 of 2006, the sentence meted out by the trial court upon conviction of the appellant was in keeping with the law. This court could only interfere with the sentence if the trial court applied the wrong principles in sentencing or took into account factors that are irrelevant to sentencing. This ground of appeal also fails.

Conclusion

[27] From all the above conclusions, I find and hold that this appeal on both conviction and sentence lacks merit and is accordingly dismissed in its entirety. I uphold the findings of the learned trial Magistrate. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 13th day of October,2016

RUTH N. SITATI

JUDGE

In the presence of ;-

.....Present.....for Appellant

.....Mr. Jamsumba (present).....for Respondent

.....Mr. Polycarp.....Court Assistant.