



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 225 of 2010

ELIJAH GITAU NDUNGUAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 979 of 2009 in the Resident Magistrate's Court at Gatundu – Mr. D.G. Karani (RM) on 15th February 2010)

JUDGMENT

1. The appellant **Elijah Gitau Ndungu** faced a charge of defilement contrary to **Section 8(1)** as read with **sub-section 2** of the **Sexual Offences Act No. 3 of 2006**, before the Resident Magistrate's court at Makadara. In the alternative he faced a charge of indecent act with a female contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

2. Consequently the learned Resident Magistrate Mr.D.G.Karani convicted the appellant on the main charge and sentenced him to twenty years (20) imprisonment.

3. The appellant being dissatisfied with the conviction and sentence, filed an appeal based on grounds which may be summarised as follows:

- 1) *The case was based on a grudge and fabrications and the evidence was not conclusive.*
- 2) *The Appellant was denied a fair trial due to contravention of Section 214 of the CPC.*
- 3) *The evidence of PW1 and PW3 were contradictory.*
- 4) *The prosecution case was not proved to the required standard.*
- 5) *The sentence was manifestly harsh and excessive.*

4. Learned Counsel Mr. Kadebe appearing for the respondent opposed the appeal urging that the prosecution proved it's case beyond reasonable doubt by relying on cogent evidence, and that the appellant knew the complainant well before the sexual assault, and lastly that the defence was considered and it did not manage to dislodge the prosecution evidence. The learned state counsel urged the court to dismiss the appeal in its entirety.

5. Being the first appellate court I have analysed and re-evaluated all the evidence on record, and come to my own conclusion. In the process of re-evaluating the evidence I have been mindful of the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses as they testified. This is in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR**. In the foregoing casethe learned judges of the Court of Appeal held *inter alia* that:

“A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised on the appeal?”

6. The prosecution called four witnesses to advance their case. **PW1** was a minor and was stated in the charge sheet to be aged about 13 years old, having been born on 9th November 1995. She testified that she and the appellant were known to each other before as he used to frequent her home. On a date that she could barely remember, the Appellant came to their house and asked to have sex with her which she declined. He then forced her to have sex with him after he dragged her to their shamba where he forced himself on her. She threatened to scream but the Appellant said he would strangle her if she did so.

7. **PW1** testified as to how the appellant forcefully removed her undergarments and forced her to the ground where she lay facing upwards. He then removed his trousers and inserted his penis inside her vagina having pulled up her dress. When he was through with this ordeal, **PW1** observed some whitish substance coming out of her. She testified that it was not the first time that the accused was having sex with her but that he had done so on several occasions since May 2009. She however had never reported this to her Parents.

8. Two weeks after this ordeal, the Appellants wife came to her place and abused her demanding to know what was going on between her and her husband and warned her to keep off him. **PW3** (PW1's mother) who was nearby and heard the Appellant's wife exchange with the complainant sought to find out what was happening. The complainant confessed to having had a sexual relationship with the Appellant.

9. The evidence of the minor was corroborated by **PW3** her mother as to the confrontation between **PW1** and the Appellant's wife. **PW3** testified that on 26th July 2009 at about 5pm, she saw the Appellants wife who was known to her, approach while she was at her hotel near their house. She asked for **PW1** and threatened to beat her up as she alleged that she was having an affair with her husband. **PW3** demanded an explanation from her daughter who confirmed that indeed the Appellant had come to their home and forced her to have sex with him. **PW3** reported the matter to the Chief who advised her to take **PW1** to the hospital for examination. At the hospital **PW1** was issued with a P3 form. The Appellant was later arrested and charged with this offence.

10. **PW2** Dr. Rose Chemwei a medical officer based at Gatundu testified that she filled and signed a P3 form in regard to **PW1** on 5th August 2009. **PW1** presented with a history of having been sexually assaulted by someone known to her. **PW2** produced the P3 as PExh 1. She examined **PW1** and confirmed the following findings:

- a. Her dress was intact and there were no tears.
- b. Her upper limbs were intact as were the lower limbs.
- c. Her hymen was broken.
- d. There was no discharge.
- e. There was evidence of penetration which from her history could be penile penetration.
- f. HIV test was negative.

11. **PW4** the Investigating Officer of Gatundu Police Station Crime Branch recalled that on the 15th May 2009, she was at the station when **PW1** accompanied by **PW3** reported that she had been defiled by the Appellant between May 2009 and 19th July 2009. The Appellant had defiled her on about four previous occasions at their banana plantation while her parents were away at work. She said that the Appellant would coerce her by giving her meat and money to maintain her silence. **PW4** confirmed that she took **PW1** to Gatundu District Hospital where she was attended to and a P3 filled in her respect. The Appellant was subsequently arrested by her colleague.

12. The appellant in his defence gave an unsworn testimony and called no witnesses. He denied committing the offence and blamed **PW3**, the mother of the minor for implicating him in a crime he did not commit. He testified that he only came to learn of the offence on 11th August 2009 when he went to the Police Station to establish why the Police Officers had seized his motor cycle. At the Police station he was asked to come back on 17th August 2009.

13. In the intervening period he approached **PW3** and sought to have an amicable settlement before the elders. The learned trial magistrate, considered this aspect of the Appellants evidence as follows:

“The question one would want to ask is why the accused wanted the matter discussed if at all he knew and believed that he was innocent. The only logical answer to this question is that the accused knew that he was on the wrong”

The Appellant was arrested on his return to the police station on 17th August 2009.

14. I have considered his evidence alongside the evidence of all the other witnesses who testified in the case.

15. I examined his averment that the case was based on a grudge and fabrications and that the evidence was not conclusive. It was not lost on me that the Appellant never put to **PW3** during cross examination that she was the author of a scheme to implicate him in this case. Such allegations coming at the appeal stage would appear to be an afterthought and I have dismissed them as such. There is no basis from the evidence on record to conclude that there was a grudge between the appellant and **PW3** upon which the court would have found that she manipulated this case just to implicate him in a crime he did not commit.

16. The trial court also considered the evidence of the appellant and discredited it as a mere denial which did not hold any water. The appellant did not challenge the evidence of the **PW1** as to whether or not they had a sexual relationship. His line of cross-examination seemed to be seeking to establish that **PW1** had another lover, which would not discount the averments by **PW1** that they had a sexual relationship. **PW1** was a minor and whether or not she had another lover did not exonerate the appellant from guilt.

17. It is vital to warn myself of the dangers posed in relying on the evidence of one witness to convict the appellant. Sexual offences are by nature secretive and will rarely be committed in the presence of witnesses. There is however no legal requirement for independent evidence to corroborate the evidence of a victim.

18. **Section 124 of the Evidence Act** provides that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reason for believing that the complainant is telling the truth be recorded in the proceedings.

19. The trial court recorded the reasons for believing the minor as follows:

“The evidence of **PW1** that she had sexual intercourse with the accused remain unchallenged. It was corroborated by the **PW3**. I accept the same. I have already found that **PW1** was a child at the time of

the incident and therefore lacked capacity to consent to the act. The accused never said that he believed that she was of majority age before proposing to her a sexual relationship. In the circumstances, sexual intercourse between him and PW1 was unlawful. I find and hold so.”

20. On the question of whether the Appellant was denied a fair trial due to contravention of **Section 214** of the **CPC**, I have examined the relevant provision of the law. The question I would endeavour to ask is whether there is a duty of the court to inform the accused person of his right to recall and re-examine witnesses after the charge has been amended? The Trial Magistrate did not afford the Appellant this opportunity.

21. On the face of it, **Section 214 proviso (i)** is mandatory; the accused person is called upon to plead afresh where a charge has been altered. - The court shall thereupon call upon the accused person to do so. The Appellant was indeed afforded this opportunity.

The **proviso (ii)** Provides that witnesses may be recalled if the accused person so requests. The proviso as couched is open to subjective application by courts to the prejudice of the accused person who may not be in a position to know that he does have a right to recall and re-examine witnesses.

22. Courts have progressively determined that the accused person should be informed of the right to recall and examine witnesses.

In **Daniel Chege Kamundia and 2 Others vs. Republic, (2006) eKLR**, the court (Lesiit and Makhandia, JJ) ruled that

“...provisions of section 214 are couched in mandatory terms ousting the court’s discretion in determining whether or not to comply with them. The intention of the draftsman in making this law was to protect an accused person during his trial to ensure he gets a fair hearing. Failure to put on record that the learned magistrate had complied with the provisions aforesaid and the failure to comply meant that the appellants were denied an opportunity to recall and examine the witnesses.”

23. In **Yongo versus Republic (1983) KLR 319**, the court held that the court has the power to order an amendment or alteration of the charge provided that the court shall call upon the accused to plead to the altered charge, and that the court shall permit the accused, if he so requests, to re-examine and recall witnesses.

24. It is a mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the **proviso (ii)** to **section 214** of the **Criminal Procedure Code cap 75 laws of Kenya**.

25. The appellant should have been given the opportunity to elect whether he wished to further question the prosecution witnesses. It cannot be said that the failure to give him, that opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witness’ evidence.

26. These cases, though progressive, do not expressly demonstrate the duty of the court to inform the accused of his right. However, the Judges of Appeal Omolo, Githinji and Deverell JJA were more categorical that the court has a duty to inform an accused person of his right to recall witnesses in **Njuguna versus Republic, (2007) 2EALR 370**, in the following words that;

.....there is still the troublesome question of paragraph (ii) of the proviso. The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled.....This is not a procedural failure such as failing to ask him to plead afresh. The right to hear witnesses giving evidence afresh on the amended charge or to cross examine the witness further is a basic right going to the root of a fair trial and clearly it was the duty of the trial court Magistrate to show in his record that he had informed the appellant of that right and to record further what the appellant said in answer to the information.”

I therefore find that failure on the part of the learned trial Magistrate to inform the Appellant of this right available to him was, in the circumstance of this case, not only prejudicial but may also have resulted in a denial of his fundamental right to a fair trial.

27. Thirdly, on whether or not the evidence of **PW1** and **PW3** was contradictory, the Appellant submitted that **PW1** in her evidence submitted that she was confronted at her parents' home whereas **PW3** stated that she was confronted by the Appellants wife at the Hotel. I find these statements contradictory as evinced in the court record.

28. For the foregoing reasons I therefore allow the appeal. I quash the conviction entered and set aside the sentence imposed upon the appellant. The appellant is set at liberty unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **14th** day of **February 2013**.

L. A. ACHODE
JUDGE