



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 56 OF 2013

BETWEEN

B A M APPELLANT

AND

REPUBLIC RESPONDENT

(Being appeal from the conviction and sentence of Hon. Andwera Onginjo C.M.

dated 12th July 2013 in the original Kisii Criminal Case No.10 of 2012).

JUDGMENT

1. The appellant B A M was charged with the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act the particulars of which were that on the 31st day of December 2011 at [Particulars withheld] sub location in Marani District within Kisii County intentionally and unlawfully had an act of penetration to the genital organs of S K.
2. He faced an alternative charge of indecent act contrary to Section 11(1) of the sexual offence Act the particulars of which were that on 31st day of December 2011 at [Particulars withheld] sub location Marani district within Kisii county did commit an indecent act with S.K. A child of aged 7 years by rubbing his penis against her vagina.
3. He pleaded not guilty to the charges was tried convicted and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raises the following grounds:-
 - (a) his defence was never considered
 - (b) the complainants age was not proved.
 - (c) the prosecution case was not proved beyond reasonable doubt.
4. When this appeal came up for hearing before me, the appellant who was not represented filed written submission which he relied upon, while Mr. Otieno for DPP conceded to the appeal on the basis that a reasonable doubt in the prosecution case was raised by the complainants mother.
5. It was submitted by the appellant that the prosecution had decided to withdrawn the case against him which was not allowed by the trial court and that pw1 admitted having fabrication the case against the appellant which fact was overlooked by the trial magistrate. It was the appellant contention that pw1 in

her evidence stated that she was not defiled by Ben but Bill.

6. It was further submitted that there were material contraction in the prosecution case and that vital prosecution witnesses were not called in support of which the case of **Ngong v R. CRA No. 50 of 1981 CA Nairobi** was submitted. It was submitted that pw1 the complaint was not a reliable witness to which the appellant submitted in support the case of **Ndungu Kimani v R. (1979) kLR 282**.

7. It was submitted further that the trial court did not consider the appellants sworn evidence which she termed unsworn in the judgment which was a clear case of miscarriage of justice. It was further stated that the age of the complainant was not proved and that his constitutional rights under Article 5(1)(2)(c) of the constitution were violated in that he was not provided with an relevant materials the prosecution intended to rely upon.

8. It should be noted that the court is not obliged to allow the appeal simply because the state has conceded to the same and mustthe evidence tendered before the trial court and to come to its own conclusion through taking into account the fact that it did not have the privilege of seeing and hearing witnesses.

9. The prosecution case was that pw1 S K. Age of 7 years on 31.12.11 went to the posho mill with D B her sister having been sent by their grandmother. On their way back they met the appellant (B) who took them to his house gave them juice cola and told D B to go out before doing "*bad manners to her*" she felt pain but did not bleed. She screamed the appellant left her and told her to go home having warned her not to tell anybody or else he would get her and slaughter her and her father was also slaughter her. So she did not tell anybody. On Monday she was taken to hospital because she was unable to walk.

10. Under cross examination she stated that she appellant was her uncle and used to stay at their home before he moved out and rented a room and that he had once brought police to their home but she did not know the reason for that. She further stated that she knew a boy named B who had also did bad manners to her.

11. Pw2 I M M testified that on 1.1.2012 when she came from church she found pw1 walking with legs apart she inquired she told her that she was sick and since sometimes she gets rushes in her private part. She told her to apply jelly. They later went to the market where pw1 said she was been tired. On arrival at home she went straight to bed. The following day when she examined her private part she found her discharging whitish discharge and when she inquired from her she said that B did bad manners to her when she was sent to the posho mill.

12. They thereafter made a report to the police and the appellant was arrested. Pw3 APC Ernest Ochieng received a report on the alleged defilement and arrested the appellant on 2.1.2012 asleep in his house and escorted both the appellant and complainant to Marani Level 4 hospital where they were examined.

13. Pw4 Dennis Omurwa a clinical officer filled p3 which indicated that lab examination gave positive spermatozoa confirming sexual assault.

14. When put on his defence the appellant gave sworn evidence and called some witnesses. It was Dw1's evidence that on 24.2.2011 together with his wife and his sister in law went to Kisii to wait for his brother from Mombasa. They stayed at Gesieka in his rental house until 27th when his mum fell sick, they took her to their grandmother's home until 29.12.11 when they moved to KISII TOWN. On 31.12.11 they went to his brothers wife place upto 6.00p.m.

15. It was further evidence that on 1.1.2012 they went back to Gesieka for new year celebration and on 2.1.2012 they escorted his brother to Mosochi on his way back to Mombasa when he stayed upto 9.30 p.m. Before going back home. The following morning his wife left him aslee0p to go to the river when he was arrested before being taken to court on 3.1.2012 under cross examination he confirmed that on 31.1.2011 he was in Itumbe his brother's in law's place.

16. Dw2 M K testified that she is the one who sent Pw1 to the posho mill on returning back her mother sent her to the river but she refused to go. When asked why she stated that she met someone at the river who led her to the maize plantation and defiled her when asked why she did not report she said it was the appellant and that she mentioned his name because she knew her but on the material day the appellant was not at home.

17. Dw3 T A pw1's grandfather stated that pw1 mentioned the appellant as the one who had defiled her since she feared her father dw4 W M M corroborated the appellants evidence. Dw5 I M the complainants mother who had earlier testified as a prosecution witness testified that in September 2012 pw1 changed her story and stated that the appellant did not defile her and that she was defiled after she had come from the posho mill when she had been sent to the river. It was her evidence that pw1 said she fabricated the appellant in order to bring the matter to rest. Under cross examination she stated that the appellant came in company of the complainant and her group from the posho mill and later went to Kisii town.

18. Dw6 G M the appellant wife corroborated his evidence and stated that she was with the appellant the whole day on the date of alleged defilement. Dw7 M K the appellants mother testified that the complainant said that she had fabricated the appellant because her father was threatening her and therefore wanted a way of appeasing him.

19. In convicting the appellant the trial court had this to say.

“She (accused) knew who committed offence as her father's cousin. The evidence by the accused person and his witnesses including pw2 who later sneaked in a defence witness that complainant didn't know the person who defiled her in my view cannot therefore stand. I suspect that it is after thoughtto exonerate accused from the serious crime he committed against the helpless seven (7) years old child that he stood inparents to.....

Accused person Dw1 together with his brother Dw4 and accused persons wife Dw6 alleged that on the material day 31.12.2011 they had gone to visit the in laws of Dw4 in Itumbe and returned to Kisii town at 6.00p.m. And therefore he could not have committed offence as he was not at the place of offence while complainants mother was testifying as Pw2 she was crossed by the accused and she said that when the 2 children came back from the posho mill at 6.00p.m. Accused person was with them

Dw7 accused person's mother said accused was not at home when offence was committed but she avers not say where he was. It is only accused and his brother Dw4 accused's wife Dw6 who seen to allege they had visited Dw4 in laws but Dw4 wife and her relatives who were allegedly visited conspicuously missing to attend and testify.“ (.....added)

20. From this judgment as guided above it is clear that the trial court passed her burden of proof upon the appellant. It is trite law that when an accused person raises an alibia defence, the burden of his approving the same was with the prosecution and therefore in holding that the appellants brother's wife and ever parents who were visited to the home called to testify the trial magistrate misdirected herself and therefore fell into error.

21. The issue for considered the above notwithstanding it whether the prosecution case against the appellant was proved beyond reasonable doubt. The fact that the complainant was defiled is not in dispute as the same was confirmed by the evidence of pw4 and pw1, pw2 and the complainants grandmother. The only issue in dispute is whether she was defiled by the appellant.

22. The complainant while under cross examination by the appellant admitted that she had been defiled by one Billy with the only missing link being when she was defiled by the said Bill. Taking this evidence together with the evidence of the defence witnesses, it is clear that there was also doubt raised in the prosecution case the benefit of which should have been given to the appellant.

23. Whereas there is clear possibility as indicated by the trial court that there might have been an attempt by the appellant and his relatives to compromise this matter, sad as might be, it is clear to my mind that there is a doubt raised in the prosecution case and therefore the case against the appellant was not proved beyond reasonable doubt.

24. It therefore follows that the conviction of the appellant was not safe and would therefore allow the appeal herein quash the conviction and set aside the sentence herein. The appellant should be set aside forthwith unless otherwise lawfully held.

Delivered, signed and dated at Kisii this 16th day of June 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Accused in person.

Mr. Majale for the state.