



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 337 OF 2011

STEPHEN NGULI MULILIAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 5953 of 2009 in the Chief Magistrate's Court at Thika – B. J. Ndeda (SRM) on 09/12/ 2011)

JUDGMENT

1. The Criminal Appeal stems from the Appellant's conviction in **Chief Magistrate Cr. Case No. 5953 of 2009**, for the offence of defilement contrary to **Section 8(1)** as read with sub-section (3) of the **Sexual Offences Act No. 3 of 2006 laws of Kenya**. Upon conviction the Appellant was sentenced to serve ten years imprisonment.
2. The grounds of appeal urged by Mr. Nyangito learned counsel for the appellant were that no independent witnesses testified for the prosecution, the circumstances of identification were not conducive since the offence occurred at night, the complainant's evidence was contradictory and unreliable, and that there was no evidence of penetration.
3. Mr. Nyangito contended that the complainant's evidence was not corroborated, yet she was a child of tender years and that the learned trial magistrate contradicted himself in his judgment in rejecting evidence adduced on the issue of Kshs. 2,000/=, allegedly offered by the family of the appellant as compensation to the father of the complainant, only to later rely on it as a basis for convicting the appellant. He further argued that the constitutional right of the applicant was contravened because he was not given a chance to submit under **Section 210 of Criminal Procedure Code**. He did not specify which constitutional right had been so contravened.
4. Miss Njuguna, learned state counsel opposed the appeal on behalf of the respondent. Her reasons were that the prosecution proved its case beyond reasonable doubt, and that **Section 124 of the Evidence Act Cap 80 laws of Kenya**, allows the court to convict in reliance of the evidence of a minor alone in cases of sexual offences. She also submitted that the minor knew her assailants well and that the appellant made the choice not to submit, at the close of the prosecution case.
5. I have perused the proceedings in the lower court record and assessed the evidence afresh to draw my own conclusions and make my own findings, being mindful of the fact that I did not have the advantage of seeing the witnesses as they testified. Upon the re-evaluation of the evidence I find that the minor's evidence was corroborated by **PW2** and **PW3** the minor's father and mother respectively who searched for her in vain on the evening in question. They were called to the

police station at 1.00 am after the police found her and they noted the torn state of clothes she was in.

6. I reminded myself of the Court of Appeal decision on identification in the case of:

JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212 in which the court stated that:

“A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.”

I have also considered the case of **Okello v Republic Cr. App No. 8 of 1986**, and that of **Maitanyi v Republic Cr. App No. 6 of 1986 KLR**. In the **Maitanyi case** it was held that:

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for a testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

7. The case before me turns on the evidence of a single identifying witness and the appellant raised an alibi defence testifying that on the material date he was away in Mlolongo visiting his sister. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable (*see* Court of Appeal’s decision in **Kiarie v Republic [1984] KLR pg 740**).

8. The offence in question took place at night. The evidence however shows that the minor knew the appellant as a neighbour for a long time and in her own testimony they used to greet each other whenever they met. The appellant came upon the minor at 8 p.m. on the ill-fated night, as she waited for her friend Lydia. She had no apprehension since he was known to her. She identified him by name in her testimony and stated that she conversed normally with him as he offered to take her to where her friend Lydia was.

9. She followed him from the road side but suddenly he took hold of her hand and pulled her into a deserted house. He covered her mouth with a handkerchief so that she could not scream and defiled her. There is no evidence that her eyes were also covered. She could therefore see her assailant throughout the time they were together. They remained together for two hours before he released her. She returned to the road where a police officer on patrol rescued her and took her to the police station and called her father.

10. The learned trial magistrate does not appear to have placed reliance on the evidence of the attempted reconciliation to convict the appellant, as averred by Mr. Nyangito for the appellant. The magistrate however, did consider the appellant’s alibi defence in his reasoning thus:

“Though it was only PW1’s evidence which is incriminating the accused person to me this evidence is unchallenged. I have too considered the accused person’s alibi defence, which to me remains to be a mere statement which is uncorroborated or unsubstantiated. No doubt I am convinced the accused whom the complainant knew very well before this incident, thus the offence of defilement. P3 form put the complainant at 13 years old. Though this is a single witness testimony, only PW1 I find it convincing and believable besides all prosecution witnesses were credible and honest.”

It is therefore clear that the learned trial magistrate considered the evidence of both the prosecution and the defence and chose that of the prosecution over the defence for stated reasons.

11. The medical witness lent credence to the minor’s testimony that she had been defiled when he testified that upon examination the genitalia of the minor was found to be tender and to have a white foul smelling discharge. He was not able to recall whether the minor had showered since the attack, although **PW1** and **PW3** testified that she had not showered. The medical witness confirmed that the minor had been sexually assaulted.
12. The appellant was represented by learned counsel Mr. Karanja during the trial. Mr. Mbiyu who held his brief when the ruling under **Section 210 Criminal Procedure Code** was read, requested for the defence hearing to be deferred to another date. The record does not reflect that he requested for, nor that he was denied a chance to make submission on no case to answer. **Section 211** of the **Criminal Procedure Code** was complied with as shown in the lower court record. At the close of the defence case Mr. Karanja informed the court that he did not wish to submit.
13. The trial commenced before Hon. L. W. Gicheha, Principal Magistrate on 15th April 2010. On 23rd September 2010, it started *de novo* before Hon. Ndeda, Senior Resident Magistrate. There is therefore, no question of the matter having proceeded before two different magistrates without observing the provisions of **Section 200(3)** of the **Criminal Procedure Code**.
14. After a careful re-assessment, of the evidence on record, I am in agreement with the findings of the trial court, and I am satisfied that the conviction entered against the appellant was based on sound evidence. I therefore uphold the conviction and find that the appeal is unmeritorious.
15. On the sentence imposed by the learned trial magistrate, the appellant was convicted for the offence of defilement of a minor contrary to **Section 8(1)** as read with **sub-section (3)** of the **Sexual Offences Act**. The minor was aged 13 years at the time of the attack and **Section 8(3)** of the **Sexual Offences Act** provides for **“imprisonment for a term of not less than twenty years”** upon conviction. The appellant was sentenced to a term of 10 years which was therefore unlawful. For this reason when the appeal came up for hearing on 16th May 2013 the respondent put the appellant on notice that they would be seeking enhancement of sentence should the appellant’s appeal prove to be unsuccessful. Mr. Nyangito for the appellant notified the court that the appellant wished to prosecute his appeal in spite of the notice.
16. The appeal having failed, I therefore substitute the sentence imposed by the trial court with that which is provided by law and order that the appellant shall serve 20 years imprisonment. The sentence shall commence from the date of the sentence in the trial court.

The appeal is hereby dismissed.

SIGNED DATED and DELIVERED in open court this **13th** day of **June** 2013.

L. A. ACHODE

JUDGE