REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 138 of 2011

(From original conviction and sentence in Criminal Case No.207 of 2011 of the Chief Magistrate's Court at Nakuru – E. TANUI, RM)

JOSEPH ATALA (ADALA)…………………………APPELLANT
VERSUS
REPUBLIC…………………………………………RESPONDENT

JUDGMENT

Joseph Atala (Adala) was charged with the offence of defilement of a girl aged 16 years contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006.** In the alternative, he was charged with an offence of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. He was convicted of the main charge and sentenced to 18 years imprisonment. Being aggrieved by the said conviction and sentence, he preferred this appeal based on grounds found in his petition of appeal and submissions. The said grounds can be condensed into the following:-

1. That he appellant's conviction is based on defective charges;

2. That the evidence was insufficient to sustain the charge and was not proven to the required standard;

3. That the trial magistrate failed to consider the appellant's defence;

4. The court failed to consider the fact that the complainant's mother and the Investigation Officer were related.

The appellant therefore prays that based on the above grounds, the court should allow his appeal, quash the conviction and set aside the sentence and set him free.

Mr. Chirchir, the Learned State Counsel, opposed the appeal for reasons that the incident occurred at about 5.00 p.m. in broad daylight; the appellant was well known to the complainant as a neighbour and by name and there was no possibility of mistaken identify; that after the complainant was dragged into the appellant's house, he threatened her with a knife; a struggle ensued and as a result the appellant was injured on the hand but still went ahead to defile her; the Doctor found that the complainant had been defiled; it was never disputed that the appellant was arrested and the allegation that there was a grudge between the families of the appellant and complainant only arose during the appellant's defence. Counsel urged the court to uphold the conviction and sentence.

This being the first appellate court, it is incumbent upon me to analyse and evaluate all the evidence adduced before the trial court afresh and arrive at my own findings and conclusions but always bearing in mind that I did not have the opportunity to see the witnesses to assess their demeanour (see **Gabriel Njoroge v Rep [1982-1988]1 KAR 1134**).

I will start by briefly stating the case before the trial court. The complainant is N.C (PW3), a girl aged 16 years. She told the court that on 20/8/2010 about 5.00p.m., while coming from visiting her friend, she was walking on a small footpath when somebody held her by the neck from the back. She got to see that it was the appellant, a person she knew well as a neighbour. PW3 said that the appellant held her neck tightly that she could not scream. She fell and he dragged her into his house. When she defied his orders to undress, he took a kitchen knife and threatened her with it. A struggle ensued which resulted in his being cut on the hand. He managed to defile her. The blood from his hand stained the complainant's clothes. He tried at penetrating her but he got tired and left her as she was crying. After the incident, PW3 went to inform her mother, PW1, E.A.K who in turn reported the incident to the police, the complainant was issued with a P3 form, was escorted to Nakuru Provincial General Hospital where she was examined and later, by Dr. Onchere (PW4) on 23/8/2010, found the complainant to have been defiled and had injuries to her neck. PW2, PC Benard Kipkoech investigated the case and received PW3's T-shirt which was blood stained, petticoat and pant (PEx.2, 3 & 4). The appellant was arrested on the same night. When at the station PW2 found that the appellant had an injury on the hand sustained during the struggle with PW3.

The appellant denied committing the offence. In his sworn statement, he recalled that he was at his home at Solai Energy Village on 20/8/2010. He worked in the farm till 2.00 p.m. and went back home. While at home he heard, the wife quarreling with PW3 because PW3's little sister had gone for a long call outside the appellant's house and when the complainant was asked to clean, she refused and a fight broke out between the complainant and the appellant's wife (PW2). PW3 was abusive and the appellant slapped her. She left and threatened the appellant with dire consequences. Later that day, he was arrested by police and learned of these charges while at the police station. The appellant's wife testified as DW2. She told the court that on 20/8/2010 about 10.00 a.m., children were playing outside her house, PW3's sister went for a long call at her door, she called PW3 to clean the mess but she refused. A fight ensued between them and the appellant slapped PW3 and PW3 then threatened the appellant with dire consequences. The appellant was arrested later that day.

In respect of the 1st ground that the charge was defective, the appellant submitted that the charge stated that he committed, the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006**; yet the complainant's evidence was that the appellant tried to penetrate her but he failed and therefore the appellant should have been charged with the offence of attempted defilement of a girl contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offence Act**. I believe what the appellant wanted to say was that the evidence did not support the charge under **Section 8(1)** of the **Sexual Offences Act** because he did not point to any defect in the charge sheet. The charge was properly framed and it was left to the prosecution to prove its case.

In the complainant's testimony in the trial court, she stated as follows:-

"…he then proceeded to defile me. He had sex with me. I was a virgin. He tried penetrating me but he did not succeed. He asked me whether I had sex but I said no. He pushed his penis into my vagina. I felt pain. He told me to stop crying when I cried. He did not succeed in penetrating me. He got tired, …"

It is necessary to recall what constitutes an offence of defilement. **Section 8(1)** of the **Sexual Offences Act No.3 of 2006** defines defilement:-

"A person who commits an act which causes penetration with a child is guilty of the offence of defilement."

Section 2 of the same **Act** then defines what penetration means. It states:-

" 'Penetration' means the partial or complete insertion of the genital organ of a person into the genital organ of another person."

From the explanation given above by PW3, that the appellant pushed his penis into her vagina, there was sufficient penetration.

PW4, Dr. Onchere produced in court the P3 form (PEx.1) and the Post Rape Care Form (PRC form) (PEx.1b) all completed on 23/8/2010. PW4 also said that apart from examining PW3, he considered the history of PW3. On the PRC forms, it is clearly stated that there was an old broken hymen and they did not note any recent injuries to PW3's genitalia. Unfortunately, the prosecutor did not prode the Doctor to

find out if the hymen would have been healed within 3 days from 20/8/2010, the date of the defilement. PW4 opined that PW3 had been defiled. No explanation was given for the lack of injuries in PW3's genitalia but PW3 gave the explanation that the appellant attempted in vain at penetration. That explanation given by the complainant that the appellant only managed partial penetration constitutes an offence of defilement. It did not matter that there was not complete penetration.
The complainant was a girl aged 16 years and a Form II Student. The court conducted a voire dire examination on her and found her to be intelligent and understood the meaning of the oath and therefore gave her evidence on oath. It is not disputed that the appellant and are not strangers to each other. They lived in neighbouring plots. The complainant's mother (PW1), PW3, the appellant and his wife all admitted to this. It is also clear from the evidence that they had never been any disagreement between the appellant and complainant before the 20/8/2010.
There is no issue of mistaken identity. The incident occurred during broad daylight at about 5.00p.m. PW3 vividly explained what happened to her. She was accosted while walking on a footpath when the appellant held her neck from the back so tightly that she became weak. She fell and the appellant pulled her to his house where he defiled her. PW3's evidence that she was tightly held on the neck was corroborated by the findings of PW4 that PW3 had injuries to her neck. PW3 also told the court that the appellant threatened her with a kitchen knife and during the struggle he was cut on the hand. PW2 confirmed having seen the injuries to the appellant's hand. That was not disputed nor did the appellant offer any explanation as to how he got injured on the hand. In his defence, the appellant stated that the complainant and his wife disagreed on 20/8/2010 over a child who dirtfied DW2's entrance. The appellant and his wife's testimony are not truthful at all as they were contradictory in material particulars. Whereas the appellant claimed that the wife had a confrontation with PW3 in the afternoon well after 2.00p.m., the appellant's wife, DW2 talked of the incident having occurred at 10.00a.m. The trial magistrate did consider this glaring contradiction in the defence evidence. Besides, the appellant never raised either PW1 or PW2, the Investigation Officer about this alleged fight between PW3 and DW2 that had occurred on the same that he was arrested. The incident being so fresh, the appellant would have certainly remembered what had just happened between the wife and PW3 and would have offered an explanation as to what caused his arrest. I do find that the defence did not raise any doubt in the prosecution case and it is a fabrication to get the appellant off the hook. The trial court did consider the appellant's defence and dismissed it as untrue. I do agree with the findings of trial court.

I do subscribe to the trial court's observation that the Investigation Officer should have gone further and had the blood on PW3's clothing examined and samples of vaginal swab taken from PW3. However, that omission did not weaken the prosecution case because it is no longer a requirement in law that there be corroboration in sexual offences. **Section 124** of the **Evidence Act** did away with that requirement of corroboration so that it is enough that the court is satisfied that the complainant was truthful and that the court goes ahead to record the reasons for believing the said evidence.
In his submissions, the appellant seemed to complain that relevant witnesses were not called. PW3 testified that soon after the incident, she met one E.A.K who asked her why she had blood on her hands. PW3 said that E.A.K claimed to have heard what happened. E.A.K was not called as a witness. It is not clear why she was not called but her evidence would not make any difference to this case because it would be hearsay, because she would only tell what PW3 told her. PW3 was alone when she was first accosted and nobody witnessed the incident. Under Section 143 of the Evidence Act, no particular number of witnesses are required to prove any fact unless a particular law provides so. One witness was sufficient to prove the allegation of defilement and the trial court was satisfied and believed PW3's evidence which is supported by that of PW2 and PW4.
The appellant alleged that the Investigation Officer (PW2) was the relative of PW1 and therefore seems to suggest the investigations were not fair. No where during the trial or in his defence, did the appellant raise such allegation. PW1 and PW2 testified in court and the appellant had an opportunity to cross examine them on the alleged relationship but he never put a single question to them of that nature. Neither did the appellant raise with PW3 such allegation. In any event, it is improper for the appellant to raise the allegation when the witnesses cannot be able to respond. That ground is unfounded and it is hereby dismissed.
After considering all the grounds of appeal raised by the appellant, I find that there is sufficient evidence to prove the offence of defilement and the trial court correctly convicted the appellant of that offence. The conviction is safe and I confirm it. The complainant was 16 years at the time of the incident. The

appellant was charged under **Section 8(1)** and **8(4)** of the **Sexual Offences Act**. Under **Section 8(4),** upon conviction, a person is liable to imprisonment for a term not less than 15 years. The trial court sentenced the appellant to 18 years imprisonment. I find the sentence to be fair in the circumstances and I find no good reason to interfere with it. For all the above reasons, I dismiss the appeal. It is so ordered.

DATED and DELIVERED this 13th day of May, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:
The appellant present in person
Mr. Chirchir for the State
Kennedy – Court Clerk