REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 211 of 2009

RAPHAEL NJERU IRERI...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the Sentence and Conviction of L.K. MUTAI Principal Magistrate Embu in Criminal Case No. 1013 of 2009 on 30th October 2009)

J U D G M E N T

RAPHAEL NJERU IRERI hereinafter referred to as the appellant was convicted of the offence of Defilement of a girl under 11 years contrary to Section 8(1)(2) of the Sexual Offences Act No. 3/2006. The particulars in the charge sheet were as follows:-

On the 29th day of June 2009 at [particulars withheld] Embu District within Eastern province, intentionally and lawfully defiled P.M a girl aged 8 years.

He had also been charged with an alternative count of committing an indecent act of a child contrary to Section 11(1) of the Sexual Offences Act No. 3/2006. He was convicted on the Principal Count of defilement and sentenced to life imprisonment. He was however acquitted of the second count of Grievous Harm as there was no evidence to support the charged.

The appellant was aggrieved with the Judgment and filed this appeal raising the following grounds in the amended petition of appeal;

1. ***The learned Principal Magistrate erred in relying on the uncorroborated evidence of a single witness.***
2. ***The learned Principal Magistrate erred in relying on the doctor's evidence (PWIV).***
3. ***The learned Principal Magistrate erred in law and in fact in relying almost exclusively on hearsay evidence.***
4. ***The evidence tendered was inconclusive and could not lead to a conviction.***
5. ***The sentence was manifestly excessive under the circumstances.***

When the appeal came before me for hearing Mr. Githinji for the appellant made oral submissions. He submitted that one lady called "MN" who is said to have found the appellant in bed with PW1 and who got reports from all these other people was never called as a witness.

And the assistant chief (PW2) after receiving the report did nothing. He further submitted that the doctor's report was not conclusive to confirm this kind of offence. He also raised the issue of the age of

PW1 not having been ascertained. Finally he submitted that the appellant was not brought to Court within 24 hours and hence breach of his constitutional right under Article 49(i)(f) of the Constitution.

The learned State Counsel Ms. Macharia opposed the appeal. She said PW1 was aged 8 years and this was confirmed by PW3. The appellant was well known to PW1. He defiled her in his house and was caught by the wife (MN). The said MN refused to record a statement as she covered up for her husband. The doctors evidence she said confirmed there had been defilement. She submitted further that the appellant could file his claim for violation of his constitutional rights before the right forum. Further she submitted that the learned trial Magistrate believed PW1 and Section 124 of the Evidence Act allowed her to convict based on that evidence. Mr. Githinji dismissed PW1's evidence as being unreliable.

This being a first appeal this Court is enjoined to re-consider and re-evaluate the evidence adduced before the lower court and arrive at its own decision, while bearing in mind that it did not see nor hear the witnesses.

Ref. ***1. NGUI VS REPUBLIC [1984] KLR 729***
2. ***MWANGI VS REPUBLIC [2004] 2 KLR 28***

The Prosecution had called six witnesses. Their case was that PW1 a child aged 8 years and a neighbour to the appellant was called by the latter to his house. She gave her ugali and thereafter took her to his bed where he defiled her.

The two were found in the house in bed by MN who is the appellant's wife. PW1 reported this to her mother, Mama N and Nyakio. The matter was reported and she was taken to Kianjokoma Hospital and later at Embu Provincial General Hospital.

PW2 an assistant chief on 29/6/2009 3 p.m. met the appellant and MN and the latter reported to him that he had found the appellant and PW1 in bed. This witness did nothing, but passed this information to PW3 (who is PW1's mum). She acted by taking the child to the police then to the hospital.

Dr. Korregi (PW4) examined PW1 on 3/7/2006. His finding was that the genitalia was normal with no bruising. The hymen was not visualized and the cervix was closed. No signs of STD. A HVS was extracted and examined and it showed no pus cells, no spermatozoa or organism nature. In cross examination he stated that the hymen had been freshly perforated. PW5 and PW6 were the arresting and investigating officers respectively. They explained the roles they played.

I will combine all the grounds of appeal and deal with them together. The appellant was charged with a specific offence under the Sexual Offences Act called defilement of a child aged eleven years or less. And the particulars state that the victim was aged 8 years. Therefore the first imperative for the Prosecution was to prove that this minor was aged 8 years.

PW1 herself did not know a lot about herself. Being in standard 2 is not in itself a confirmation of age. Age is proved either by documentary evidence or by age assessment by a medical doctor. The learned trial Magistrate in her judgment at page 28 lines 6-9 states

"It was revealed that at all material time the complainant was only aged 8 years a fact which was not disputed by the defence on cross examination hence my conviction that the complainant was only 8 years old at all material time."

It is the duty of the Prosecution at all times to prove its case. It was therefore its duty to prove to Court the age of the minor and not to wait for the defence to challenge it for it and/or the Court to act. That is why the defence is challenging it now on appeal. The sentences of a number of offences under the Sexual Offences Act are pegged on age and its imperative that judicial officers dealing with these kind of cases find it their duty to ensure that the victim's age where required is established.

Secondly the lady referred to as MN who is said to be the appellant's wife was never called to testify

The investigating officer (PW6) told the Court that she had refused to record a statement. Section 127(3) of the Evidence Act provides;

"In criminal proceedings the wife or husband of the person charged shall be or <u>competent</u> and compellable witness for the prosecution or defence without the consent of such person any case where such person is charged

(a) with the offence of bigamy

(b) with offences under the Sexual Offences Act."

It is therefore not an excuse for PW6 to tell the Court that he could not secure her attendance to testify because she refused to record a statement. If indeed she was a crucial witness to their case the Prosecution would have sought the necessary assistance of the Court. Even the Court could have secured her attendance for ends of justice to be met. This was not done.

The medical evidence (EXB1) is so disturbing. Under Section 8(1) of the Sexual Offences Act, an act causing penetration is called defilement. And penetration under the ACT means

"the partial or complete insertion of the genital organs of a person into the genital organs of another person".

What has to be proved therefore is penetration. The presence of spermatozoa is not a must as that may only be found when the whole act was complete. Coming to the evidence of PW1. This incident is said to have occurred during the day. PW2 allegedly got the report the same afternoon. Being an assistant chief and I believe thats why the matter was reported to him, he did nothing. In his presence was the culprit and the reporting wife. PW2 even saw PW1. Instead of acting as expected he went to look for PW3 (mother) to report to her. I hope he is no longer working as an administrator.

Eventually PW1 was taken to Kianjokoma Health Centre the same day when things were still fresh. PW4 was seeing PW1 on 3/7/2006. There were no treatment notes from the primary hospital produced before the learned trial Magistrate. The person who first treated this girl is the one who would tell the Court what he/she observed. The P3 (EXB1) shows that PW1 suffered Grievous Harm when the whole of page 2 shows everything was Normal. At page 3 (EXB1) it shows

"Normal labia, no bruising on vagina, hymen not visualised and cervix closed".

And at page 4 (EXB1) at item 6 he notes

"Patient has had normal external genitalia, labia not developed, no discharge noted no marks and no tears noted".

It is no where indicated that THE hymen had been <u>freshly perforated.</u> In cross examination he indicated that the hymen had been freshly perforated. If indeed that was the position, bleeding ought to have been noted when this child was seen on 29/6/2006. There is no evidence that this was the case. Is it possible that an adult like this appellant would penetrate an 8 year old girl and there is no tear, no mark, no pus cells, no bruises etc.? Its unbelievable.

The absence of the hymen could mean many things. This may have been done to her long before this particular date. And that is why it is important for the Court to look at all the evidence in totality including the defence raised.

From the charge sheet I note that the appellant was arrested on 6/7/2009 and arraigned in Court on 8/7/2009. It is not clear what day of the week 6/7/2009 was. To me that would not be a reason for this court to release the appellant if indeed 6th was not a weekend and if he feels his rights were violated he is at liberty to lodge his claim before the right forum.

Otherwise from the issues I have raised above on age, medical report and MN and explained I do find that it would be unsafe to let the above conviction to stand. I allow the appeal, quash the conviction and set aside the sentence.

The appellant to be set free unless otherwise held separately under a separate warrant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-
Ms. Ing'ahizu for State
Ms. Muthoni for Githinji for appeallant
Appellant
Njue