REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 72 of 2012

An appeal from the original conviction and sentence in Criminal Case Number 22 of 2010

at the Principal Magistrate's Court in Kyuso (B.M Mararo).

DANIEL MULI MULYUNGI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGEMENT

Daniel Muli Mulyungi, the appellant, was convicted by the Principal Magistrate at Kyuso on two counts of committing indecent act with a child and sentenced to fifteen years jail term on each count. The sentences are to run concurrently. He is aggrieved by the conviction and sentence and has brought this appeal with four grounds, namely that the charge is defective; the sentence is harsh and excessive; the evidence was fabricated and that the evidence was contradictory and inconsistent.

The appellant had been charged with one count of defilement and an alternative count of committing an indecent act with a child. He faced two other counts of rape and a further count of committing an indecent act with a child. After full trial, the magistrate convicted the appellant on two counts of committing an indecent act with a child. I will address the anomalies in the judgement of the trial court in the course of this judgement.

The appellant has submitted in support of his appeal that the charge is defective because it is brought under section 2 (1) of the Sexual Offences Act and that it omits the word "unlawfully"; that the trial court sentenced him on a charge of committing an indecent act with a child when there was no evidence to prove the same; that he was acquitted on the charges of rape and convicted on committing an indecent act when there was no such charge in respect of counts one and two; that the evidence has been fabricated due to an existing grudge between him and a senior teacher; the medical evidence did not prove rape or defilement and that the prosecution failed to prove the case beyond reasonable doubt.

The appeal has been opposed with the learned State Counsel submitting that the charges are not defective and that the appellant understood the charges and the proceedings in the lower court; that the sentence is not harsh and excessive since the appellant was facing several charges of rape; that corroboration was unnecessary since a conviction can occur basing on evidence of a single witness; that the court ought to enhance the sentence by varying it to run consecutively and that the evidence is not tailored since it was

not possible for all the witnesses to implicate the appellant.

I find this case very interesting in a negative way. If the allegations in this case are true, then the appellant would be one very sick person who should not be allowed anywhere near any classroom with female students. If the allegations are not true, then, the girls involved have weaved very intricate lies that could pass as a convincing story. The events that are alleged to have taken place are so strange that anyone wonders if they could have happened in a school with leadership worth talking about and involve so many girls and go undetected. The appellant, like any person facing criminal charges, does not have to prove his innocence. Our criminal justice system places such a burden on the prosecution and the standard of proof is beyond reasonable doubt. This is a very high standard. This court sitting on first appeal has the duty placed on it under the law to examine all the evidence adduced in the lower court afresh and re-evaluate it with a view to arriving at its own independent decision. I intend to examine and evaluate all the evidence on record before determining the issues in this appeal.

The prosecutor in the lower court presented to court twelve witnesses. **M. M** testified as PW1. PW1 is the complainant in respect of the count one and the alternative count. She told the court that she was aged 17 years and a pupil at K Primary School; that on 20th April 2010 the appellant who was her teacher called her and made sexual advances towards her; that she turned him down but he persisted that he must have sex with her that day; that he followed her as she left school to go home while in company of other pupils; that he bought her a cup of tea on the way home; that he offered her a lift on his bicycle but she refused; that she told him to accompany her to her home to avoid people suspecting them; that at her home the appellant talked briefly with her parents and asked to be escorted; that her father told PW1 to escort him but not to go far; that on the way the appellant stopped the bicycle and held her hand. In her own words:

"He pushed me to the forest. He put on a condom. He raped me. Then I went home. My mother was not there. My father was there. I did not tell him. I told Mr. Mbindo our class teacher when we opened. He told the head teacher……I was summoned and I explained to him……"

On cross examination PW1 said she should have told her mother but she was scared of her parents because the appellant was a respected teacher. She said she did not scream during the assault and that she thought it was best to tell the class teacher.

For her part **C. M. M** (PW2) who said she was 16 years old and who is the complainant in counts two and three testified that on 17th April 2010 during school holidays the appellant asked her uncle to allow her and other three children to go and assist him in cultivating at his place. Afterwards that day the appellant's wife told him to buy PW2 a leso; that the appellant bought her a pair of shoes after missing the leso; that on the way home, the appellant used a route she did not know and approached her for sex but she refused; that the appellant insisted, removed her clothes and raped her; that they went home and the appellant showed the shoes he had bought for her to her aunt; that she went home and showed her aunt called Kasyoka Peter the shoes. It is not clear which aunt had been shown the shoes by the appellant but it appears that PW2 is referring to two different aunts.

Further evidence by PW2 is that on 5th May 2010 the appellant sent one Kithei Munyoki to call her to his office but she refused; that he also sent Ms Musila a teacher to call her and sought to know why she had refused to comply with his summons earlier on; that he punished her by kneeling down; that he took her to the head teacher's office and locked the door and defiled her; that teacher Mwatu went to ask permission from the appellant and found her kneeling; that she reported the matter to the head teacher the following day which would be 6th of May 2010. In cross examination she said she did not tell her aunt about the assault and that she did not scream. The evidence of teacher Justus Musau Mwatu (PW8) is that on 5th May 2010 he went to seek permission from the appellant at the head teacher's office and found PW2 kneeling down and that later on 12th May 2010 PW2 told him that the appellant had forced himself on her after PW8 left her and the appellant in the head teacher's office.

The evidence of PW8 regarding the report he received from PW2 contradicts her evidence in some material aspects. He testified that PW2 went to report three issues to him on 12th May 2010 namely that

the appellant had made sexual advances to her on 31st March 2010; that the appellant had raped her on 20th April 2010 and again on 5th May 2010. In her evidence, PW2 never mentioned sexual advances on her by the appellant on 31st March 2010 and the rape is alleged to have been committed on 17th April 2010 when she went to cultivate at appellants place and not on 20th April 2010.

The other teacher mentioned as having been informed by PW2 about her sexual assault is Mutemi who is indicated in the proceedings as Peter Ngui Mutemi, PW5. His evidence is that on 5th May he went to the head teacher's office to seek permission to leave but found the door locked; that he could hear moving feet and furniture; that he later went to the head teacher's office with PW2 and was told by the appellant to punish her later; that PW2 told her guardian who summoned PW5; that he (PW5) confronted PW2 who confirmed that she had been defiled. This evidence contradicts that of PW2 who said she did not tell her aunt as she was not her parent. PW5 also contradicted himself when he stated that he found the appellant and PW2; that the appellant was fully dressed and PW2 looked shocked; that he knocked the door and was told by the appellant to enter the office. This is contrary to his statement that he found the head teacher's door locked but he could hear moving feet and furniture.

M. M (PW3) is the complainant in count four which is wrongly indicated on the charge sheet as count three. The charge indicates she is a child aged below 18 years. In her evidence, she testified that she was thirteen years old and that she had completed standard 8. Her testimony relates to 3rd May 2010. She stated that on that date during break time, the appellant call her and told her that there was rumour that both were intimate friends; that on a Tuesday (does not give date) she was sent to close the classroom and went looking for the keys; that she met the appellant who told her to see him later; that she went to see him later and found him sitting on his desk; that he asked her to move closer; that he held her arms and told her that boys liked her; that he held her breasts; that there was a parent outside and the appellant told her to leave and that she reported to the head teacher what happened. On cross examination she stated that she did not tell her parents but told the head teacher because he had told the pupils to report to him.

There is on record further evidence by **K. K** (PW4) who told the court that she was 17 years old and that the appellant made sexual advances at her on 3rd and 10th March 2010 but she refused. Then there is **M. M** (PW6) who testified that the appellant called her to his office on 7th May 2010 and told her that he wanted to have sex with her; that she left and went to class; that in the afternoon the same day he called her and repeated the demand; that she did not respond but left; that she told one Mr. Mbilo who reported to the head teacher; that the appellant demoted her from prefect after she refused his sexual advances. In cross examination PW6 contradicted this evidence by stating that she reported to the head teacher. **M. N** (PW7) is another girl who testified that on 5th May 2010 the appellant told her to wait for him in his office where he joined her and told her that he wanted them to be lovers but she refused; that he jumped and held her breasts; that she confronted him (does say what she did) and he became annoyed; that the appellant went to the head teacher's office and called her there but she refused; that the appellant went towards her and she ran away.

What PW4, PW6 and PW7 have in common in respect to this case is that they are not complainants. I fail to see what the investigating officer aimed to achieve by their evidence since he did not treat them as complainants and prefer charges against the appellant in respect of the three girls. I also fail to see what relevance their evidence is to this case other than perhaps to emphasize the character of the appellant assuming that their evidence is factual.

The evidence of Stephen Mbilo (PW9) a teacher at the school is equally contradictory. He testified that on 10th May 2010 PW6 reported to him that the appellant had made sexual advances to her on 6th May 2010. The evidence of PW6 is that the appellant allegedly made advances to her on 7th May 2010. He further testified that PW4 reported to him on 10th May 2010 that the appellant made sexual advances towards her on 7th May 2010. This contradicts what PW4 told the court that the appellant allegedly made sexual advances towards her on 3rd and 10th March 2010. PW9 testified further that PW4 was caned by the appellant and told to bring her parents and that her father came to school. PW4 did not testify that she was caned or that her father was summoned to school. PW9 further stated that the appellant admitted to the

head teacher on 15th May 2010. He did not clarify what the appellant was admitting and the head teacher did not testify in court. PW9 further told the court that PW1 also reported to him that the appellant had raped her when he escorted him. Other than the evidence touching on PW1, the evidence of PW9 relates to the witnesses who are not complainants in this case and whose evidence I have examined, evaluated and commented on above.

Corporal Mike Maginya, PW10, says he investigated this case and charged the appellant with two counts of defilements and two counts of indecent acts. He also testified that he interviewed the complainants, some teachers and the chief, recorded their statements, arrested the appellant and preferred the charges against him. On cross examination he stated that the initial report was made to the District Officer (DO) Tseikuru and that the Chief of Katilinge investigated the matter. Of course this is irregular and even if the Chief had conducted some investigations it was incumbent upon the police to conduct independent investigations and make their own decision to charge the appellant. The Chief was not a witness nor was the DO. Both these officers may have had valuable information to assist the court arrive at an informed decision. Finally, there is the evidence of the Clinical Officer, one Kennedy Kioko (PW11) who filled the P3 form in respect of PW2. He also testified on behalf of Eunice Kiema who filled the P3 form in respect of PW1. As regards PW2, PW11 stated that he filled the P3 form on 18th August 2011; that although PW2 had been seen at Tseikuru District Hospital, she was not treated; that it was 1 year and 3 months; that there was no medical evidence of sexual assault and that she had been sexually active previously. In respect to PW1, the witness stated that there were no bruises noted and the hymen was broken and that the girl was treated 2 months and 3 weeks after the alleged assault. In brief the medical evidence is not conclusive.

The appellant told the trial court that he was a devoted Christian of Kavonokya sect; that the charges are malicious; that he is a married man; that he was being victimised because he qualified as deputy head teacher a fact that made his colleagues especially Mr. Mbilo PW9 jealous; that PW9 organized with other teachers and the girls who were radicals to fabricate the evidence and get even with him; that the evidence is contaminated and coached.

I have also carefully read the judgement of the trial court. I fault the trial court for finding the evidence of the prosecution witnesses consistent and corroborated. I have in this judgement drawn out the contradictions in the evidence especially of the complainants and PW5, PW8 and PW9 the three teachers said to have interacted with the complainants in respect of this case. The trial magistrate contradicted himself by finding that evidence is corroborated and also stating that, "**This being sexual offence corroboration is unnecessary and as such I find the prosecution as having proved their case to the required standard……..**" While the trial magistrate appreciated that medical evidence was not supportive of the charges, he failed to properly guide himself in convicting the appellant. The appellant faced one count of defilement and an alternative count of indecent act. This charge relates to PW1. On finding the main count not proved, the trial magistrate ought to have convicted on the alternative count of indecent act if that charge had been proved. However he convicted on both counts for indecent act. The relevant part of the judgement reads **"……….I find the prosecution as having proved their case to the required standard in regards to the offence of committing an indecent act with a child and I convict him accordingly on both counts (counts 1 and 2)"** Such counts do not exist. He ought to have convicted on the alternative count in respect of count one and convict on lesser charge of indecent act contrary to section 11 (1) of the Sexual Offences Act in respect of count two if there was evidence to support that charge. Further, the trial magistrate did not address the second count of rape and the fourth count of indecent act in respect of PW3.

I have found a number of irregularities in the proceedings from the lower court. Firstly, the numbering of the charges is erroneous. After the second count of rape which is correctly numbered as count three, the fourth count is also numbered as three; secondly, the alternative to count one quotes the definition section 2 (1) of the Sexual Offences Act instead of section 11 (1) of the same Act; thirdly, the trial magistrate allowed the prosecutor to introduce P3 forms at the stage of re-examining PW1 which is unprocedural. The same case applied to PW10 who introduced exhibits at re-examination stage.

In the course of my analysing the evidence, I have brought out the many contradictions and

inconsistencies in evidence. In addition, I wish to state that it is strange that all the girls testified that they did not report the alleged sexual molestations to their parents or even female teachers. For instance, PW1 is told by her father to escort the appellant, which sounds strange. This girl stated that after walking for some time the appellant pushed her to the bushes and held her hand, he then put on a condom and raped her. The act of putting on a condom connotes a situation that would require both hands. There is no evidence to show that PW1 was tied or in any other way restrained. She did not do anything to attempt to escape. That is not all. On returning home, she did not tell her parents claiming she feared them and that the appellant was a respected teacher. In school she tells PW9 and not the head teacher or any female teacher.

Further, PW2 is raped twice according to her evidence, on 17th April and 5th May 2010. On 17th April she had been cultivating at the appellants and the appellant's wife tells him to buy PW2 a leso. On missing a leso, the appellant buys her a pair of shoes and rapes her on the way home. After this they reached home and the appellant showed her aunt the shoes he had bought for her. She also tells her aunt Kasyoka Peter that the appellant had bought her shoes. I said elsewhere in this judgement that it is not clear whether this was the same aunt but whatever the case, this girl does not see it fit to tell her aunt that she had been raped. Again on 5th May 2010 she claims to have been raped at the head teacher's office and does not tell anyone until the following day when she says she told PW8. I have analysed the contradictions in her evidence and that of PW8 elsewhere in this judgement. All this evidence leaves more questions than answers.

The DO and the Chief did not testify yet it is alleged that they were involved in one way or another in this matter. The DO is said to have received the initial report and the Chief is said to have 'investigated' the reports. Their evidence would have been very valuable. Again the parents of the girls were not called to testify yet it is alleged that they were informed. The head teacher did not testify. The school he was in charge of was 'on fire' so to speak in regard to the goings-on there yet he was not a witness!

The appellant has raised four main grounds of appeal, defective charge, harsh and excessive sentence, fabricated evidence and contradictions and inconsistencies in the evidence. My findings are that the charges are not defective save for quoting the wrong section of the law and the wrong numbering of the charges as I have shown above in this judgement. The appellant understood very well what he was facing and actively participated in the trial, properly cross examining witnesses on relevant sections in regard to the charges and defending himself against those charges. The sentence is also within the law. As regards fabricated evidence and contradictions in the evidence, I have analysed all the evidence in detail. There is no telling whether it was fabricated or not. As far as this court is concerned, the inconsistencies and contradictions in the evidence and the omissions to call crucial witnesses leave doubts in my mind. I started by stating that either the appellant is the kind of teacher who should not be let anywhere near any female pupils or the girls are the craftiest liars around. Either one must be true depending on which of the two sides is telling the truth. Courts of law rely on available evidence to either convict or acquit. The law, procedure and practice dictate that courts ought not to of fill gaps for the prosecution for doing so would destroy the impartial arbiter tag placed on the courts of law. The evidence placed before the trial court has serious deficiencies. There are many contradictions and inconsistencies in evidence and it would be a miscarriage of justice to base a conviction on such evidence. I am of the view that this is not a fit case for retrial due to the many deficiencies in the evidence, the poor investigations and the manner the trial was conducted. Ordering the retrial would only afford the prosecution a chance to fill the gaps in their case. The applicable principles for remitting cases for retrial are that this can only be done if it has been shown, inter alia, that there is sufficient evidence to sustain a conviction.

In view of the reasoning above, I come to a conclusion that this appeal has merit and do hereby allow the same. The consequence of this order is that the conviction is hereby quashed, the sentence set aside and the appellant set free. He shall be released from custody forthwith unless for any other lawful reason he is held. I order accordingly.

S. N. Mutuku

Judge

Dated, signed and delivered on 19th March 2013 in open court.