



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO 7 OF 2012

J G CAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 217 of 2012 in the Principal Magistrate's court at Baricho – HON. E.H.KEAGO (PM))

JUDGMENT

The appellant **J G C** was tried and convicted with the offence of **defilement** contrary to **section 8(1) (3)** of the **Sexual Offences Act** by the Principal Magistrate's court at Baricho.

The particulars of the offence alleged that on the 12th day of March 2012 in Kirinyaga West District of the Central Province, the appellant intentionally caused his penis to penetrate the vagina of **E W** a child aged twelve years.

Upon his conviction, the appellant was sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal raising the following grounds which I reproduce verbatim;

1. Pleaded not guilty.
2. The learned trial magistrate erred in law and in fact by not considering that the prosecution failed to issue me with witness statements on time. Some statements of key witnesses were issued to me after closing the file. I was therefore not well prepared for the case.
3. The learned trial magistrate erred in law and in facts by denying me the chance to recall and re-examine the witnesses even after getting their statements when they had already testified hence I was not accorded a fair hearing.
4. The learned trial magistrate erred in law and in facts by relying on the evidence of the examining medical officer that the victim had been sexually assaulted yet the same medical officer did not confirm medically whether the spermatozoa seen in the victim's private parts belonged to me. The only test done to me was H.I.V. test through the blood sample.
5. The learned trial magistrate erred in law and in facts by not considering the grudge between the family of PW1 and my family. PW1 is my cousin and there is a land dispute between the two families.
6. The trial magistrate erred in law and in facts by denying me a chance to proceed with the language on which I am conversant with. He forced me to use Kiswahili language which is very difficult for me to speak. I went to school up to standard 2 and I stay at home.
7. The learned trial magistrate erred in law and infacts by not considering my defence and mitigation.

When the appeal came up for hearing, the appellant chose to entirely rely on written submissions which

he submitted to the court. In those written submissions, the appellant abandoned all his grounds of appeal except ground No. 5 in which he complained that the trial magistrate erred in not appreciating that the complainant was his cousin and that there was an existing grudge between their two families over a land dispute which apparently motivated PW1 to give false evidence against him thus the inconsistencies in her testimony.

A reading of the appellant's submissions also shows that after abandoning the grounds stated in his petition of appeal except ground 5, he purported to introduce other grounds of appeal in his submissions for example the claim that he was convicted on the basis of unreliable and contradictory evidence. He urged the court to allow the appeal.

The appeal was opposed by the state. Learned state counsel **Mr Omayo** in opposing the appeal submitted that the evidence tendered by the prosecution in the trial court was collaborated, reliable and credible; that it was not dislodged by the alibi defence given by the appellant; that the evidence proved the guilt of the appellant beyond any reasonable doubt and that therefore the appellant was correctly convicted and sentenced. He invited the court to dismiss the appeal for lack of merit.

Briefly, the case for the prosecution is that the appellant and the complainant were cousins. The complainant, a girl aged 12 years testified as PW1 and stated that on 11th March 2012 at 4p.m, she was at their home when the appellant found her accompanied by one **Maina**. That the appellant subsequently led her to his residence where after threatening her with a panga ordered her to remove her clothes, removed his own clothes before he defiled her. PW1 recalled that after her ordeal, she remained in the appellant's house till around 10a.m when her mother went for her. Her mother **C N K** (PW2) testified that on the fateful night, she returned home at 7p.m. and noted that her daughter (PW1) was missing. Her other daughter informed her that the appellant had left with PW1. She immediately proceeded to the appellant's house arriving there at around 9p.m. she was accompanied by PW5 who gave her a ride in his motorcycle. The appellant was present but on enquiry, he denied that he was with PW1 but PW1 emerged from the house and they all fled after the appellant armed himself with a panga.

PW2 recalled that on leaving the appellant's house, PW1 reported to her that the appellant had defiled her. She checked on her private parts and noted that her vagina was wet and had some discharge. She escorted her to Baricho police station where they reported the matter to PW3 **CPL Catherine Migwi**. PW3 on her part stated that upon receiving PW1's complaint, she referred her to Baricho Dispensary for treatment. She also visited the scene in the company of the complainant where she recovered a petticoat, biker and underpants at a fence near the appellant's house. PW1 identified the clothes to be the inner wear she had worn when the appellant defiled her. The same were produced as exhibit 4,5 and 6 in support of the prosecution case.

PW3 also recalled that she arrested the appellant on identification by the complainant as her assailant and charged him with the offence for which he was tried and convicted.

The appellant in his defence gave an unsworn statement. He called his mother as his witness but she had nothing to say regarding the charges preferred against him. Her brief testimony was therefore worthless.

On his part, the appellant denied having defiled the complainant as alleged and claimed that he spent the entire day at his place of work after which he went back to his home and relaxed watching television. That he was arrested the same night at 11p.m. and charged with an offence he knew nothing about. He also claimed that he had a land dispute with the complainant who had allegedly taken away their land implying that the complainant had fabricated the charges against him owing to the alleged land dispute.

This being the first appeal, this court guided by the Court of Appeal decisions in ***Mwangi V R (2004) 2KLR 28; Kiilu and another V R (2005) KLR 175*** among others is aware of its obligation to re-examine and re-evaluate the evidence adduced before the trial court in order to arrive at its own independent conclusion whether or not the appellant's conviction can be sustained. In doing so, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses.

Having carefully re-examined the evidence adduced before the trial court, I find that the appellant was well advised to abandon most of the grounds in his petition of appeal because none of the abandoned grounds could have been sustained given the record of proceedings before the trial court.

The court record shows that both the prosecution and the appellant applied for the complainant to be recalled as a witness for their different reasons which application the learned trial magistrate allowed. The appellant was given an opportunity to cross-examine the complainant every time she testified. The appellant did not apply for any other witness to be recalled nor did he apply to be provided with witness statements at any time in the proceedings.

Secondly, the fact that the appellant was able to cross-examine the prosecution witnesses proves beyond doubt that he was able to participate in the proceedings and that therefore there was no merit in his claim that he had been forced to proceed in a language he was unfamiliar with.

Turning to the ground which the appellant relied on in prosecuting this appeal, namely that he was framed with the offence because he had a land dispute with the complainant's family, my analysis of the recorded evidence shows that this claim cannot be true and was at best an afterthought. Had this claim been true, the appellant would have sought to establish its veracity at the earliest opportunity when cross-examining the prosecution witnesses especially PW1 and PW2 which he failed to do. The first time when he made reference to a land dispute with the complainant's family was when he was making his unsworn statement when presenting his defence.

In any event, the complainant in this case was a child aged 12 years and not her parents. She is the one who narrated how the appellant who is her cousin took her to his home on 12th March, 2012 and defiled her. She was found by PW2 and PW5 in the appellant's home on the same day between 9-10p.m. and she immediately reported to her mother that the appellant had defiled her. Her claim was confirmed by PW2 who after examining her genitalia found it wet and producing a discharge. According to the treatment notes and P3 form (exhibit 2 and 3), when the complainant was medically examined on the following day, she was found with bruises on the labia minora and labia majora. Her hymen was also broken. Laboratory tests revealed presence of spermatozoa. Though a medical examination on the appellant did not reveal anything, there cannot be any doubt that the complainant had been defiled on the date alleged and no other person had opportunity to do so other than the appellant.

Besides having had the opportunity, the appellant was well known to the complainant prior to the fateful day and she positively identified him to be her assailant. The complainant's claim that she was in the company of the appellant from 4pm to around 10pm on the fateful day was not challenged by the appellant on cross-examination nor did he expressly deny it in his defence. This claim must be true because she was found in appellant's home that evening by PW2 and PW5. This court does not find any reason to doubt that claim by the complainant and indeed her entire evidence. I find that her recognition of the appellant as her assailant was correct and free from error.

That is why the inner wear she had worn on the fateful day was recovered by PW3 on a fence near the appellant's residence. PW3 was the investigating officer and an independent witness in this matter and had no reason to give false evidence against the appellant.

In the circumstances, I find no merit in the appellant's complaint that the complainant had framed him with the offence. I am satisfied that the evidence adduced against the appellant before the trial court was straight forward and sufficiently proved the charges preferred against him beyond any reasonable doubt. In view of the foregoing, I have no hesitation in finding that the appellant was properly convicted.

On sentence, the birth certificate produced as exhibit 9 conclusively proved that the complainant was slightly over 12 years at the time the appellant committed the offence.

Section 8(3) of the **Sexual Offences Act** (the **Act**) prescribes a minimum sentence of 20 years for a person convicted of defiling a child aged between 12 and 15 years. It is therefore obvious that the victim in this case was in the age bracket contemplated by **Section 8(3)** of the **Act**.

The record shows that the appellant was sentenced to 20 years imprisonment. This was a lawful sentence since it is the minimum sentence allowed by the law. The learned trial magistrate did not have any discretion to impose on the appellant any other sentence. Consequently, this court has no reason to interfere with the sentence imposed by the learned trial magistrate in this case.

In view of the foregoing, it is clear that this appeals is not merited and it is accordingly dismissed.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 16TH DAY OF MAY, 2014 in the presence of:-

The appellant

Mr Omayo for state

Martin Court Clerk