



IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 136 OF 2012

J W M..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence contained in the Judgment of the Hon. M. D. Ireri (Resident Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 4569 of 2011 delivered on 23rd July, 2012)

JUDGMENT

J W M, the Appellant herein was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars as contained in the charge sheet were that on the 12th day of December, 2011 in Lugari District within Western Province unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of V M a child aged fourteen (14) years.

In the alternative, he was charged with indecent act to a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that he unlawfully and intentionally caused his penis to come into contact with the vagina of V M a child aged fourteen (14) years.

The Appellant was convicted in the main count and was sentenced to serve twenty (20) years imprisonment.

He appealed both against the conviction and sentence. He raised the following issues in the grounds of appeal:-

(a) That he was denied the right of access to prosecution witness statements in contravention of Article 50 of the Constitution.

(b) That he was convicted on the basis of inconsistent and contradictory evidence.

(c) That investigations were shoddy and crucial witnesses were not summoned to testify.

(c) A DNA test was not conducted, hence medical examination to prove the offence of defilement was not exhaustive.

On 6th December, 2012, the Appellant filed a Supplementary ground of appeal in which he faulted the evidence of PW1 as lacking credibility.

The appeal was canvassed on 27th May, 2014. The Appellant who was in person relied on his written submissions filed in court on 6th of December, 2012.

Learned State Counsel Miss Oduor acted for the Respondent. She conceded to the appeal. She submitted that the prosecution's evidence was riddled with contradictions. She cited the testimony of PW1 who testified that she was defiled on a sofa set as the bedroom was locked. She said she could not scream because the Appellant held her mouth. That further, the Appellant was arrested by her grandmother and uncle.

But in a sharp contradiction to PW1's evidence, PW2 (PW1's grandmother) stated that she heard a noise from a bed and upon entering the house saw PW1 coming out of a bed. It was her testimony that the house was made of only one room but is divided with a bed sheet to make two rooms, namely a bedroom and a sitting room.

PW2 also stated that she solely arrested the Appellant and was not assisted by PW1's uncle.

Miss Oduor submitted that PW1 and 2 were the key prosecution witnesses. That evidence being contradictory, it was difficult to establish where the incident took place.

Further contradictions were marked by the evidence of PW3 and 4. PW3 who was an AP officer from Matete DC's office stated that he arrested the Appellant. According to him PW1's dress had blood stains next to her private parts. But according to PW4, the Clinical Officer who examined PW1, PW1's clothings were dry and had no blood stains. Her inner clothings were also dry and had no blood stains.

The concession by the learned state counsel notwithstanding, this being the first appellate court must evaluate the evidence on record and come up with its own conclusions – See **OKENO -VS- REPUBLIC EA, 32, MOHAMED RAMA ALFANI AND 2 OTHERS -VS- REPUBLIC CRIMINAL APPEAL NO. 223 OF 2002.**

Having in mind the grounds of appeal raised by the Appellant and the submissions by the learned state counsel, I find the main issues for consideration herein to be;

- (a) Whether the Appellant's rights were violated.
- (b) Whether the prosecution's evidence was contradictory and not credible to warrant a conviction.
- (c) Whether a DNA test was necessary.

VIOLATION OF CONSTITUTIONAL RIGHTS

The Appellant contended that he was denied access to the prosecution witnesses' statement. He referred the court to page 20 line 3 of the record of appeal. This reference is subject of the proceedings on 7th February, 2012 which run from page 19 to 20 of the record of appeal. Part of the proceedings read as follows:-

“7/2/12 Court Prosecutor: I have 2 witnesses.

Accused: I am not ready to proceed. I was praying for statements.

Court: Application for adjournment is allowed. Statements to be applied to the accused person. Further hearing on 24/2/2012.”

On 24th February, 2012, the trial did not proceed as the prosecution sought an adjournment. The Appellant did not oppose the request for an adjournment. The hearing was rescheduled for 28th

February, 2012. On this date the prosecution sought an adjournment but the Appellant was ready to proceed. Court adjourned the trial to 23rd May, 2012. On the latter date, again the prosecution sought an adjournment and the Appellant did not oppose the same. Hearing was rescheduled to 25th May, 2012. On this date both the prosecution and the Appellant were ready to proceed. This is what the court recorded:-

“25/05/2012

Prosecutor: We have just found the police file from the prosecution office. We are sorry for that error.

Prosecutor: I have two witnesses.

Accused: I am ready to proceed.....”

In view of the foregoing proceedings, it appears that after the Appellant applied for witnesses statements on 7th February, 2012, he was furnished with them. That request was laid to rest as in the subsequent days when he appeared in court, he did not request for the statements. Indeed he too was ready to proceed when the prosecution availed the court file. The trial court could not therefore make a determination on an issue that was not raised before it. Based on the record, it is factual that he was availed the statements well before the trial commenced and that therefore his constitutional right to a fair trial was not violated.

WEIGHT OF THE PROSECUTION'S EVIDENCE

A total of five (5) prosecution witnesses were called who testified as follows:-

PW1, V M and the complainant was a minor then aged fourteen (14) years. A voire dire examination was conducted after which the court ruled that she would give a sworn statement of evidence. According to her, on 12th December, 2011, at about 6.00 p.m. she was at her uncle's home together with one F and a small boy named K who was younger than her. The Appellant entered into her uncle's house and she followed to inquire what he was up to. The Appellant then requested to have sex with her and threatened to kill her if she refused. The young boy, K later closed the door from outside and the Appellant had sex with her. PW2 later came and found the Appellant in the act. The Appellant tried to escape through the window in vain and he was arrested by PW2 and her (PW1) uncle.

PW2, G N, the grandmother to PW1 testified that she was informed by a boy called Junior aged three (3) years that PW1 had been locked up in her uncle's house. She went to the scene and found the door closed but not locked. It was about 7.00 p.m. She pushed it open. PW1 went outside while the Appellant took cover under the bed. When she asked the Appellant what he was doing with PW1, he stated that he wanted to marry her. She arrested the Appellant and escorted him to Matete A.P. Camp. At that time she had not known that the Appellant had had sex with PW1. She stated that she was not assisted by anyone to arrest the Appellant. Later, PW1 informed her that the Appellant had forced her to have sex with him.

PW3, A.P.C. Josiah Kachika of Matete DC's office testified that on 12th December, 2011 at about 7.30 p.m., three people went to the A.P. Camp accompanied by M N. It was alleged that they found the Appellant defiling pW1 in her uncle's house. He testified that it was PW2 who found the Appellant committing the offence. He took the people to Lumakanda Police Station for assistance.

It was PW3's further testimony that PW1's clothings had blood stains next to her private areas.

PW4, Dennis Ekisa, a Clinical Officer from Lumakanda District Hospital examined PW1 on 13th December, 2011 and filled her P3 form. PW1 reported to him that she had been lured into sex by a person known to her on 12th December, 2011 at about 6.00 p.m. She had dry clothings with no

blood stains. The skirt had a tear along the right hem. The inner clothes were dry with no blood stains or mud. There were no swellings on her private parts. The vulva was inflamed and the hymen was torn. There was a whitish discharge from the genitalia. No bleeding was noted.

HIV, pregnancy and syphilis tests were negative. Vaginal swab showed no signs of sperm deposit. Urine tests showed traces of white blood cells. PW4 concluded that PW1 had had sexual intercourse.

PW4 also examined the Appellant on the same date, 13th December, 2011. His genitalia was normal. HIV test was negative. His urine test showed traces of white blood cells for which he was treated.

PW4 produced PW1's and Appellant's treatment notes and P3 forms as exhibits.

PW5, Police Constable Eva Cherop from Lumakanda Police Station investigated the matter. She received information on 13th December, 2011 that the Appellant had lured PW1 into sex on 12th December, 2011. She took PW1 to Lumakanda Police Station for examination. After it was confirmed that PW1 had had sexual intercourse he preferred the charges against the Appellant.

The Appellant gave an unsworn statement of defence. He stated that on the 12th December, 2011, he was at his place of work in a sugarcane farm when he was arrested. He denied having defiled PW1.

From the foregoing evidence, there are two marked contradictions. One is with respect to the arrest of the Appellant. According to PW1, he was arrested by her uncle and grandmother (PW2). PW2 on the other hand testified that she solely arrested the Appellant.

The other contradiction regards the set up of the house in which the Appellant was arrested. According to PW1, the house had a bedroom which was not confirmed by PW2. It was a one-roomed house divided by a sheet to make two rooms.

These two contradictions are not material to the charges facing the Appellant. They do not ouster the fact that the Appellant sexually assaulted PW1. The Appellant was arrested by PW2 after she forced open the door of the house. He took cover under the bed but was nonetheless arrested. Thereafter, PW1 disclosed to PW2 that the Appellant had forced her to have sex with him.

The medical evidence of PW4 did in fact confirm that PW1 had been sexually assaulted. He examined PW1 on 13th December, 2011, a day after the incident. He found the vulva was inflamed and the hymen lacking which was indicative that the sex was a recent occurrence.

Although PW4 found no blood stains on PW1's inner clothings, it is important to note that the examination was done a day after the sexual assault. There was then the probability that PW1 could have changed her inner clothings by the time of examination by PW4. Be that as it may, the presence of blood stains on inner clothings is not a prequisite proof of a sexual assault as one may have sex and necessarily bleed.

PW1 struck the trial court as a truthful witness. I have no reason as well to doubt that she spoke the truth. After all, the Appellant was caught in circumstances that undoubtedly implicated him. And with the corroboration of the medical evidence, I also uphold the trial court's finding that it is the Appellant who defiled PW1.

THE DNA TEST

The rationale for a DNA test is founded in the provisions of Section 36 (1) of the Sexual Offences Act No. 3 of 2006. The same reads as follows:-

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

According to the Appellant, it is the DNA test that would have linked him to a sexual contact with PW1. However, under Section 36 (1) of the Sexual Offences Act, a DNA test is not mandatory and only when the court deems it fit that it should order for one. In the instant, there was strong evidence that it is the Appellant who defiled PW1. A DNA test would thus have served no purpose. As such, no prejudice was occasioned to the Appellant in not conducting a DNA test.

Finally on sentencing, the Appellant committed the offence while he was a minor aged seventeen (17) years but had attained the age of eighteen (18) years by the time of sentencing. The trial court passed an imprisonment term of twenty (20) years as per Section 8 (3) of the Sexual Offences Act.

Under Section 354 (3) of the Criminal Procedure Code, ***“The court may then, if it considers that there is no sufficient ground for interfering, dismissing the appeal or may alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence.”***

Under Section 8 (7) of the Sexual Offences Act and Section 191 (1) of the Children's Act, an imprisonment penalty for a child offender is not recommended.

Section 8 (7) of the Sexual Offences Act provides that;

“Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence

the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.”

Whereas Section 191 (1) of the Children's Act provides;

“In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the

following ways -

(a) by discharging the offender under section 35 (1) of the Penal Code;

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable

to his

needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides establishment and regulation of borstal institutions; *for the*

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l) in any other lawful manner. ”

In the instance, the trial court ought to have preferred a non-custodial sentence. In **JOHNNESS MWANJALA -VS- REPUBLIC (2014 @ KLR, H.C. AT MOMBASA CRIMINAL APPEAL NO. 251 OF 2012**, the learned Judge Muya, J. while sentencing the Appellant to Community Service stated as follows:-

“The learned trial Magistrate should have not sentenced him to imprisonment but should have resorted to a punishment under the Children's Act or under Probation Act as envisaged by Section 8 (7) of the Sexual Offences Act. Presently, the Appellant is aged above nineteen (19) years and most of the punishment prescribed by Section 191 are not available for the Appellant. The one that looks more available and relevant is that of Community Service. It is ordered that the Probation Department does avail a report as appertains to Community Service within two weeks from the date of this Judgment.”

Record shows that the Appellant availed to court an age assessment report which indicated he was eighteen (18) years old at the date of conviction. He thus committed the offence when he was seventeen (17) years old but which factor the trial court ignored.

In the result, I uphold the conviction. I however set aside the twenty (20) years imprisonment jail term. Given that the Appellant has already served two years jail term which he ought not to have, I will consider it as sufficient punishment so far. I order that he be forthwith set free unless he is otherwise lawfully held.

DATED and DELIVERED at ELDORET this 22nd day of October, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Present in person for the Appellant

Mr. Mulati for the State