



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.88 OF 2014

BETWEEN

JOSEPH BARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence of the Butali Ag. SRM's Court Criminal Case No.862 of 2013 delivered on 1/7/14 by Hon. M.L. Nabibya (Ag. SRM))

J U D G M E N T

Introduction

1. The appellant JOSEPH BARASSA was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act No.3 of 2006.
2. Particulars of the offence were that on the 18th day of December 2013 at *[particulars withheld]* Area Lwandeti sub location at Matete District in Kakamega County JOSEPH BARASA unlawfully and intentionally caused his penis to penetrate the vagina of J.M a child aged 17 years.
3. In the alternative count, he was charged with committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. Particulars of the offence are that on the 18th day of December 2013 at *[particulars withheld]* area Lwandeti sub location in Matete district within Kakamega County intentionally and unlawfully touched the private parts namely vagina of J.M a child aged 17 years with his penis.
4. The appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment. He has now appealed against the conviction and sentence on the following grounds:-
 1. THAT the learned trial Magistrate erred both in law and in fact by admitting Prosecution evidence which was marred by various contradictions and inconsistencies.
 2. THAT the learned trial Magistrate erred in both law and facts by failing to appreciate that there was not a medical examination report on the basis of DNA test on both the complainant and the appellant.
 3. THAT the learned trial Magistrate erred in both law and facts by admitting hearsay evidence without evaluating the possibility of discredited, unprofessionalism in the investigations carried out.
5. The appellant prays that the appeal be allowed, the conviction quashed and the sentence set aside.

- To support the appeal, the appellant filed written submissions, the highlights of which are that: a) He was never medically tested with a view to establishing whether indeed he was the one who committed the alleged offence, b) That the complainant never shouted or screamed when she was allegedly defiled which is a clear demonstration that she was in fact never defiled, c) the clothes the complainant wore on the day of the alleged defilement have never been produced in Court as exhibits. d) the evidence of Dr. Dixon Mchana clearly exonerated the appellant, e) the report of the alleged defilement was never recorded on the day it was allegedly made, but was recorded some 2 days later, f) the appellant's friend in whose house the appellant allegedly defiled the complainant was never called to testify, g) the trial Court failed to consider the appellant's alibi defence, h) the appellant's rights as to a fair hearing were breached, i) the sentence meted out to the appellant was improper and j) some critical witnesses were not called to testify.
6. The appeal was opposed. Mr. Oroni, Counsel for the respondent submitted that the appellant's appeal lacks merit on both conviction and sentence. He urged the Court to dismiss the appeal in its entirety.
 7. This being a first appeal, this Court is duty bound to reconsider and evaluate the whole of the evidence afresh with a view to reaching its own conclusions in the matter, only bearing in mind the fact that it never saw or heard the witnesses who testified during the trial see **Pandya –vs- R [1957] EA 336** and **Kariuki Karanja –vs- Republic [1986] KLR 190**.

The Prosecution Case

8. In support of its case, the Prosecution called 4 witnesses. The complainant, J.M testified as PW1. She told the Court that she was born on 29/02/1996 and that on the material day she had gone to borrow a book from a certain friend of hers in the neighbourhood, but did not find her. The time was about 5.00p.m she then went to another unnamed place to look for the girl and it was then that she was held and taken to a nearby small house beside the road and raped by the appellant. She did not scream during the ordeal because she did not expect the appellant to rape her. She then lost consciousness but later came to at about 6.00pm and went home. When she got home, she was afraid to say anything to anyone about what had happened to her.
9. Later that evening she was taken to Chimoi hospital where she was treated and her vagina stitched. She was admitted until the following day when she was taken to Matete district hospital for further examination.
- 10.Regarding the incident itself, the complainant stated that when the appellant took her into the house, he pulled her clothes up, removed her panty, lowered his trouser and then put his penis into her vagina. Though she tried to free herself, the appellant overpowered her. She also testified she felt pain because that was her very first sexual encounter.
- 11.During cross examination, the complainant told the Court that she was not aware if there was any dispute between her parents and the appellant.
- 12.PW2 was A K M, the complainant's mother. She stated that when she returned home at about 8.00pm on 18/12/2013, her husband informed her that the complainant was sick. By then the complainant had fainted and was lying on the floor in the house. On examining her, PW2 saw some blood stains on the complainant's legs. PW2 heard the complainant saying Barasa. PW2 called Barasa and Barasa came and was informed that the complainant was calling his name. Barasa is the appellant and is a neighbour.
- 13.PW2 then took complainant to Matete Health Centre. The matter was also reported to the Assistant Chief. PW2 produced the complainant's Birth Certificate – PExhibit 2. She also produced the complainants progress report as PExhibit 4 to show that the complainant was a student at ***[particulars withheld]*** Girls Secondary School.
- 14.During cross examination, PW2 denied that she hated the appellant. She also said that she had washed the clothes the complainant had worn during the incident because they were blood soaked and were stinking.
- 15.PW3 WANYAMA JOSEPH a senior enrolled nurse at Matete Health Centre told the trial Court that on the 22/12/2013 he examined the complainant who had been treated at Chimoi Health Centre but had not improved. The complainant had a history of having been forced into a sexual act and injured. The complainant's vagina had been stitched and was discharging blood and slight pus. He also stated that the complainant's genital area had been damaged with all features of STD

- laboratory findings. Pregnancy test carried out on the complainant was negative. PW3 told the Court that his examination findings were based on the initial treatment notes from Chimoi Faith Based Hospital. The P3 form was produced as PExhibit 1 while the initial treatment notes were produced as PExhibit 3. PW3 also told the Court on cross examination that the presence of pus in the complainant's private parts showed that she had an STD infection and further that by 22/12/2013 when he examined the complainant, sperms could not have been detected.
16. PW4 was number 83762 PC Carolyne Kikulu of Matete Police station. She stated that on 20/12/2013 while she was on duty at the Station, she received the complainant who was escorted by her parent. They reported the complainant had been defiled by a person known to her by the name Joseph Barasa. She however booked the report on 22/12/2013 and issued the complainant with a P3 Form. She later visited the scene of the alleged defilement. She gathered information on how the incident had occurred.
17. PW4 stated that she was able to establish during investigations that the complainant and the appellant who are neighbours knew each other well. On 25/12/2013, the appellant was arrested in execution of an arrest warrant through AP Chimoi Camp.
18. PW4 also testified that she did not find it necessary to have the appellant medically examined although she had been informed the laboratory investigations had revealed the complainant was infected with an STD namely gonorrhoea.

The Defence Case

19. At the close of the Prosecution case, the appellant was put on his defence. He elected to give sworn evidence. He did not call any witnesses. In his testimony the appellant denied committing the offence and stated that this case was a frame-up after their cow he was looking after strayed into the farm of Charles Masinde, the complainant's father. He also told the Court that on the day of the alleged offence he was in Nairobi visiting his uncle. He produced some bus tickets showing he had travelled to Nairobi on 11/12/2013 and travelled back on 24/12/2013. Then on 25/12/2013 at about 1.00pm, he was arrested by officers from Chimoi AP Camp. On 30/12/2013, he was taken to Malava Police Station. He was then charged with the present offence. During cross examination, the appellant stated that Charles Nyongesa Masinde never complained to the appellant's mother about the straying cow.
20. Before writing of judgment the trial Court called Dr. Dixon Mchana for expert opinion evidence on the issues in controversy. Dr. Mchana explained that a person who is infected with an STD was likely to have wounds (ulcers) and could also experience problems when passing urine, and that pus could also be seen. He also stated that the presence of gonorrhoea can be detected within 1 to 2 weeks, and that in a case of defilement, symptoms of gonorrhoea could present in 1 – 2 weeks from the date of defilement. Dr. Mchana also told the Court that it was common for surgical procedures to have itching and pus.
21. During cross examination, Dr. Mchana testified that where body fluids are to be tested in a case such as defilement, he would test specimens from both the victim and the suspect. He also stated that in a defilement case, the clothes of the victim during the incident should be handed over to the Investigating Officer.

Judgment of the Trial Court

22. After carefully considering the evidence that was before Court, both by the Prosecution and the defence and also after taking into account the expert evidence by Dr. Dixon Mchana, the trial Court reached the conclusion that the Prosecution had proved its case beyond any reasonable doubt against the appellant. The appellant was therefore found guilty as charged on the main Court convicted and sentenced to 15 years imprisonment.

Issues for Determination

23. After going through the whole of the evidence on record, the issues that arise for determination are the following:

1. Whether the complainant's age was proved.
 2. Whether there was penetration and
 3. Whether it was the appellant who defiled the complainant.
24. From the submissions of the appellant the appellant says the Prosecution evidence was contradictory and that the judgment of the learned trial Magistrate was hearsay. He also complains that no medical evidence was placed before the Court linking him to the commission of the alleged offence. The respondent's Counsel only asked the Court to consider the evidence on the record and to make a finding that the appellant indeed defiled the complainant.
25. Regarding the first issue, there is no doubt that the age of the complainant was proved beyond doubt. PW2 told the Court that the complainant was born on 29/02/1996. To that end, she produced the Birth Certificate – Pexhibit 2 showing the complainant's birth was registered on 28/02/2010.
26. The more difficult issue is the second issue and that is whether the Prosecution proved that there was penetration. The Prosecution produced the P3 form – Pexhibit 1 which showed that the complainant's perineum labia majora and minora were stitched and that the hymen was torn. The P3 form also showed that the complainant was infected with an STD and was also discharging some whitish stuff with spotty oozing of blood from the stitched wound. So from the evidence of the P3 form, there was penetration.
27. The third and most critical issue is whether it is the appellant who defiled the complainant. A careful consideration of the evidence given by the Prosecution reveals some considerable gaps in the said evidence. First of all, I find the casual manner in which the complainant handled her ordeal to be unbelievable. Her assertion that she did not scream because she did not think the appellant would defile her creates some doubt in my mind as to whether the sexual encounter if at all, between the appellant and the complainant ever took place. She also stated that even when she went home, she was afraid to say anything about the incident. I find it difficult to believe the complainant especially because it is said that she was bleeding and her clothes were bloody and in the words of PW2 stinking.
28. There is also the evidence of the P3 form which indicated that the complainant was infected with gonorrhoea, an STD that can only manifest between 1 – 2 weeks from the date of infection. The complainant is alleged to have been defiled on 18/12/2012. She was examined by the Clinical officer either on 20 or 22/12/2013. From the expert opinion of Dr. Mchana, the gestation period for the disease was still running. So, is it possible that the complainant had been defiled earlier than 18/12/2013 and by somebody else? I ask that question because the appellant was not taken for examination to establish whether he also had the STD. For this reason, I would give the benefit of doubt to the appellant.
29. There is also the issue of the appellant's alibi defence. This is what the learned trial Court said about it. **“Accused person's defence of alibi coupled with the evidence of existence of some form of grudge between the two families needed more than was presented. This evidence needed corroboration from that of the said uncle or that of his parents to prove that there may be reason to be framed.”** While I do not find any force in the appellant's alibi defence as would displace or shake the evidence of the Prosecution, I am of the considered view that the trial Court went beyond simply considering the alibi defence when it required the appellant to prove his innocence. For that reason too, I would give the appellant the benefit of doubt. It may as well be true that there was a grudge between the two families.

Conclusion

30. In conclusion and for the reasons above stated, I do not think that the conviction of the appellant was safe. I therefore allow the appeal quash the conviction and set aside the sentence of 15 years imprisonment.
31. Unless he is otherwise lawfully held, the appellant is to be released from prison custody forthwith.
32. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 30th day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant