



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 111 of 2009

ANDERSON KARIUKI NJERUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 264 OF 2008 at the Chief Magistrate's Court at Embu by Hon. F.W. MACHARIA – RM on 26/5/2009

J U D G M E N T

ANDERSON KARIUKI NJERU hereinafter referred to as the Appellant was charged with the offence of defilement of a girl contrary to section 8(2) of the Sexual Offences Amendment Act No.3 of 2006.

The particulars as stated in the charge sheet were that **on the 2nd day of March 2008 at [particulars withheld] in Embu District within the Eastern Province, intentionally and unlawfully defiled JKM a girl aged 6 years.**

ALTERNATIVE COUNT

The particulars as stated in the charge sheet were that **on the 2nd day of March 2008 [particulars withheld] in Embu District within the Eastern Province, unlawfully and indecently assaulted JKM by touching her private parts.**

The matter was heard and the Appellant was convicted on the Principal count and sentenced to life imprisonment. He was dissatisfied with the Judgment and filed this Appeal raising the following grounds;

1. That the learned trial Magistrate erred both points of law and facts by relying on the evidence adduced by the Doctor while the Appellant was not examined.

2. That the trial Magistrate erred in both points of law and facts by failing to consider that the evidence adduced by PW1 and PW2 was surrounded with a lot of doubts.

3. That the learned trial Magistrate erred in both points of law and facts by failing to consider that the whole incident was a mere frame up.

4. That the learned trial Magistrate erred in both points of law and facts by failing to consider that there existed a grudge between the Appellant and complainant's parents.

5. That the learned trial Magistrate erred in both points of law and facts by rejecting the Appellant's defence without sufficient reasons.

When the Appeal came for hearing the Appellant presented the Court with written submissions. In his submissions he expounds on his grounds of appeal.

The State through Mr. Miiri the learned State Counsel opposed the Appeal. He submitted that the evidence by the Prosecution witnesses was strong. PW1 was taken by the Appellant from PW3's home in the pretext of taking her home. He instead took her into a tea plantation and defiled her there. He then took her home at 9pm. The parents had been looking for her. The next day PW1 told her mother (PW2) what had happened. The medical report confirms the complaint.

This is a 1st appeal. I am enjoined to re-consider and re-evaluate the evidence adduced and come to my own conclusion. I should not lose sight of the fact that I never heard nor saw the witnesses. I am guided by the cases of;

1. OKENO -V- REPUBLIC [1973] EA 32

2. NGUI -V- REPUBLIC [1984] KLR 729

3. SIMIYU & ANOTHER -V- REPUBLIC [2005]1 KLR 192

The facts of this case are that PW1 had gone to visit the grandmother (PW3). The Appellant whom PW3 had sent to take a sufuria to PW1's mother (PW2) came later that afternoon saying PW2 had sent him to collect PW1. PW3 faithfully released PW1 to him. He then took PW1 and defiled her then took her home. The next day PW1 told the mother what had happened to her. She was taken to hospital and a report was also made.

The Doctor (PW4) examined PW1 on 4/6/2008 and found her to have been defiled. He examined her within hours of the incident.

In his unsworn defence he denied the charges. He said he was Muriuki's houseboy and Muriuki (PW4) had failed to pay him shs.8000/=. On 3/2/2008 he had called him to get his money. When he went the next day he was arrested and beaten and his property taken away. He was later charged.

I would wish to first of all start with the charge sheet. The Appellant was charged and convicted of an offence under section 8(2) of the Sexual Offences Act. Section 8(2) is a penalty provision. It does not create any offence. He was therefore charged under the wrong provision of the law.

Secondly PW1 was said to be 6 years. Besides telling this Court so the Prosecution did not avail any evidence to the Court to confirm the age of the minor. PW4 did not carry out an age assessment of the minor.

Thirdly PW1 being a minor had to be examined by the Court in what is known as a “*Voire dire*”. Section 19 of the Oaths and Statutory Declarations Act (Cap.15) Laws of Kenya provides as follows;

“Section 19(1) – where, in any proceedings before any Court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not in the opinion of the Court or such person understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given an oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section”.

From the guidelines in the cases of;

1. ***NYASANI S/o GICHANA [1958] EA 190***
2. ***KIBANGERY ARAP KOLIL -V- REPUBLIC [1959] EA 92***
3. ***KINYUA -V- REPUBLIC [2002] 1 KLR 256***
4. ***JOHN MURURI -V- REPUBLIC [1983] KLR 445***
5. ***OPICHO -V- REPUBLIC [2009] KLR 369***

It will be appreciated that the whole purpose of carrying out this examination is for the Court to satisfy itself as to why it should decline to take evidence of a minor; or take the evidence under oath or unsworn. Section 19 of the Oaths and Statutory Declarations talks of the **Opinion of the Court**. A Court expresses its opinion in a Judgment, Ruling or Order. In the case of *voire dire* the Court must make an opinion on the examination.

I have looked at the record herein at page 7 to 8. The learned trial Magistrate conducted a *voire dire* examination and that was all. She never made her opinion known. Its not on record. After the *voire dire* examination what I see at page 8 lines 1-14 is PW1 giving unsworn evidence. This learned trial Magistrate is the one who had the advantage of seeing this witness testify. I would not wish to imagine what she saw. PW1 was a vital witness in this trial. It would have therefore been important to know the amount of weight to place on her evidence. For example PW1 stated that the Appellant called her and told her not to say. He took her to the maize plantation. PW3 was in the house and did not see the Appellant go with her. On the other hand PW2 says at page 13 lines 10-13;

“He came and told me that Joy's mother had sent him to take Joy home so that she can take supper. I released Joy to him”.

These contradiction is material.

As was held in the case of ***OPICHO -V- REPUBLIC (supra)*** the child (PW1) was a vital witness in the trial and failure by the Court to comply with the procedure in the reception of her evidence vitiated that evidence.

Fourthly PW4 examined this child on 4/3/2008 and he said he examined her within hours of the incident. The particulars indicate that the offence occurred on 2/3/2008. The examination could not have been within hours if the offence indeed occurred on 2/3/2008.

The 5 defects I have clearly outlined above go to the root of the charge and they vitiate the evidence and the conviction. Would this be salvaged through a retrial? In this instant the defects leading to the vitiating of the conviction have been caused by both the Prosecution and the Court. It therefore means the Court must look at the whole picture presented by the case herein. In doing so I rely on the cases of;

1. KINYUA – REPUBLIC [2002]1 KLR 256

2. EKIMAT -V- REPUBLIC [2005] KLR 182

3. OPICHO -V- REPUBLIC [2009] KLR 369

The record shows that the Appellant was charged on 7/3/2008 and was convicted on 26/5/2009. It would not be just for both the Appellant and PW1 for this Court to order for a retrial. It may lead to re-opening fresh wounds for PW1.

I therefore allow the Appeal and quash the conviction. The sentence is set aside.

The Appellant to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU THIS 24TH DAY OF MAY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Miiri for State

Appellant

Njue C/c