



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
APPELLATE SIDE
CRIMINAL APPEAL NO. 98 OF 2011

(From the original conviction and sentence in criminal case no. 53 of 2010 of the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)

FESTUS ZIRO POLEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, Festus Ziro Pole was charged with two counts defilement contrary to Section 8(2) of the Sexual Offences Act. The particulars stated that on 6th November, 2010 at Sunpark he defiled two minors J O and A S aged 8 and 7 years respectively.

Following a full trial he was convicted and sentenced to life imprisonment on the first count, sentence on the second count left in abeyance. He appealed to this court against both conviction and sentence. Although he had listed six grounds of appeal, his counsel Mr. Gicheru abandoned half way arguing grounds 1, 4 and 5 which are as follows:

“1. THAT the honorable trial magistrate erred in law and fact when she convicted and sentenced yet the doctor’s evidence exonerated me from the charges.

4. That the honorable trial magistrate erred both in law and fact for convicting me in total disregard of the fact that some essential witnesses were not called to testify hence a violation of the law.

5. That the trial magistrate erred in law and fact by convicting me on reliance of a charge sheet which was incurably defective and was drafted contrary to the law.”

In his submissions the defence counsel faulted the medical evidence saying that it did not confirm penetration and that the perforation of the hymen could have been sustained in the course of “sex games”

indulged in by the neighbourhood child as described by PW3 and PW4. Finally, that the minor's evidence required corroboration. No submissions were made concerning the property of the charge raised in the 5th ground.

The state in opposing the appeal stood with the medical evidence and that of the minors. Miss Mathangani stated that the reports that the children had indulged in "sex games" led to the revelation of the minor's molestation after they were questioned.

They stated that the question of corroboration is settled under section 124 of the Evidence Act. Moreover, that the charges were not defective as all necessary injunction was disclosed.

As the first appellate court, I am under a duty to evaluate the evidence afresh and to draw my own conclusions (see (**Okeno v R 1972 EA (1972) EA32**)).

The gist of the prosecution evidence in the trial was that the appellant was employed as a caretaker in the plot where J A lived with her aunt T A O (PW3) PW2 (A3) or A K her friend lived in the same neighbourhood with her parents including her mother E A O (PW4). The minors were aged 8 and 7 years at the material time, and knew the accused by his nickname Babuu (grandfather).

On 6th November, 2009 he saw PW1 who was heading to PW2's home to play. He instructed her to go call PW2 so that he could give them cake. When the girls came to his house, he locked the door and sexually assaulted them in turns. He sent them away instructing them to go home, take a bath and not tell anyone. He repeated this on the next day and severally thereafter before a report emerged in the neighbourhood that the local children were engaging in "sex games."

The two girls when questioned "told their parents that the appellant had abused them. The matter was that on 20th November, 2010 the matter was reported to police and the minors referred for treatment and examination. The P3 forms completed on 26th November, 2010 by PW5 indicated their hymen was perforated and that "defilement was "highly possible."

On the basis of the foregoing medical evidence, the appellants asserted that the medical evidence "Exonerated" him does not stand. However, with regard to the evidence tendered, it does not seem that he was proved beyond reasonable doubt to have been responsible for the state of the two minors.

Because, looking at the accounts of the two minors, there were glaring inconsistencies that should have created a doubt in the mind of the trial magistrate. Firstly, PW1 said that she was the first to be penetrated by the appellant, while PW2 stood by. PW1 said the appellant asked her to lie on top of him for that purpose and that she bled. She did not wash her blood stained clothes as instructed by him. When she got home PW1 said she left PW2 inside the appellant's house. She had already witnessed her being sexually abused.

But according to PW2 the appellant lay on top of PW1 while having sex with her but in her case he asked her to lie on top of him and had sex with her. According to PW2, she left PW1 in the appellant's house and went home. She said the two washed the blood stained clothes and then returned to the appellant. He defiled them and hid their panties. In both cases they told no one as the appellant had warned them not to.

This matter came into the open when a report was made in the neighborhood that a certain boy and girl were having sex (per PW3) the two were beaten by their parents. It would seem that subsequent to this discovery parents in the neighborhood decided to inquire and PW3 and PW4 interviewed the two minors who named the appellant. PW2 did so reluctantly. The alleged blood-soaked panties were not recovered

In my considered view the contradictions in the minor's description of the events of 6th November 2010 were significant. Secondly, there was admittedly some form of pressure applied on the children in the neighbourhood concerning the report in "sex games." Hence the trial court's conclusion that the minors had no reason to lie is not entirely correct. It is time that the appellant's defence statement was a mere

denial but the burden lay with the prosecution to prove its case to the required standard. Investigations were poorly carried

In my considered view, the evidence tendered by the prosecution fell below that standard. There is room for reasonable doubt in this case that ought to have been resolved in the appellant's favor. The conviction for the two counts of defilement is unsafe and cannot be allowed to stand. I will therefore quash it and set aside the life sentence imposed. The appellant is to be set at liberty unless otherwise lawfully held.

Delivered and signed at Malindi this 28th day of March, 2014 in the presence of the appellant, Mr. Musyoki for the State.

Court clerk – Samwel

C. W. Meoli

JUDGE