



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.96 OF 2012

BETWEEN

MARWA MWITA MUHONOAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence of the SRM's Court at Kehancha in Criminal Case No.1367 of 2010 – by Hon. A.P. Ndege, SRM, delivered on 3rd April, 2012).

JUDGMENT

Introduction

1. The appellant herein, Marwa Mwita Muhono was charged with gang defilement contrary to **Section 10** of the **Sexual Offences Act No.3 of 2006**, the particulars being that on the 27th day of July 2010, at [particulars withheld] village in Kuria West District within Migori County in association with another not before court intentionally caused his penis to penetrate the vagina of A B T, a child aged 16 years.
2. In the alternative, 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**. The particulars being that on the 27th day of July 2010 at [particulars withheld] village in Kuria West District within Migori County, he intentionally touched the vagina of A B T, a child aged 16 years, with his penis.
3. The appellant pleaded not guilty and the case went to trial. The prosecution called 3 witnesses namely A B T as PW1 (complainant), Number 65998 Police Constable Davas Donte (PW2) and David Nyamohanga, a clinical officer at Kuria District Hospital who testified as PW3.

Facts and Evidence

4. The facts and the evidence of this case are that the complainant was a girl aged 16 years old and a standard 8 pupil at [particulars withheld] Primary School. She produced her Child Health Card showing that she was born on 2nd October 1995. The card was tendered in evidence as **P. Exhibit I**.
5. She stated that on the 27th July 2010 at about 9.00 p.m., she was walking home from [particulars withheld] Church. She was in the company of J G G, S BM and E R. (None of these girls were called as witnesses). As the group of girls walked along, two boys emerged from the bushes and started chasing them (girls). Since there was moonlight, the complainant said she was able to

- recognize the two boys as Wambura Mwita and Kerati Marwa, and both boys were saying that if they caught up with the girls, they would defile them.
6. The complainant also stated that the 4 girls started running in different directions and as she ran along the road towards her home, she fell down, as a result of which the two boys caught up with her and told her to go into the bush with them. They went some two hundred metres into the bush. Kerati Marwa ordered her to remove her underpants but she refused as she also tried to run away while screaming. The two boys again chased her and caught up with her and put her on the ground. Marwa Mwita, the appellant herein held her hands while Kerati removed her bikers and underpants. The appellant then defiled her not once but twice.
 7. After the appellant had defiled the complainant a second time, he and his companion told her to stand up and go away. She stood up and ran away to her uncle M's home. She told her uncle what had happened before taking her home on his motor cycle. At her home, the complainant also told her parents of her ordeal.
 8. On the following day, the complainant, together with her parents went to Kehancha police station and made a report of the incident. She was issued with a P3 form before being escorted to Kuria District Hospital. At the hospital she was treated and issued with treatment notes dated 28th July 2010. She identified both the P3 form (**PMF1-3**) and the treatment notes (**PMF1-2**). She also identified the appellant as a person she knew well as a resident of [particulars withheld] village. The complainant also confirmed to the court that she had no grudge with either the appellant or Kerati, the other boy who is still at large.
 9. During the cross examination that followed after her evidence in chief, the complainant stated that though she told both her uncle M and her parents that the appellant had defiled her, none of them went to the appellant's house to look for him. She also stated that the appellant was arrested 6 months after the incident. The complainant also stated that the Child Health Card (**P Exhibit I**) gave the name of the child as B G and the name of the father of the child as G M. She however denied that the Child Health Card did not belong to her. She testified that it was her mother who gave her the card so she (complainant) could produce it in court.
 10. PW2, No.65998 Dawas Donte received the complainant at Kehancha police station report office desk at 7.30 a.m. on 28th July 2010. The complainant was accompanied by her parents. She explained how on the night of 27th July 2010 at about 10.00 p.m., while walking from [particulars withheld] village in the company of 3 other girls, she had been accosted by the appellant and another by the name of Kerati Marwa. That she also explained how she and her colleagues ran in different directions and that after she fell down, the appellant and his companion caught up with her, led her into the bush some 200 metres away from the road and defiled her.
 11. PW2 also testified that the complainant told him that when they got to the bush, her pants were forcefully removed by Kerati whereupon the appellant defiled her and then Kerati Marwa did the same.
 12. After taking the complainant's statement, PW2 issued her with a P3 form and escorted her to Kuria District Hospital. PW2 also issued a police arrest order for the appellant. Later, the appellant was arrested by AP's. PW2 also testified in court that the complainant told him that she had recognized the appellant and Kerati Marwa with the help of moonlight.
 13. During cross examination, PW2 stated that though the complainant informed him that she had recognized her assailants with the help of moonlight on the fateful night at 10.00 p.m., she did not say how bright the moonlight was. He also stated that though the incident took place on 27th July 2010, the appellant was not arrested until 22nd December 2010, the reason being that both the appellant and Kerati Marwa had fled to Tanzania after the incident.
 14. PW3, Daniel Nyamohanga who was working at Kuria District Hospital as clinical officer gave evidence on behalf of his colleague Risper Opindu a registered clinical officer who was his immediate boss. Risper filled the complainant's P3 form after the complainant informed her that she had been gang raped by two men known to her. According to Risper's report, the complainant presented dirty clothes with some black jack on them. The examination of the genitalia revealed some mild brownish and smelly discharge and a few spermatozoa seen in the vagina and the urine. There were also pus cells as well as red blood cells in the urine. A pregnancy test was negative. The P3 form together with the treatment notes were produced as **P. Exhibits 2 and 3** respectively.

15. In his further testimony on cross-examination, PW3 stated that the P3 form he had produced in court did not contain either an OP or ID number, an omission the witness said was an anomaly that occurs only during emergency admissions. He could not say whether his boss had manufactured the P3 form, but added that medical reference numbers are not always entered in the medical examination documents. As to the cause of vaginal discharges, PW3 stated that sexual activity or other causes could be responsible for the same.
16. At the close of the prosecution's case, the appellant was put on his defence. He gave a sworn statement and stated that he was a boda boda operator between Kehancha and Isebania. He denied committing the offence, stating that on the night of the alleged offence, he was asleep in Kehancha town. The appellant did not call any witnesses.

Trial Court Judgment

17. After careful consideration of the evidence that was placed before it and upon consideration of all the submissions made on behalf of the appellant as well as the State, the learned trial court reached the conclusion that the prosecution had proved its case beyond any reasonable doubt against the appellant. It proceeded to find him guilty as charged, convicted him and sentenced him to 18 years imprisonment.

The Appeal

18. Being aggrieved by both conviction and sentence, the appellant preferred this appeal on 12 home made grounds which can be collapsed into the following:-

1. *THAT the learned trial magistrate erred in both law and fact in convicting the appellant when the conditions for his identification/recognition were not conducive to positive identification/recognition.*
2. *THAT the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution, which failed to call certain vital witnesses, failed to prove its case beyond any reasonable doubt.*
3. *THAT the learned trial magistrate erred in law and fact in accepting the prosecution's contention that the reason why appellant was not arrested earlier than 22/12/2011 was because he had run away to Tanzania.*
4. *THAT the learned trial magistrate erred in both law and fact in convicting the appellant on insufficient evidence.*

19. The appellant therefore prays that the appeal herein be allowed, conviction quashed and sentence of 18 years imprisonment be set aside.

The Duty of this Court

20. This is a first appeal which means that in deliberating on this appeal, this court must rehear the whole case by reconsidering and reevaluating the evidence afresh with a view to reaching its own conclusions in the matter. In carrying out this duty this court would be mindful to remember that it does not have the privilege of seeing and hearing any of the 3 witnesses who testified before the trial court. See **Okeno –vs- Republic [1972] EA 32** and **Mwangi –vs- Republic [2004] 2 KLR 28**. This court is also under a duty to carefully weigh and consider the judgment of the learned trial magistrate.
21. I have carefully done so and note that the prosecution's case against the appellant is pivoted on recognition since the complainant stated that she knew the complainant before as they are from the same village.
22. It is not in doubt that the incident complained of occurred in the night. According to the complainant's oral testimony, the time was 9.00 p.m. on the night of 27th July 2010. According to her recorded statement with the police, the time was 10.00 p.m. Whether the incident took place at 9.00 p.m. or 10.00 p.m., is immaterial. What is material is that it was at night.
23. According to the complainant, she was able to recognize the complainant and also Kerati Marwa

with the help of moonlight, though there is no detail on the record to show how bright the moonlight was.

24. I also note from the record that the prosecution did not call any of the other girls who were with the complainant on the fateful night. The prosecutor told the court before closing the case against the appellant that the parents of the intended witnesses obstructed police officers from serving witness summons on them (intended witnesses). I note that the complainant is the only eye witness to the alleged incident.

The Submissions

25. At the hearing of this appeal, the appellant put in written submissions and contended that the evidence of identification upon which he was convicted was doubtful and weak especially in view of the fact that the complainant must have been frightened when she and her friends were ambushed in darkness. He also contended that the complainant did not indicate how much time she took with the appellant to suggest positive identification.
26. In the case of **Wamunga –vs- Republic [1989] KLR 424** and **Mugo –vs- Republic [1966] EA 124**, the courts have been cautioned against convicting a defendant based on evidence of identification when such identification took place under difficult conditions. In the **Wamunga case** in particular, the court held that a court must carefully consider such evidence and satisfy itself that the circumstances for the identification/recognition were favourable and free from possibility of error before it can safely make it a basis for a conviction.
27. In response to the appellant's submissions, Mr. Shabola appearing for the respondent submitted that the testimony of the complainant completely settles the question of who her assailants were, having recognized them with the help of the help of the moonlight. He also submitted that there was medical evidence showing that the complainant was defiled and that in the circumstances, the prosecution proved its case against the appellant beyond any reasonable doubt. He urged the court to dismiss the appeal on both conviction and sentence and to enhance the sentence of 18 years imprisonment to life imprisonment.

Findings and Conclusions

28. After all the above analysis, the question that arises for determination is whether the prosecution proved its case against the appellant beyond any reasonable doubt, bearing in mind the fact that the only eye witness evidence of the incident is that of the complainant.
29. In the case of **Roria –vs- Republic [1967] EA 583**, it was held that it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, though there are certain exceptions when it is known that the conditions favouring a correct identification were difficult. As was held in the case of **Abdalla bin Wendo & another –vs- R[1953] 20 EACA 166**, “in such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
30. In the circumstances of this case too, the provisions of **Section 124** of the **Evidence Act** are relevant. The section provides:-

“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person

if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

31. Applying the above principles and law to the instant case, I am satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt. The complainant clearly recognized her attackers, first before she and her colleagues started running away after they were ambushed by the appellant and Kerati Mwita and secondly when they got hold of her after she fell down and walked with her for about 200 metres into the bush.
32. I am also satisfied that there was enough moonlight to enable the complainant recognize the appellant. There is also evidence that as Kerati held the complainant's hands, she had enough time to clearly see both of them at close range with the light from the moon. The complainant knew the appellant. He defiled her not once but twice. I am thus satisfied that the finding of the learned trial magistrate on this issue was sound and that the appellant's complaint that he was not properly identified is not true.
33. Having settled the issue that the appellant was properly recognized, and thereby dispelling his defence of alibi, I move on to determine two other issues:- one is whether the complainant's age was confirmed and two is whether there was penetration during the ordeal.
34. On the first issue, I accept as true, as indeed the trial court did, that the Child Health Card – **P. Exhibit 1** – settled the complainant's age by showing that she was born on 2nd October 1995.
35. With regard to the issue of whether or not there was penetration, the evidence given by PW3 confirmed the presence of spermatozoa in the complainant's vagina and in the urine. There were pus cells as well, a sure indicator that penetration had taken place. The appellant's complaint that there was no sufficient medical evidence is therefore hollow and is dismissed.
36. Finally, there is the issue of sentence. The State has asked the court to enhance the sentence of 18 years imprisonment to life imprisonment. **Section 10 of Sexual Offences Act** provides that the sentence for the offence of gang rape/defilement upon conviction is for a term of not less than fifteen years **“but which may be enhanced to imprisonment for life.”** In the case of **Wanjema -vs- Republic [1971] EA 494**, the Court expressed itself as follows on when an appellate court may interfere with the sentence imposed by a trial court:-

“An appellate court should not interfere with the discretion which a trial court exercised as to sentence unless it is evident that it overlooked some factors, took into account some immaterial factors, acted on wrong principles or the sentence is manifestly excessive in the circumstances of the case”

37. In the instant case, I do not find any evidence that the learned trial magistrate overlooked any factors or took into account some immaterial factors or that he acted on wrong principles in sentencing the appellant. Nor can it be said that the sentence is manifestly excessive in the circumstances. I also do not find any justification to have the sentence enhanced to life imprisonment as urged by the State.
38. Accordingly, this whole appeal is found to be without merit. The same is dismissed on both conviction and sentence.
39. The appellant has a right of appeal to the Court of Appeal within 14 days from today.
40. It is so ordered.

Dated and delivered at Kisii this 24th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Present in person for Appellant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk