REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 661 of 2010

FREDERICK WAWERU NJATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case number 73 of 2007

in the Chief Magistrates Court at Makadara – T. Murigi (PM) on 12th November 2010)

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl contrary to **Section 145 (1)** of the **Penal Code** and in the alternative with indecent assault of a female contrary to **Section 144(1)** of the **Penal Code.**

2. At the conclusion of the trial, the Appellant was convicted and sentenced to life imprisonment under the **Sexual Offences Act**, 2006. Aggrieved by both the conviction and the sentence, the Appellant filed an appeal in which he raised 6 grounds of appeal summarized as set out below.

(1) There was no proper description report of the appellant by the complainant;

(2) The identification parade was conducted in contravention of the law;

(3) There was no medical report to link the appellant to the offence;

(4) The trial court did not consider the manner of the Appellant's arrest;

(5) Crucial supporting evidence to link him to the offence was absent;

(6) The defence which was not challenged by the prosecution, was not considered.

3. Mr. Mulati, the learned Counsel for the Respondent opposed the appeal, and submitted that despite the inconsistencies in the testimonies of some of the prosecution witnesses regarding the occurrence of the offence there was sufficient evidence to support a conviction. He urged the court to dismiss the appeal, or in the alternative order a retrial should the discrepancies in the dates be in issue.

4. It is the duty of this court, as a first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the decision of the trial court should be upheld. Such re-evaluation must be apparent on the face of the record.

5. Mr. Kiome for the Appellant submitted that there were discrepancies in the prosecution testimony on the dates and that the complaint was made on 26th January 2007. He observed that it was not clear whether the offence took place on 14th December 2005 or 14th January 2005. The Investigating Officer indicated that the offence took place on 14th December 2005, while **PW2**, the complainant's mother reported about a missing child on 14th January 2005. **PW1**, herself said that she was defiled on 14th December 2005. The learned Counsel also questioned why the medical reports relied on were made two years after the occurrence of the offence. Learned Counsel urged that it would occasion injustice to uphold the conviction on the face of such serious contradictions. He contended that even a retrial could not cure such contradictions and urged the Court to quash the conviction of the Appellant and set aside the sentence.

6. Regarding the dates of the occurrence of the offence, **PW1** stated that she was defiled on 14th December 2005; this was reiterated by the child's mother, **PW2** who confirmed that her child went missing on 14th December 2005 and was later brought home by the police. It was also the testimony of **PW2** that she took the child to the hospital the following day, which would be 15th December 2005. **PW7** produced the medical report dated 30th January 2007 which also confirmed that the child was examined at Nairobi Women's Hospital on 15th December 2005. **PW5,** the Investigating Officer on the other hand, was the only witness who referred to 14th January 2005 as the date when the report of a missing child was made.

7. I note that **PW5** took up the case on 26th January 2007 when the complainant and her mother went to report the defilement. **PW7** referred to the Occurrence Book of 2005 in his testimony as the source of the history of the case. The Occurrence Book was however not produced in Court. The evidence of **PW1** on the date when the offence was committed was confirmed by **PW2** and **PW7** who were material witnesses on the issue of the dates when the offence was committed. The P3 Form produced in evidence concerning **PW1** also referred to 14th December 2005 as the date the offence, was committed.

8. The other discrepancy pointed out by the Appellant was with regard to the description of the scene of crime. That while **PW1** described it as bushes, **PW2** described it as a quarry. I find that this was not necessarily a discrepancy as one is not mutually exclusive of the other.

9. In the 2nd and 3rd grounds of appeal, the Appellant contends that the trial court erred by convicting him in the absence of evidence to link him to the offence. In his submissions, learned counsel Mr. Kiome challenged the admissibility of the medical report from Nairobi Women's Hospital which was produced by a doctor other than the one who made it. Learned Counsel also questioned why the Occurrence Book report of a lost child was not produced and whether it made reference to a reported case of defilement.

10. The medical report in question was produced by **PW7,** Dr. Adan Rilwan in place of Dr. Muhombe of Nairobi Women's Hospital who at the time of the trial was indisposed. The production of a medical report by a person other than its maker does not render the evidence inadmissible as this is permitted by law.

11. However, even when such production of a document is permissible under the law, the Court should ensure it is properly produced. In this case, the Appellant was represented and it is not shown that Counsel for the Appellant objected to the production of the medical report by **PW7**. In my humble view, the medical report was properly produced in evidence by **PW7** who had worked with the author, knew her handwriting and signature, and could vouch that the signature in the report belonged to her.

12. Learned Counsel for the Appellant also challenged the failure by the prosecution to call any of the police officers who brought the child back home, to testify despite being the first independent people to see the child walking at the road block. On this issue, I refer to **Section 143** of the **Evidence Act** which

provides that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

In ***Michael Kinuthia Muturi versus Republic, Criminal Appeal No. 51 of 2008, Court of Appeal Nairobi (2011) eKLR***, the Court of Appeal noted that:

"There will be instances, of course, when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case."

In this case, there is sufficient evidence to prove the material facts that the complainant was defiled and the offence was committed by the Appellant. I therefore find that the failure in this case to call the police officers at the road block does not warrant the drawing of a negative inference.

13. The learned Counsel for the Appellant also contended that the offence was not proved sufficiently to link the Appellant thereto since the Appellant is HIV positive yet the child was not infected. The medical report by Dr. Muhombe confirmed that the minor was indeed defiled, and had to undergo corrective surgery, although the P3 report indicated that the HIV test results were negative. The question was whether this exonerated the Appellant from the offence for reasons that the child was not infected with HIV while he was HIV positive.

14. There is no evidence on record to the effect that, it is not possible for one to have been exposed to HIV without getting infected. The medical report from Nairobi Women's Hospital indicated that the child was put on preventive medication (Combivir, Euvax, and Antibiotics) immediately, which may be the explanation as to why the child did not necessarily get infected with the HIV virus despite being exposed to possible infection.

15. Counsel for the Appellant submitted that the Magistrate seemed to have been influenced by the results of the identification parade yet, the complainant was coming to identify a person she had already seen before, according to the testimony of **PW2**. He contended that in this case, the identification parade should not have been allowed because the child already had someone in mind. The mother got a report that it was the person who comes to ask for seats who assaulted the minor.

16. PW5, the Investigation Officer testified that the identification parade was necessary since some time had elapsed since the offence was committed. Although the procedure for arranging the identification parade was correct I find, that the parade was inconsequential since the child already knew the suspect and had identified him prior to his arrest. **PW2** testified that it was the complainant who identified the appellant as the person who defiled her before he was arrested. The Appellant was well known to the complainant as she had seen him before at her home.

17. The complainant was clear regarding the identification and arrest of the Appellant. She testified that:

"…accused had come to our home when my mother was there….I told my mother that the person who had defiled me is the person who had come to ask for his seats…."

This description by the complainant is also supported by **PW2** who testified that on reaching home, she found her daughter missing and upon inquiring, one of her other children informed her that:

"…she had been carried by the man who is always asking for his seats."

18. From the above description, I am satisfied that the Appellant was positively identified, since he was known to the complainant and her mother. The initial description of the assailant by the complainant is what led to the appellant's arrest once he was spotted by the complainant's mother.

19. On the 6th ground, the Appellant contends that the trial magistrate did not consider the appellant's defence which was not challenged by the prosecution. In his defence, the Appellant said that he had not been anywhere near the scene of crime and that he had been at home the whole day on the material day. He also denied knowing the complainant or her mother. The trial magistrate considered the defence testimony and reasoned thus:

"I discredit the accused persons defence as a mere denial. This defence that the complainant mistook him holds no water as she positively identified in the identification parade that was held one year after the offence was committed. His defence that he was too weak to commit the offence as he was HIV positive and had T.B. and was undergoing treatment has no basis….Dr. Kamau….he found that his sexual organs were normal thus he could penetrate. All in all, his defence has no basis at all"

20. The trial magistrate therefore, did take into account the defence testimony in reaching a conviction. The prosecution testimony is consistent as to the identity of the complainant's assailant. The Appellant's contention that the prosecution did not challenge the defence evidence is untenable since the defence of mistaken identity was displaced by the overwhelming identification testimony by **PW1. PW2** Corroborated the minor's evidence in respect of what the minor stated immediately she was brought home.

21. An issue which was not addressed by the Appellant but which this Court must address in the interests of justice is with regard to the law under which the Appellant was charged and convicted. The Respondent in her submissions submitted that even if the offence was committed on 14th December 2005 before the **Sexual Offences Act No. 3** of **2006** came into force, the Appellant was arrested on 30th January 2007 when the Act had commenced and that he was therefore rightly charged under the said Act.

22. An evaluation of the proceedings shows that: the Appellant was initially charged with the offence of defilement contrary to **Section 8(2)** of the **Sexual Offences Act**. On 9th March 2009, the prosecutor made an application for the amendment of the charge sheet to read **Section 145** of the **Penal Code** as read with the **Sexual Offences Act, No. 3** of **2006**. This was not objected to by Counsel for the Appellant. On 15th April 2009, the Application was allowed and the charge sheet was amended to read defilement contrary to **Section 145(1)** of the **Penal Code.**

23. The trial magistrate therefore erred in her judgment by making reference to the charge as defilement of a child contrary to **Section 8(1**) of the **Sexual Offences Ac**t; and further sentencing the appellant under that provision of the law. The learned State Counsel also erred in making reference to this section by submitting that the Appellant was correctly charged under the Sexual Offences Act no. 3 of 2006.

24. Section 8 of the **Sexual Offences Act** provides that:

"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

The transition clause in the **First Schedule Paragraph 3** provides, that:

"Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws."

The **Second Schedule paragraph 2** amended several provisions on sexual offences under the Penal Code including **Section 145** of the **Penal Code**, under which this case was brought.

25. The correct provision under which the Appellant ought to have been convicted therefore was **Section 145** (now repealed) of the **Penal Code** under which he was tried. **Section 145** of the **Penal Code** provides

that:

"(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."

19. However, the sentence was not materially affected since the sentence under the repealed section of the Penal Code was imprisonment for life with hard labour, as it was not in doubt that the child was below the age of 14 years at the time of the commission of the offence. I therefore uphold the conviction and the sentence of life imprisonment save to add that this was as provided for by the now repealed **Section 145** of the **Penal Code.**

In view of the foregoing, I find that this appeal lacks merit and dismiss it accordingly.

SIGNED DATED and DELIVERED in open court this 21st day of February 2013.

L. A. ACHODE

JUDGE