



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 13 OF 2010.

LESIT, J

FRANCIS GITONGA MAINGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT.

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 4194 OF 2003 IN THE PRINCIPAL MAGISTRATES COURT AT MERU BY HON. S. N. K. ANDRIESSEN PRINCIPAL MAGISTRATE)

JUDGEMENT

1. The Appellant **FRANCIS GITONGA MAINGI** was charged with defilement contrary to section 145(1) of the Penal Code. He was found guilty and convicted for this offence and sentenced to 10 years imprisonment.
2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. Subsequently Mr. Riungu Advocate came on record for the Appellant and filed a substituted petition of Appeal in which he raised the following four grounds:
 1. **That the learned principal magistrate erred in law in allowing the case to proceed to determination with an incurably defective charge sheet.**
 2. **That the learned principal magistrate erred in law and fact in failing to order an age assessment of the complainant.**
 3. **That the learned principal magistrate erred in law and fact in failing to establish on the record that the child was intelligent enough to give evidence and whether or not she understood the nature and purpose of an oath.**
 4. **That the learned Principal Magistrate erred in law and in fact in failing to appreciate from the evidence adduced that no rape or rape.**
3. When this appeal came up for hearing Mr. Riungu argued on the four grounds which I will consider.
4. The state was represented by Miss Muriithi learned state counsel who opposed the appeal.

5. I have considered the Appeal and as expected of a first Appellate Court I have subjected the entire evidence adduced before the lower court to afresh analysis and evaluation and have drawn my own conclusions when bearing in mind that neither saw nor heard any of the witnesses and have given the due allowance. I am guided by the Court of Appeal case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005 it was stated as follows:-

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

6. The complainant was a child of seven years at the time the offence was committed and nine years when she testified in court. She was sleeping next to her baby brother when somebody suddenly slept on top of her. By the time she realized that there was someone of her she screamed and her mother PW2 went to their room with a lamp. The mother who was PW2 found the accused sited on a chair and totally drunk. she checked the complainant and found that a panty was torn and that she was also wet in her private part and was complaining of pain saying that the Appellant opened her legs and inserted something in her private part which caused her pain and wetness. Eventually the Complainant and the Appellant were examined by PW4 a Clinical Officer and both were found to be suffering from a sexual transmitted disease. The complainant’s panty was sent to the Government Chemist by PW3 and it was confirmed that there was presence of spermatozoa. The complainant’s genitalia were found to be normal.
7. The Appellant in his unsworn statement denied the charge and said that the mother of the complainant who used to be his wife is the one who was implicating him with the offence. He said that she fabricated the case after luring him into her house and locking him inside. He said that he jumped out through the window and went to his house and slept. He said that later he was led to the Meru General Hospital where he was examined and eventually charged with this offence.
8. Mr. Riungu in his submissions urged that the charge against the Appellant was defective because the words intentionally and unlawfully were not included in the particulars of the charge and therefore the defect was fatal. Counsel relied on High Court of Kenya Criminal Appeal No. 11 of 2008 ERRO OBA VS. REPUBLIC for the proposition that where the charge drawn by the prosecution is defective the conviction should be vitiated and the appellant set free. Miss Murithi for the state urged that the case cited by the Mr. Riungu was not applicable.
9. I agree with the learned State Counsel that the case of ERRO OBA VS. REPUBLIC does not apply because the offence in the cited case was rape contrary to section 3(1) of the Sexual Offences Act. the charge against the Appellant in this case was brought under the Penal Code contrary to section 145(1) which states

“145(1). Any person who unlawfully and carnally knows any girl under the age of 16 years is guilty of a felony and is liable to imprisonment with hard labour for life.”

10. The particulars of the charge against the Appellant stated as follows: On the 13th day of October,

- 2003 at about 9.00 at [particulars withheld] in Meru Central District within the Eastern Province, had a carnal knowledge of I G a girl under the age of 14 years.
11. The issue raised by Mr. Riungu is not new however the point is that the offence under which the Appellant was arraigned in court makes it an offence for a person to have unlawfully and carnally know. The particulars of the charge as framed omitted the word “unlawfully” that omission is however not fatal because there will be no instance where carnal knowledge of a girl under the age of 16 years would be lawful for the simple reason that consent is irrelevant. The particulars of the offence given in the charge against the Appellant were sufficient to disclose the offence of defilement and to enable the Appellant to know the charge against him and to adequately prepare to defend himself. Nothing therefore turns on this point.
 12. The other argument raised by Mr. Riungu was that no age assessment was carried out in this case and that therefore the omission was fatal. In the P3 form the medical officer who examined the complainant estimated her age to be 7 years. PW2 the mother of the complainant gave her age as 9 ½ years old on 19th January 2006 when she testified in court. The offence was committed on 13th October, 2003 which was approximately 3 years before the date the case was heard. That sets her age at the time the offence was committed at approximately 7 years. During cross examination of PW2 the Appellant did not raise the issue of the complainant’s age. Nevertheless I find that PW2 the mother was the person best placed to give the age of the complainant and she did so in her testimony. Furthermore for purposes of the offence preferred against the Appellant it was sufficient for the prosecution to show that the complainant fell within the age brackets of given under section 145(1) of the Penal Code and this was done. The complainant was below the age of 16 years at the time the offence was committed and therefore her age fell within the provisions of the section invoked by the prosecution. Nothing therefore turns on that ground.
 13. Mr. Riungu for the Appellant argued that the learned trial magistrate did not test the intelligence of the complainant to testify before taking her evidence. Counsel relied on High Court Criminal Appeal **No. 85 of 2002 Shavock Onyambu Ogao vs Republic**. Where learned judge expressed the view that the failure by the learned trial magistrate to show on the record that he sufficiently tested the intelligence of the two children is fatal to the conviction.
 14. The leading case on the issue of testimony of children is **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** held:

“Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

15. I have perused the record of the lower court and I agree with Mr. Riungu that the record does not show that the learned trial magistrate subjected the intelligence of the complainant to any test because she did not record the questions put to the complainant and the answers that the

- complainant gave. What is contained on the record is a ruling to the effect “**the witness I is found old enough to be able to give evidence. She seems clear and articulate in her answers to the questions put to her. Because of her tender age she is affirmed.**”
16. The learned trial magistrate did not follow the proper procedure in *voire dire* examination of the complainant’s evidence. That being the case her evidence would require to be corroborated by other evidence implicating the Appellant.
 17. I have considered the evidence adduced in this case. I find that the Appellant was found red handed in the complainant’s room when she screamed for help after she felt a man on top of her. It was in the night. PW2 the complainant’s mother corroborated the complainant’s evidence that the Appellant was seated on a chair in her room when PW2 went to her rescue. The Appellant admits he was inside the house but explains that the complainant lured him there. The medical findings on the Appellant and the complainant confirmed that the two had a similar form of Sexually Transmitted Disease. In addition the complainant’s pant was found to have spermatozoa on analysis by a Government Chemist. The prosecution adduced sufficient evidence which established beyond any doubt that the Appellant had both the time and the opportunity to commit the offence.
 18. The evidence before court shows that there was no evidence of bruising or injury to the complainant’s private parts. The valve and the genitalia were found intact. There was evidence of spermatozoa and also pain to her private parts and tearing of her underpants. I find that these are sufficient proof that the Appellant did cause contact between his organs and that of the complainant. It was sufficient proof of violation of a sexual nature against the complainant. Even though the offence under the old law. The Penal Code left a lot to individual assessment as opposed to the new law which makes it clear that proof of mere contact is enough; even then I am satisfied that in this case, there was proof of contact between the Appellant’s male organ and the complainant’s. Fact she felt pain is proof of a degree of penetration. In the circumstances I find that the offence was proved.
 19. I agree with the learned trial magistrate’s finding that the Appellant must have defiled the complainant. The evidence against him was overwhelming. The complainant’s evidence was not the only evidence against the Appellant. I find that there was other evidence which was sufficient to sustain the conviction.
 20. Mr Riungu urged the court to consider reducing the sentence imposed against the Appellant if I was not persuaded by the appeal. The Appellant was sentenced to 10 years imprisonment. The section under which he was charged provided for a sentence of 14 years with hard labour. The sentence was in my view quite lenient. Besides he got away free of an order of hard labour.
 21. I have come to the conclusion that the Appellant’s appeal has no merit. The same is dismissed. The conviction is upheld and the sentence confirmed.
 22. Those are my orders.

DATED SIGNED AND DELIVERED AT MERU THIS 31st DAY OF OCTOBER, 2013.

LESIIT, J.

JUDGE