



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 14 OF 2013

MWALONGO CHICHORO MWANJEMBE APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 51 of 2012 of the Principal Magistrate's Court at Mariakani – Hon. Machhage - PM)

JUDGMENT

MWALONGO CHICHORO MWANJEMBE hereinafter referred to as the Appellant in this case was Convicted and Sentenced to twenty five (25) years Imprisonment for the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act number 3 of 2006.

The particulars are that:-

“On the 27th day of January, 2012 at [Particulars withheld]- Kwale County, intentionally and willfully caused his penis to penetrate the vagina of H J a girl aged nine (9) years”.

The grounds for the appeal are that:

1. The Sentence was harsh and excessive.
2. That the prosecution case was riddled with inconsistent contradictory and unreliable evidence.
3. That the learned trial magistrate did not take into account the alibi defence offered by the defence.
4. No DNA test or medical examination was conducted on the Appellant to establish whether he was infected with a sexually transmitted disease.

The appeal was opposed. Counsel for the State Mr. Kiprop submitted that the appellant should have the Sentenced meted against him of twenty five (25) years imprisonment enhanced to life imprisonment.

He also contended that any variance as to time or date is not material as its curable under Section 214 of the Criminal Procedure Code. That the learned trial magistrate did consider the alibi defence and the evidence adduced by the defence Witnesses.

This being the first appellate Court its duty bound to examine and re-evaluate the evidence on record and come to its own conclusion. See **Okeno –Vs- Republic 1972 EALR page 31.**

The brief facts of this case are that the Complainant a standard five (5) pupil aged nine (9) years, on

the 27th day of January, 2012 was on her way to Church for choir practice when she met the Accused whom she knew before as she used to see him at the church. He told her that he was also heading to the same direction. They took a short cut to the church but after a short duration he got hold of her neck and throttled her and proceeded to defile her. She lost consciousness. When she regained it she found herself alone in the bushes. She started walking to find her bearings and met a young man who escorted her to Taru police station.

Her parents were later informed and she was taken to Mariakani Hospital for treatment and examination. She later pointed out the Accused who worked at a nearby sisal plantation and he was arrested.

Age assessment is not a ground of appeal in this case. Counsel for the defence had tried to sneak it in through his oral submissions but it was pointed out to the Court that it was not among the grounds of appeal hence he could not argue it without amending the grounds which he had not done.

Secondly, the Complainant's mother had testified to the effect that her daughter was born in the month of February, 2002 though she had forgotten the date. She also did tell the Court that she had a clinic attendance card but she had left it behind as the police had not asked for it. The prosecutor had at the time indicated that he would recall her later for purposes of producing the clinic card but he seems either to have forgotten or to have decided otherwise. I am satisfied (in the absence of any evidence to the contrary) that at the time of the defilement the Complainant was aged nine (9) years.

Penetration

The Complainant was examined by PW 1 a clinical officer on 30th January, 2011 who found that she had bruised back side with nail marks on the lower back of the neck. Her hymen was broken, the labia was swollen and she was bleeding vaginally.

The Complainant herself at page 5 line 9 had told the Court,

“he struggled me, I lost power, he defiled me, I regained memory later, I found myself alone”.

Her evidence is corroborated by that of the clinical officer who had found injuries on her neck which is consistent with strangulation.

The evidence of a broken hymen swollen labia and vaginal bleeding is consistent with penetration.

Identification

The defence had put up an Alibi defence to the effect that on the day in question 27th January, 2012 he was on duty till 7:00 p.m. His three Witnesses also testified to have been on duty with the appellant the whole day. I have duly perused the record of proceedings and nowhere in his cross-examination of the prosecution witnesses did the Appellant allude to having been on duty on the day and time alleged.

The only thing he alluded to was the fact that he was a Muslim but not a Christian as alleged by the Witnesses. In her evidence in chief page 5 line 3 the Complainant testified thus,

“I know the suspect by appearance. I see him in our church AIC church where I fellowship”.

On the same page line 16 she repeats the same by saying,

“It was painful, I was hurt, I knew him by appearance only, I did not know where he comes from. I proceeded to his place of work, I picked him. My dad knew where he works”.

The Complainants mother PW 2 also did testify that she knew the Appellant as a church member at Taru AIC church, where they had been fellowshipping since the beginning of that year. She also stated that the Appellant was a brother to the pastors wife.

It is instructive to note that this incident took place in broad daylight 3:00 p.m. The Complainant and the appellant had a casual walk together for some distance while chatting. She had told him that she was going to church and he had told her that he was also heading there. She had ample time and opportunity to observe his physical features before he defiled her and she temporary lost her consciousness.

The learned trial magistrate in his Judgment did take into consideration the Alibi defence and found it wanting and observed this at page 3 line 10,

“The defence Witnesses could not account for the suspect every moment of his time at the time and hence commission of such crime does not require planning but make the most of the moment available for the selfish gain of the assailant. I dismiss their defence”.

I do concur with him. There was nothing to show that the Witnesses the defence had called were the appellants workmates though the Court is in cognizance of the fact that its the prosecution to disprove the Alibi defence mounted by the defence. This Alibi defence was an afterthought as nowhere in his cross examination of the Witnesses produced by the prosecution did the appellant allude to have been on duty at the time of the incident.

It is the contention of the Appellant that when the Complainant was examined by the clinical officer she was found to be suffering from a sexually transmitted disease – Gonorrhoea hence there was need for him to have been taken to Hospital for examination.

There was need for that

- 1. To examine him with a view to treating him in the event he was found to be suffering from any sexually transmitted disease.**
- 2. To bolster and or buttress the prosecution case.**

However, failure to examine him is not fatal to the present case as there are no serious doubts as to the act of penetration itself.

Secondly, the appellant could have undergone treatment before he was arrested.

Having carefully analyzed the evidence which was adduced before the lower Court and the Judgment of the learned trial magistrate, I find no good reason to interfere with both Conviction and Sentence. The appeal has no merit and its dismissed.

Judgment delivered dated and signed this **27th** day of **May, 2014**.

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M. MUYA

JUDGE

27TH MAY, 2014

In the presence:-

Learned Counsel for the state Miss Mwaura

Counsel for the defence Mr. Ontwere

Appellant present

Court clerk Musundi

M. MUYA

JUDGE

Court: Copies of the Judgment and proceedings to be availed to the Defence and the Director of Public Prosecution.

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M. MUYA

JUDGE

27TH MAY, 2014