REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 83 OF 2012

BERNARD GIKUNJU MURIUKI……..……..…APPELLANT

-VERSUS-

REPUBLIC …….RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 29 of 2012 in the Senior Principal Magistrate's Court at Kerugoya – HON. NDUNG'U H.N (S.P.M)

JUDGMENT

1. The appellant ***Bernard Gikunju Muriuki*** was charged before the Senior Principal Magistrate's court at Kerugoya with the offence of defilement Contrary to ***Section 8(1)*** as read with ***Section 8(2)*** of the ***Sexual Offences Act*** particulars being that on the 3rd day of January 2012 at [particulars withheld] within Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate the vagina of ***M W N*** a girl aged 9 years.

The appellant also faced an alternative charge of committing an indecent act with a child Contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** (the ***Act***) in that on the same date and place, he unlawfully caused his penis to rub the vagina of ***M W N*** a girl aged 9 years.

2. Though it was not specifically expressed in the judgment of the learned trial magistrate, it is apparent that after full trial, the appellant was convicted of the principal charge of defilement and was sentenced to life imprisonment.

He was dissatisfied with the conviction and sentence and through his advocates M/S Ngigi Gichoya & Company Advocates, he filed his petition of appeal in which he raised the following five grounds of appeal;

a. ***The Learned magistrate erred in law and fact by failing to appreciate that the evidence adduced did not support the charge.***
b. ***The learned trial magistrate erred in law and fact in failing to appreciate that there were discrepancies regarding the identification of the appellant.***
c. ***The learned trial magistrate erred in law and fact in failing to appreciate that the co-existing circumstances destroyed the inference of the appellant's involvement in the alleged offences.***
d. ***The learned trial magistrate erred in law and fact in failing to appreciate that the conviction was against the weight of the evidence adduced.***
e. ***That the sentence was manifestly harsh and excessive regard being made to all circumstances of the case.***

3. In support of its case in the lower court, the prosecution called four witnesses.

After a brief voire dire examination, the complainant ***M W (PW1)*** gave sworn evidence though the learned trial magistrate had clearly indicated on record that in her assessment, the complainant did not understand the nature of an oath and that therefore she was fit to give unsworn evidence of little evidential value.

In her evidence, PW1 testified that she was nine years old and that on 3rd January 2012 as she was asleep in their house alone, one ***Bernard*** who she identified as the appellant herein went to the house and asked her where his wife was. He then removed her clothes, defiled her and left. Her mother who had gone to work at Wagoma Bar returned at around 10p.m. but she did not inform her immediately about what had happened in her absence.

4. On her part, PW1's mother who testified as PW3 recalled that on 8th January 2012 , she noted that her daughter ***M*** was walking in pain and on inquiry , ***M*** reported to her that ***Bernard*** had defiled her and warned her not to tell her mother promising to buy her shoes. She immediately reported the matter to the police and caused the appellants arrest on the same day.

She also took ***M*** to Kerugoya District hospital where she was examined by ***Mr Hezron Macharia,*** a clinical officer who testified as PW2.

5. In his evidence, PW2 recalled that after examining PW1, he noted that her labia Majora and Minora were bruised; her vagina walls were swollen and bruised. Her hymen was also torn. He completed the P3 form which he produced in evidence together with his treatment notes. They were marked as exhibit 1 and exhibit 2 respectively.

6. In his defence, the appellant made a very brief unsworn statement in which he denied having committed the offence as charged. He claimed that the prosecution witnesses had lied to the trial court.

7. When the appeal came up for hearing, ***Mr Ngigi*** learned counsel for the appellant made oral submissions in support of the appeal. He argued all the five grounds together.

It was ***Mr Ngigi's*** submission that the trial magistrate erred in not appreciating that the evidence adduced before the trial court did not support the charge of defilement; that the appellant was not properly identified as the person who had committed the offence and that the prosecution did not discharge its burden of proving the age of the victim to the required standard of proof.

He urged the court to find that the appellant had been wrongly convicted and that the appeal ought to be allowed.

8. The state through learned state counsel ***Mr Sitati*** opposed the appeal.

In his submissions, ***Mr Sitati*** asserted that the appellant was positively identified as the complainant's assailants as he was known to the victim before and that therefore, this was a case of recognition as opposed to identification.

He further submitted that the evidence adduced before the trial court supported the charges and that the appellant was properly convicted. He invited the court to dismiss the appeal for lack of merit.

9. This being the first appellate court, I am alive to the court's obligation to reconsider and re-evaluate the evidence on record in order to arrive at its own independent findings and conclusion on the validity or otherwise of the conviction and the sentence being challenged on appeal.

In so doing, the court will off course bear in mind that unlike the trial magistrate, it did not have the advantage of seeing or hearing the witnesses .This is basically the duty of the first appellate court as established by the Court of Appeal in numerous authorities. See for example;

- ***MWANGI VS REPUBLIC (2004) 2KLR 28***
- ***CHARO VS REPUBLIC (2007) EA 43***
- ***OKENO VS REPUBLIC (1972) EA 32***

10. I have considered the submissions made by ***Mr Ngigi*** for the appellant and ***Mr Sitati*** for the state alongside the grounds of appeal. I have also re-examined the evidence on record.

In my view, the evidence on record leaves no doubt that the offence of defilement was committed against the complainant having in mind the medical evidence adduced by PW2 which went unchallenged by the appellant.

Though I agree with ***Mr Ngigi's*** submission that the complainant's alleged age stated to be nine(9) years was not strictly proved by production of either a birth certificate or an age assessment report as would be ideally required given the importance of age in sentencing in sexual offences, in my opinion , strict proof of age would only be necessary in borderline cases where there is room for doubt whether the victim had either reached the age of majority which is 18 years or was outside the age brackets set out in ***Section 8(2) ,8(3)*** and ***8(4)*** the of ***Act*** when the offence was committed.

The reason why it is important to prove the victim's age in sexual offences is that ***Sections 8(2)-8(4)*** of the ***Act*** prescribes the penalty to be imposed on an accused person convicted of the offence of defilement depending on the age of the victim.

11. Having said that, I wish to add that other than in borderline cases, other modes of evidence can properly be used in other cases to prove the age of the victim.

In this case, the particulars in the charge sheet alleged that the complainant was nine years old when the offence was committed.

When she testified before the court, PW1 re-iterated this fact and added that she was a pupil at [particulars withheld] Primary School in class 3. This fact was not disputed or challenged by the defence on cross-examination .

The offence of defilement is committed when it is established that an accused person had carnal knowledge of a child and a child has been defined in ***Section 2*** of the ***Children's Act*** as ***"any human being under the age of eighteen years".***

In this case, there cannot be any doubt that ***M***, the complainant herein was a child as she was obviously below the age of 18 years when the offence was committed.

12. Though as stated above the evidence clearly established beyond doubt that the offence of defilement had been committed against the complainant, a close analysis of PW1'S evidence reveals that she was not sure of the identity of the person who sexually assaulted her as alleged.

At first she claimed that it was ***Bernard*** the appellant who she saw entering the house and proceeded to defile her.

Later on in her evidence at page 6 line 21-23, she changed her mind and claimed that she was defiled by a man she did not know. She stated as follows:-

> ***"The accused was not formerly known to me. It is my mother who told me his name. When he defiled me it was at night. I lit a torch (reffering to torch) and saw a man I did not know and he raped me and switched off my torch".***

These contradictions in PW1's evidence can only prove one thing- that she was not sure about the identity of her assailant.

13. The learned trial magistrate in her judgment was alive to these contradictions which she explained away as confusion due to the complainant's tender age.

The learned magistrate proceeded to make a finding of fact that the appellant was well known to the complainant prior to the material date and that for this reason she was able to properly identify him. If this were the case, even taking into account ***M's*** tender age, there would have been no basis for any confusion as regards the identity of her assailant since she would have been in a position to easily recognize the appellant as her assailant and it would not have been possible for her to confuse him with any other person. It is however doubtful whether the complainant would have been able to clearly see the intruder well enough to identify him considering that the offence was committed at night (about 9 p.m.) and the only source of light was a torch which was apparently lit for a short time.

14. It is important to note that in this case, the only evidence which implicated the appellant with the commission of the offence is his alleged identification as PW1's assailant. For this reason, the trial magistrate was duty bound to examine and evaluate the identification evidence adduced in this case with great care and caution particularly because PW1's evidence amounted to the evidence of a single identifying witness in difficult circumstances.

15. The trial magistrate in her judgment did not address her mind to the circumstances under which the appellants alleged identification was made. It is clear from the evidence that the offence was committed at night and the only source of lighting was a torch. The court was not told how bright or otherwise the torch light was and how long the complainant was able to see her assailant before the torch was switched off.

In Maitanyi vs Republic (1986)KLR 198 the Court of Appeal held that failure of a trial court to test identification evidence with regard to the nature and intensity of the light available and other conditions prevailing at the time of alleged identification of an accused person amounted to an error of law.

In this case, in failing to consider the circumstances under which the complainant allegedly identified the appellant, the learned trial magistrate fell into error. She ought to have tested the evidence of the complainant's alleged identification of the appellant carefully with the aim of establishing whether the conditions prevailing at the time the offence was committed were conducive to a positive and proper identification of the assailant. She failed to do so. Her finding that the appellant was positively identified as PW1's assailant in this case was in my view not supported by the evidence on record.

16. Having evaluated the evidence on record, I have come to the conclusion that the prosecution failed to establish beyond any reasonable doubt that the appellant is the intruder who defiled the complainant as alleged. My finding is that the evidence adduced in this case created a reasonable doubt whether the complainant was defiled by the appellant or by another person who was not known to the complainant. The learned trial magistrate ought to have given the appellant the benefit of that doubt.

17. That being my view of the matter, I find that the appellant's conviction was unsafe and the same cannot be allowed to stand. In the circumstances, I am satisfied that the appeal is merited and it is hereby allowed.

The appellant's conviction is consequently quashed and the sentence set aside.

The appellant is to be released forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 15TH DAY OF AUGUST 2014 in

the presence of:-

The appellant

M/S Kiragu holding brief or Mr Ngigi Gichoya advocate for the appellant

Mr Sitati for state

Willy Court clerk