



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
CRIMINAL APPEAL NO. 14 OF 2015

JOSEPH KIPKOECH TANGUS.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction delivered and sentence awarded by the learned Senior Resident Magistrate at Bomet Hon. Cecilia Karanja in Bomet Principal Magistrate's Court Criminal Case No. S.O. 692 of 2009).

J U D G E M E N T.

1. Joseph Kipkoech Tangus hereinafter referred to as the appellant was charged with the offence of **Defilement in Violation of Section 8(1) as Read with Section 8(2) of the Sexual Offences Act. No.3 of 2006.**

The particulars being that the appellant on the 20th day of May, 2009 at about 6.00p.m in Bomet District within the Rift Valley Province , did cause his penis to penetrate the vagina of E C a child aged 10 years in Violation of Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. He faced an Alternative Count of Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that the appellant on the 20th day of May 2009 at about 6:00p.m in Bomet District within Rift Valley Province, did intentionally and unlawfully cause his penis and hands to come into contact with the vagina of E C a child aged 10 years Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

3. He pleaded Not Guilty and the matter proceeded to full hearing with the Prosecution calling four (4) witnesses while the defence called three (3) witnesses. He was convicted of the principal count of defilement & sentenced to life imprisonment.

4. Being aggrieved with the Judgment he has appealed against both the conviction & sentence raising the following grounds:

a. The learned Magistrate erred in law and in fact in that she erroneously admitted as evidence hearsay evidence as there was no eye witness to the alleged offence. This prejudiced the appellant seriously and particularly as the learned Magistrate relied on the same inadmissible evidence in her judgment thereby convicting the Appellant on inadmissible evidence.

b. The learned Magistrate erred in law and in fact in that she failed to consider the fact that the prosecution failed to establish the actual age of the complainant by either producing a birth certificate or sending the complainant for age assessment.

c. The judgment was bad in law and never considered the Appellant's unsworn evidence at all. It was biased and never analyzed evidence before the Court.

d. The learned Magistrate erred in law in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have defiled the complainant if any.

e. The evidence of the prosecution witnesses was so contradictory and full of discrepancies that it should not have been relied upon to convict the Appellant.

f. The complainant was taken for medical examination after 8 (days) and this period was long enough for any other person either to have defiled the Complainant or had sex with her and hence concluding that the Appellant was the one who defiled the Complainant was not proved beyond reasonable doubt and in any event the Complainant's evidence was never corroborated and hence it was unsafe to convict on such evidence alone.

g. The decision went against the weight of evidence before the Court.

h. The learned magistrate erred in law and in fact in convicting the Appellant of the offence of defilement whereas there was no evidence to support the same charge for the appellant was not taken to hospital for medical examination.

i. The life sentence awarded was bad in law as no reasons were given for the same.

j. The sentence awarded was harsh and excessive in all circumstances of the appellant and of the case before the court.

5. A summary of the prosecution case is that the complainant (PW1) who was aged 9 years or 10 years was on 20th May 2009 6pm sent by her mother (PW3) to a neighbour's place to get flour. She went but found when the neighbour had gone to the posho mill. She decided to go back home. On her way she met the appellant tethering his cow on the road.

6. He greeted her and requested her to go with him to his house he gives her something for her mother. He opened the door and when she entered he held her hand and took her, to his bed. He carried her and removed her pant & lowered his trouser. He had sex with her. She bit him on his stomach twice until he left her.

7. She went out and he followed her and gave her, her pant & Shs.10/= . He warned her against telling anyone what they had done as her mother would beat her.

8. She only told her mother about it on the 3rd day. Her mother went with her to the Appellant who denied having done that to her. She was taken to Longisa District Hospital and then to the Bomet Police Station to make a report.

9. Her mother (PW3) confirmed sending PW2 to Winnie for flour on 20th May 2009 at 6p.m. She said PW2 returned three hours later saying she had a headache & went to sleep. The next day she was unable to go to school complaining of pain in her legs. After two days she confided in her sister C what the Appellant had done to her. It's C who reported to PW3.

10. PW1 the Clinical Officer saw the complainant (PW2) on 26th May 2009 and after examination found she had been defiled. She told her she had been defiled on 18th May 2009. She even had an infection.

11. The Appellant gave evidence on oath denying the charge. He said on 20th May 2009 10am-10pm he had been playing darts at Sigira's home Silibwet. On 21st May, he had caned PW3's son who used to pluck tea for him. He had not weighed tea. Later PW3 came to where he was playing cards and asked him what he wanted to do with his daughter without mentioning the name. She told him she'd kill him. He was arrested on 29th May 2009. He denied meeting PW2 on the 20th May 2009.

12. DW2 said he witnessed the Appellant beat up PW3's son on 21st May 2009 5p.m, for not weighing tea. The boy was the Appellant's worker.

DW3 who is a brother of DW2 stated that on 21st May 2009 8p.m., PW3 had come to their home & was asking the Appellant what he intended to do to her daughter. She did not mention the name.

13. When the appeal came for hearing Mr. Motanya for the Appellant who argued all the grounds together submitted that PW3 had given contradictory evidence on how she knew of the offence. Her daughter who told her about the incident did not testify.

14. He further submitted that the alleged blood stained pant was not handed over to the police.

That, it was not clear when PW2 was assaulted and whether it was 18th or 20th May 2009.

15. That the Appellant was never examined to confirm if he had the same infection as the one PW2 had.

Secondly, there was no proof of PW2's age. Finally the Appellant's alibi was never displaced.

16. The appeal was opposed by the State. Learned State Counsel submitted that there was no contradiction in the evidence of the prosecution witnesses. Their evidence is also supported by the medical findings, she said.

17. She said the issue of the dates was handled by the learned Trial Magistrate in the Judgment. **Section 214 Criminal Procedure Code** covers that point, she submitted.

18. It was her submission that PW2's evidence was confirmed by that of PW3 who even saw the Shs.10/=. She asked the Court to believe the evidence of PW2 as the alibi raised by the appellant did not displace the evidence adduced.

19. It was her submission that since the issue of age had not been raised during the trial it could not be raised on appeal.

20. This is a first appeal, and this Court has a duty to reconsider and re-evaluate the evidence and arrive at its own conclusion. In the case of **KIILU & ANOTHER -Vs- REPUBLIC (2005) 1 KLR 174** the Court of appeal stated this:-

“1. 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. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion.

2. 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 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 doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

3. The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity,

and therefore an unreliable witness which makes it unsafe to accept his evidence.”

21. I have considered the evidence on record, the grounds of appeal and the submissions by both counsels. I am also alive to the fact that I did not see or hear the witnesses who testified.

22. I do find the issues falling for determination to be:-

- i. *Whether complainant (PW2) was defiled.*
- ii. *If she was defiled, who did it?*
- iii. *If its the appellant who defiled her, whether sentence passed was unlawful.*

1. ISSUE NO. (I): WHETHER THE COMPLAINANT (PW2) WAS DEFILED.

The Charge Sheet shows that this offence occurred on 20th May, 2009. The evidence of PW2 & PW3 gives the same date but that of PW1 (Clinical Officer) is otherwise. She stated that she was told by PW2 that she was sexually assaulted on 18th May 2009. A scrutiny of the P3 form produced as Exhibit 1 shows the date & time of the alleged offence as 18th May 2009 at around 1800hrs, and the date of reporting to the police & being sent to hospital as 25th May 2009. She was eventually seen and examined on 26th May 2009 at Longisa District Hospital.

2. If we go by the date of PW1 and the police in the P3 form, PW2 was seen and examined at the hospital on the 8th day after the incident.

However if we go by the date in the Charge Sheet and the evidence of PW2 & PW3 she was seen and examined on the 6th day after the incident.

3. According to PW1 who examined PW2 she found the latter to have; Bruises on labia minora, hymen half broken, part side intact, watery vaginal discharge, pus cells, presence of venereal disease.

4. She confirmed that the injuries were consistent with the sexual act complained of. It was her further evidence that anything else other than a man's male organ could cause such an injury but not the depositing of an infection.

5. My finding on this issue is that PW2 was defiled.

6. ISSUE NO (II): IF SHE WAS DEFILED WHO DID IT?

Having found that the complainant was defiled the next issue is to establish the person who did it.

This is where the issue of dates becomes important. From the evidence before the Court, its not clear whether the incident occurred on 18th May 2009 or 20th May 2009. This issue was raised in the lower Court and this is what the learned Trial Magistrate states in her judgment;

“The defence stated that the P3 form indicated that the offence was committed on 18/5/2009 whereas the witnesses stated that it occurred on 20/5/2009 as was also indicated in the charge sheet.

The question is whether the variance in time weakened the evidence adduced by the prosecution. It is my opinion that it did not as the witnesses were consisted in their evidence. PW2 clearly stated that she had been defiled by the accused person and PW1 made a conclusion that the injuries PW2 had sustained were consistent with a sexual act. Further Section 214 (2) of the Criminal Procedure Code states that the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact

instituted within the time (if any) limited by law for the institution thereof”.

7. The information on the first page of the P3 form (Exhibit 1) is by the police. The report given to them by PW2 & PW3 was that the offence was committed on 18th May 2009. This is the same information that the two witnesses gave to PW1 when seeking treatment.

8. It is therefore not clear how the date changed to 20th May 2009. These are two different dates and not just times. The provision relied on by the learned Trial Magistrate which is **Section 214 (2) Criminal Procedure Code** talks about times and not dates.

9. When dates given are at variance, this cannot be overlooked because this is material evidence which would prejudice an accused person as he/she would not know on which date to base his or her defence.

10. I have seen the defence raised by the appellant being that of an alibi. In his sworn defence he talks about the 20th May 2009 which appeared in the Charge Sheet which was the case of the prosecution.

11. My finding is that the contradiction in the dates of the occurrence of the offence was material. The Court and prosecution had all the time to move under **Section 214 (1) Criminal Procedure Code** to address the issue but they did not.

12. The delay of reporting the incident and seeking medical attention was not explained. An unexplained delay of six or eight days in a case of this nature is too long unless there is an eye witness, to corroborate the evidence.

13. It was PW3's evidence that PW2 reported to her daughter who in turn reported to her. The said was not called as a witness. This was a crucial witness.

14. PW1 not only found that PW2 was defiled but that she was infected with a sexually transmitted disease. The appellant was arrested on 29/5/2009 but there was no attempt to have him medically examined to establish beyond doubt that indeed he was the one who had infected PW2 with the sexually transmitted disease. This should have been done immediately after his arrest.

15. Counsel for the appellant raised the issue of age which he said must be proved in every sexual offence. This is true but not in all sexual related cases. There are certain ages which may not necessarily require age assessments and/or birth certificates.

16. There are victims who fall under **Section 8(3) Sexual Offences Act** and are less than ten years, and can clearly be seen by the prosecution, defence and the Court to be of tender years.

17. The **Children's Act** under **Section 2** defines a “ *Child of tender years as a child under the age of ten years. Such children may not necessarily be taken for age assessment. It is however imperative that the Court records its observations of the witness of tender years and even conducts a voire dire examination.*

18. A perusal of the record herein shows that though a *voire dire* examination was done the witness (PW2) said she was 11 years. She was therefore not a child of tender years and as such her age should have been assessed.

The learned Trial Magistrate did not make any observation of the minor as to what made her believe that in the absence of any document or age assessment she was ten years.

19. I have also noted from the record that though the appellant was represented by an advocate Mr. Akinyi, the Court proceeded to take the evidence of PW2 on 28th December 2012 in the absence of Counsel. There is nothing indicated in the proceedings to show why the Court proceeded in that manner. Apparently PW2 was the only prosecution witness on that day.

20. After PW2's evidence was taken the appellant only asked her one or two questions. The case was then adjourned to 21st February 2013. The record does not show what transpired then but its clear the case did not proceed until 11th June 2013. Again on this date the case proceeded without the defence counsel. His appearance is only noted at the time of Cross-examination.

21. PW2 was the key witness in this case. For the trial Court to have proceeded to take her evidence in the absence of the defence Counsel and without recording any reasons for such drastic action is unfair & unjust to an accused person.

22. There was also no urgency, as the case was also adjourned soon after PW2 finished testifying. What prejudice could have been caused to the prosecution if the Court had given the appellant an opportunity to avail Counsel or even adjourned the matter to another date?

23. I find that what the trial Court did amounted to a miscarriage of Justice and Violation of the appellant's right to a fair hearing. Its not clear why the defence Counsel Mr. Akinyi did not raise this with the Court when the hearing resumed on 11th June 2012.

24. I have in the preceding paragraphs pointed out the short fall in the evidence that was presented to the trial Court. This evidence cannot be said to conclusively point to the appellant as the culprit. The evidence laid by PW2 & PW3 gives the impression that they were not really speaking the truth see *Kiilu & Another -Vs- Republic (supra)*.

Secondly I have made mention of the casual manner in which the Court handled the evidence of PW2 who was a very vital witness. This action by the trial Court resulted in the appellant being denied his right to a fair hearing and prejudiced him.

25. Considering these findings coupled with grounds 5-7 I do find the conviction to be unsupported. Had the conviction been upheld grounds 9 & 10 could have been dismissed, as the sentence would have been lawful.

26. The result is that the appeal is allowed, conviction is quashed and sentence set aside.

The Appellant to be released unless held under a lawful warrant.

Dated, Signed and Delivered in Open Court this 31st day of July 2015.

H.I ONG'UDI

JUDGE.