



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 36 OF 2014

PETER NYAGA NJOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Appeal from the Sentence and Conviction of P. M.O. Obiero – Ag. Senior Principal Magistrate Runyenjes in Criminal Case No. 164 of 2014 on 19th June 2014).

J U D G M E N T

The appellant was charged and convicted by Runyenjes Ag. Principal Magistrate of the offence of defilement contrary to section 9(1) as read with section 8(4) of the Sexual Offences Act and sentenced to serve 15 years imprisonment. He was acquitted of the alternative charge of indecent act with a child.

This appeal is against the said judgment and challenges both the conviction and sentence.

The appellant relied on four (4) grounds of appeal; that the offence was not proved against him, that section 169 of the Criminal Procedure Code was contravened, his defence was not considered and that the trial court failed to assign him a legal counsel to represent him thus contravening Article 50(4) of the Constitution.

The facts of the case is that on the 6th day of April 2014, the accused passed on the road near the complainant's home. The complainant had given out her mobile phone earlier to be charged. When she asked the accused whether she could collect the phone, the accused asked her to accompany him to go collect the phone. The accused led the complainant to the house of his employer. He locked her inside and forcefully had sexual intercourse with her despite her efforts to resist it. Later he allowed her to leave. As she walked home she met with her sister PW3 who noticed she was crying. She told the sister what the accused had done to her. The matter was reported to the police who sent the complainant for medical examination. The accused was later arrested and charged with the offence.

PW2 the complainant testified that she accompanied the accused to go pick her phone which was charging. On arrival at the home, the complainant refused to enter the house requesting that the accused picks the phone from inside the house and gives it to her. The accused got hold of PW2 and forced her into the house locking the door after her. He then went out to feed his cows and locked the door leaving the girl inside. He came back after a short while and demanded that PW2 gives her what he wanted. PW2 screamed for help but no one came to her rescue. The appellant then put on loud volume of his radio and set upon the complainant and threw her on the bed. PW2 struggled with him but he managed to undress her and had carnal knowledge with her. The appellant offered her cash KShs.1600/= which was on the table as a compromise but the complainant rejected the offer. The appellant then alleged that the complainant had stolen his Shs.100/= and demanded she refunds the money before leaving his house. It

was later that he allowed her to leave the house. Subsequently PW2 reported the matter to the police after informing her mother PW4 and her sister PW3 of her ordeal.

The P3 form was produced by PW1 a clinical officer attached to Runyenjes District Hospital. Examination revealed existence of whitish discharge with blood stains. PW1 testified that there was evidence of penetrative vaginal sex.

When PW4 and PW3 saw the complainant after the incident when she went home, she was crying and was so distressed. She told them that she had been sexually assaulted by Peter (referring to the appellant). PW5 produced the complainant's birth certificate in evidence which he had obtained in the course of his investigations.

The defence of the appellant was that he was at his home on the material day and he could not recall what happened. He said he was arrested on allegations of defiling the complainant which he denied.

It is important to note that during cross-examination the complainant said that the appellant is an employee in the home where the incident took place. She also said that she and others in the neighbourhood normally charge their phones in the said home. She said that she knows the appellant very well. The identity of the accused was not therefore in question since he was known both by the complainant, her mother PW4 and her sister PW3.

The appellant said that all the witnesses were members of one family and that for that reason, he was wrongly convicted. It was only PW3 and PW4 who were related to the complainant. The two did not witness the incident but saw the complainant thereafter in a distressed situation. There is no legal provision barring members of one family from testifying in a criminal case. The court will assess the credibility of an individual witness. The trial magistrate believed the complainant and all the other witnesses including the doctor and the investigating officer. The allegation that Section 169 of the Criminal Procedure Code was violated has no basis.

The trial magistrate found the complainant's evidence and that of PW3 and PW4 credible. On perusal of the complainant's evidence, she gave a clear and vivid account of what transpired between her and the appellant. During cross-examination, she ably and boldly answered the questions put to her. Her evidence was corroborated by the medical evidence which was to the effect that penetrative vaginal sex had taken place. The evidence of defilement was therefore sufficiently corroborated by the medical evidence and by the evidence of PW3 and PW4.

The age of the complainant was proved by tendering a birth certificate which showed that she was born on 7th May 1996. At the time of the offence on 6th April 2014, the complainant was aged 17 years 11 months. The age of the complainant was therefore established.

The defence of the appellant was a mere denial coupled with a half hearted alibi which the magistrate considered in his judgment when he set out to investigate whether the appellant and the complainant met and whether the offence was committed. He reached a conclusion that the offence was proved beyond any reasonable doubt. It is not correct therefore for the appellant to state that his defence was ignored.

The appellant contended that he was denied his constitutional right of being allocated a defence counsel. *Article 50(2)(e) provides:-*

“Every accused person has the right to choose, and to be represented by an advocate and to be informed of his right promptly”.

Enforcement of this right together with the others under Article 50 require enactment of legislation by Parliament

followed by a guidelines for implementation.

Article 50(9) provides:-

“Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

Such legislation and guidelines have not yet been developed. The Government also requires to set aside funds for enforcement of the rights even after enactment of the registration. The existence of the provision of Article 50(2)(e) does not make the right automatic. It is also important to note that the appellant did not apply before the trial court to be provided with an advocate. If he had done so, this court would have dealt with the directions of the trial court on the matter in this appeal. I find that the right under Article 50(2)(e) is a progressive right which cannot be said to have been denied.

Upon careful perusal of the evidence, I am satisfied that all the ingredients of the offence were established. The trial court was entitled to reach a finding of guilty against the appellant.

The sentence imposed was lawful under Section 8(2) of the Act. The appellant filed some mitigation on the date of

hearing this appeal where he urged the court to reduce the

sentence imposed. This court has no legal basis of interfering with a lawful sentence. The appellant was given an opportunity to mitigate by the trial court, but he chose to say nothing. This is an appeal court and cannot entertain any mitigation.

I find that this appeal has no merit and it is dismissed. The conviction and sentence are hereby upheld.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 19TH DAY OF NOVEMBER 2014.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Matere for State

The Appellant

F. MUCHEMI

J U D G E