



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 9 OF 2014

N M G.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 2of 2012 in the Principal Magistrate's Court at Gichugu – HON. M.ONKOBA (AG.SRM)

JUDGMENT

1. NEWTON MWANIKI GATAMBA is the appellant herein. He was charged with defilement at the trial court contrary to **Section 8 (1) (3)** of the **Sexual Offences Act NO. 3 of 2006** with alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the same **Act**. The particulars of the offence as per the charge sheet are that on 17th day of February 2012 between 8 pm - 9 pm at Kiangwenyi Upper Hill Academy within Kirinyaga County , he defiled **F K** a child aged 13 years .

After trial, the subordinate court found him guilty of the alternative charge, convicted him and sentenced him to serve 10 years imprisonment on 4th February 2014. He was dissatisfied with the conviction and sentence , he preferred this appeal on 14th February 2014.

2. In his petition of appeal, the appellant raised five grounds as follows:

- i. That the trial magistrate erred in law and fact by basing conviction on prosecution evidence that was fraught with inconsistencies and contradictions.
- ii. That the trial magistrate erred in law and fact by giving him an excessive and an illegal sentence considering the circumstances of the case and the fact that he was a first offender.
- iii. That the trial magistrate erred in law and fact by basing his conviction on hearsay evidence.
- iv. That the trial magistrate erred in law and fact by relying on improper identification.
- v. That the trial magistrate erred in law and fact by holding that the prosecution had proved its case against the appellant beyond reasonable doubt.

3. Before I look at the submissions made by appellants counsel, I wish

to note that the appellants counsel filed a memorandum of appeal dated 18th February 2014 on 19th February 2014 in addition to the petition without complying with the provisions of **Section 350 2(ii) and (iv)** of the **Criminal Procedure Code** . Furthermore the memorandum of appeal contravenes the

provisions of **Section 350** of the **Criminal Procedure Code** which provides that an appeal in criminal proceedings shall be in the form of a petition . This court shall consider the submissions made so far as it relates to the petition of appeal filed by the appellant on 14th February 2014 as the same is properly before this Court.

4. In his filed submissions counsel for appellant contended that the

court failed to appreciate what he termed as many contradictions and discrepancies on the evidence adduced by the prosecution. He pointed out that from the evidence there appeared to have been a blackout at the school where the appellant taught and where the complainant was a pupil. The appellant wondered why a mass could still be conducted on a Friday when there was a blackout and that it could not be possibly true that a mass could be conducted using a torch (spotlight).

5. The appellant has further submitted that there was evidence that the

complainant left the class where they were worshipping alone before the service was over but that the same complainant told the court that she left with other pupils after the service was over.

6. The appellant further pointed in his submissions that the

complainant told the court that she was directed to class 3 (the scene of crime) by the appellant but had earlier told the police that she walked with the appellant to the scene of crime(or class 3) at the school.

7. The appellant faulted the complainant's assertions that she was defiled for an hour and yet the medical records in appellant's view showed no penetration at all and that there ought to have been signs of spermatozoa dead or alive .

8. The appellant further contended that the complainant told the court that her skirt had blood stains the following day but also said that it was her panty and that the trial court was wrong to describe her as being "straightforward" and "truthful".

9. On the ground of improper identification, the appellant has submitted that the trial court relied on evidence which was not adduced which was the fact that the appellant was holding a mobile phone which was directed to his face which helped to identify him. The appellant has pointed that the complainant stated that there was absolute darkness and that she identified the appellant using the light of his phone which according to the appellant is a contradictory in itself.

10. The appellant has further submitted that the prosecution failed to prove beyond reasonable doubt that the offence had been committed . On this score, the appellant contended that the prosecution ought to have proved that the appellant had penetrative and complete sexual intercourse with the complainant and pointed out the evidence of PW3 who he submitted told the court that an injury at 11 o'clock position in the female genital organ could not be caused by sexual act done while standing and that such an act could only cause injuries at between 3-9 o'clock positions .

11. The appellant has further submitted that the absence of any injury to his organ on examination shows that there could be no corresponding injuries to the complainant as well.

12. He had pointed out that DNA examination done to the blood stained cloth worn after the complainant was defiled did not connect him to the offence as the blood stains ought to have had seminal fluids on DNA sampling .

13. The appellants counsel also submitted his conviction was erroneous as evidence adduced by PW2 needed corroborations as in his view, the witness lied to court with a view to fix the appellant.

14. The respondent through the office of Director of Public Prosecution represented by Omayo

strenuously opposed this appeal giving a brief chronology of events that led to the commission of the offence by the appellant. In his summary, Mr Omayo told this court that the complainant then aged 13 years was from Friday worship service within school compound on 17th February 2012 at around 9.30 pm, when the appellant, then a teacher instructed her to go to classroom(class 3) where he defiled her warning of dire consequences if she screamed or told anyone. After the ordeal the state submitted that the complainant went to dormitory where she discovered the following day that she was bleeding where upon she removed her stained pant and kept it.

15. The respondent has further submitted that the evidence of PW1 was corroborated by PW2 who was a pupil at the same school and PW3 who was a matron in the school.

16. In his submission, Mr Omayo submitted that penetration was proved by the evidence adduced by the prosecution at the trial court. He pointed out that PW6 the clinical officer who examined the complainant found tear on the complainant's labia and that her hymen was broken.

17. On the question of identification of the appellant, Mr Omayo submitted that there was positive identification by complainant who was able to recognize the appellant as her Arts and Social Science teacher. In his view, there was no question of mistaken identity as PW2 also told the court that she heard the appellant tell the complainant to go to class 3 which was the scene of the crime.

18. Mr Omayo further pointed out that the appellant in his defence said he was framed but failed to adduce any evidence to prove it. In his view, the evidence adduced by the prosecution at the trial court was overwhelming.

19. That State further pointed out that though the appellant is H.I.V. positive, PW1 was immediately put on medication to prevent infection which explains why the virus was not detected when the child was tested for the disease. Mr Omayo further told this court that it was unfortunate that the appellant betrayed the trust bestowed upon him as a teacher in the school and defiled a helpless child.

20. On the issue of whether the appellant was convicted on the main charge or the alternative one, the respondent submitted that the same was not fatal as the same did not substantially affect the outcome of the case.

21. Mr Omayo further submitted that there were no contradictions apparent in the prosecution case and that the evidence adduced were consistent with the charge facing the appellant.

22. On the age of the minor, the state submitted that the same was duly established and proved that the child was aged between thirteen years and fifteen years.

23. The respondent viewed the sentence meted out against the appellant as too lenient and asked this court for enhancement of the same to 20 years under **Section 364** of the **Criminal Procedure Code**.

24. To determine this appeal I have outlined three issues which I consider will dispose this appeal.

- i. Whether key ingredients of the offence were established and proved beyond reasonable doubt.
- ii. Whether the appellant could and was positively identified.

(iii) Whether the sentence on conviction was appropriate.

25. **Whether the ingredients of the offence were established and proved as required by law.**

I have considered the submissions of both sides on this point. I have looked at the evidence adduced and the judgment of the lower court. The key ingredients here for me are two .

1. Penetration
2. Age of the minor

26. The appellant contended that the prosecution ought to have proved that the appellant had penetrative and complete sexual intercourse with the complainant which they did not do. The state however pointed out that the evidence adduced demonstrated that there was penetration and that was sufficient .

27. The complainant (PW1) told the trial court that she was threatened and defiled in a standing position and that in the following morning after the ordeal she realized that she was bleeding and removed her blood stained pant and kept it. The record of proceedings shows that she later confided to her friend CO (PW2) the following day. It does appear from the proceedings that the complainant never reported the incident on 18th February 2012 as there were visitors in the school on that day. The report was eventually made on 19th February 2012 to the Director of the school (PW4) who instructed the school matron (PW3) to take the complainant to the hospital.

28. According to the evidence of PW 6, **HEZRON MACHARIA MAINA**, a clinical officer then attached to Kerugoya District Hospital, the complainant was defiled. On examination of the complainant he noted;

“The hymen was stretched and broken on the upper part, what is called 11 oclock position “and he went on to make the following observations,

“From my examination there was penetration. The stretched hymen and the effect on the labia majora and labia minora are evidence of penetration”. The medical officer who examined the complainant candidly explained to the trial court that there was penetration. **Section 2 of the Sexual Offences Act** was clearly captured by the trial court. The definition is given as :

“ The partial or complete insertion of the genital organs of a person into the genital organs of another person”. I am not persuaded by the appellant’s contention that it has to be established that penetration was complete and that presence of spermatozoa is material to prove an offence of defilement or rape. This contention is not supported by law and it lacks basis to that extent.

29. It is also crucial to note that the trial court saw first hand witnesses as they testified at the trial. The learned magistrate was better placed to read the demeanor of witnesses appearing before him. In that regard I note that he clearly observed and noted the demeanor of PW1 in his judgment and stated that he found her evidence ***“straight forward and truthful “*** He also found her clear and firm in her testimony and the trial court therefore had every reason to belief that what the witness was telling the court was the truth.

30. I have looked at the evidence of PW8 who told the court that she recovered a blood stained short from under the bed of the complainant . I noted that the typed proceedings refers to “shirt” but I have keenly looked at handwritten proceedings at page 97 and 180 and it clear that the word written is “short” but the typed proceedings inadvertently shows that a “shirt” that was blood stained was recovered by PW 8. This is clearly seen when the same was produced as P exhibit 3 and from the list of exhibits it is marked as ***“red short blood stained”.*** I find the evidence of PW8 consistent with what PW1 had told the court. The witness (PW8) told the court that DNA samples taken from the short showed that the blood sample matched that of the complainant. The exhibit memo and report were produced as exhibits 7 and 8 respectively . It is clear from the above that the evidence collected from the scene of crime was consistent with what PW1 had told the court , which is that in the morning following the night of the ordeal, she discovered that she was bleeding and removed her cloth(whether described as pant or short) and kept it. The same was found under the bed of the complainant by PW8 as indicated above when she visited the scene of crime.

31. From the above analysis , it is clear that the prosecution at trial not only established that there was penetration but proved beyond reasonable doubt that indeed there was penetration as confirmed by PW6. The trial court clearly observed this in the judgment when it inferred that in view of the tear noted on the labia majora and labia minora of the complainant by DW 2 there was;

“ Every possibility that blood should have been found and went on to note that “ blood had been

noted”.

32. The trial court however in the judgment appear to have fallen into error when he started redefining what constitutes ‘**penetration**’ according to the different opinions of two medical officers PW6 and DW3. In the first place, he found the evidence of DW3 to be unreliable as he found in his assessment he was “ **blowing both cold and hot** “ at the same time. In my view that was a fair assessment in view of the the evidence that the doctor gave at the trial court. In one instance he told the court he could not dispute the medical finding of other medical practitioners . He noted as follows:-

“ I would not dismiss medical documents signed by clinical officers”. He went further to note that and proceeded to note “ **it was clear that PW1 had injuries to her genitalia**”. But on the other hand he told the court that he could not ascertain whether or not there was penetration . He observed;

“ I cannot confirm penetration but there were injuries noted on the genitalia”. and went on to give his opinion on what constitutes penetration . He observed

“ Penetration is deemed complete once the vaginal opening is reached”

This opinion appears to have thrown the learned magistrate off course because instead of relying on what the law defines as penetration , he went to Concise Oxford English Dictionary for solution but in the process got mixed up and ended up creating an erroneous doubt in his mind on the issue of penetration where and when none existed from the evidence tendered.

33. The other ingredient in the offence facing the appellant is the age of the complainant. In this appeal the age was not an issue as the age was clearly established during trial with the production of birth certificate of the complainant as P exhibit 9 which clearly showed that the complainant was born on 17th April 1998 . Therefore at the material time of the offence she was aged 13 years ten months. There is no doubt therefore that she clearly fell within the bracket given under **Section 8(3)** of the **Sexual Offences Act**. Having established the age of victim of the offence , the only remaining major issue for determination is the question of identification.

34. The appellant contended in his submissions that the conditions obtaining at the material time was not favourable for positive identification . The State however held there was no chance of mistaken identity as the appellant was well known to the complainant. I have considered the evidence adduced by the prosecution in this regard and the assessment made by the learned trial magistrate. PW1 identified the appellant from the time he ordered her to class 3 where the offence took place and that explains why she obeyed without questions. PW2 corroborated the same in her evidence. In addition to this, is the assertion by PW1 that he was able to positively identify the appellant who was holding a mobile phone which in my view can have sufficient light to enable one be positively identified even in darkness. The learned trial magistrate in my considered view correctly evaluated the evidence adduced before him and the learned trial magistrate was correct to find that there was no room for mistaken identity. The appellant was positively identified and he told the court in his defence that he was on duty on the material night. The prosecution in my view from the evidence adduced squarely placed him on the scene of crime.

35. The appellant in his written submissions pointed out that the absence of spermatozoa or D.N.A. evidence linking him with the offence showed that the prosecution did not prove their case at trial court beyond reasonable doubt. This court however finds that the absence of spermatozoa or prove that the appellant ejaculated in itself does not negate an offence of defilement or rape for that matter. The key ingredients of the offence as aforesaid were well established and proved. I have noted the evidence adduced by the appellant at trial in addition to the submissions which suggested that if there was forced defilement, then the appellant’s organ could have suffered bruises as well. This theory lacks basis and I find the explanation given by PW6 under cross examination from appellant’s counsel clearly dispels this wrong notion.

36. This court has looked at the evidence adduced by all the prosecution witnesses and I find the same

consistent contrary to assertions made by the appellant. I find no material contradictions and the differences noted by the appellant's counsel on the evidence tendered and the statements made to the police did not substantially change the direction of the case. This court considers what the witnesses told the court to be material and important in informing a trial court whether the evidence is sufficient to find a conviction.

37. The appellant pointed out that PW1 and PW2 could have been lying but the trial court correctly dispelled this assertion in view of the fact that the appellant failed to establish the motive that might have made the witnesses to lie or try to fix him. Furthermore PW4 who was director of the school told the court that appellant was still new in the school. This court is unable to find any basis as to why anyone among the witnesses called to testify or at the school for that matter would be interested to falsely accused or make up an offence such as the one facing the appellant to fix him. The witnesses called to testify by the prosecution were all found to be credible by the trial court and I find no basis to fault the learned trial magistrate on that score.

38. In conclusion I do agree with Mr Omayo for the state that the evidence adduced by the prosecution at the trial was overwhelming. I do find that the same was sufficient to sustain the principal charge facing the appellant. For the reasons aforesaid the prosecution proved beyond reasonable doubt that the complainant had been defiled and the person responsible is the appellant herein. The trial court misdirected itself when it failed to convict the appellant on the principal charge. Consequently under **Section 354 (1) (ii)** of the **Criminal Procedure Code** I do hereby alter that finding by substituting it with a finding of guilty against the appellant on the main charge under **Section 8 (1) (3)** of the **Sexual Offences Act**. He is hereby convicted in accordance with that section. The appellant betrayed the trust placed upon him and put the life of an innocent young at peril when he defiled her when knowing his HIV status. The complainant like other children deserves protection of the law and justice. The law prescribes only one sentence in an offence of defilement of a girl aged between 12-15 years. The complainant was aged 13 years 10 months to be precise. This court has no other option but to reverse the earlier sentence meted out against the appellant by the trial court and in its place impose one prescribed by law. He is to serve 20 years imprisonment for the offence committed. It is so ordered.

R.K. LIMO

JUDGE

DATED SIGNED AND DELIVERED AT KERUGOYA THIS 29TH DAY OF APRIL 2015 in the presence of

Mr Nduku Njuki Counsel for the Appellant

Mr Omayo for state

Willy court Clerk