



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 25B OF 2010

LESIT, J

JAMES MWEBIA M'IMBARE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 37 of 2008 in the S.R.M. Court at NKUBU by Hon. S. M. GITHINJI SPM.)

JUDGEMENT

1. The Appellant was charged with defilement of a child of 9 years contrary Section 8 (1) as read with Section 8(2) of the Sexual Offences Act. After a full trial he was found guilty and convicted of the offence and sentenced to life imprisonment.
2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. His amended petition of appeal on which he relied on raises the following four grounds:
 1. **That the pundit magistrate erred in both law and fact while convicting me on the purported visual identification by recognition allegation by PW1, 2 and 3 in light of no prompt first report evidence to suit the same.**
 2. **That, the pundit magistrate erred in both law and fact while being impressed with my mode of arrest whilst no evidence was adduced from whoever arrested me to suit the same.**
 3. **That the pundit magistrate erred in both law and fact while convicting on charges laid in my respect in light of no evidence from essential witnesses which contravened section 150 of the CPC.**
 4. **That the pundit magistrate erred in both law and fact while rejecting my sworn defense that**

was not challenged by the prosecution side to meet the interest of justice as spelt in section 212 of the CPC.

3. In his submissions during the hearing of the appeal he relied on his filed submissions. In addition he urged the court to note that both the complainant and other witnesses were from same family and that there was a grudge between the complainant's family and his family after the grandfather of the complainant died when his brother hit him.
4. In the written submissions the Appellant challenges the evidence of identification saying it was doubtful due to absence of corroboration by the Sub-Area and lack of a first report to confirm it. Secondly he decried lack of evidence from the Investigating Officer. Finally Appellant argued that his sworn defence was not given due consideration.
5. The state was represented by Ms. Muriithi. The Learned State Counsel opposed the appeal on grounds there was sufficient evidence to support the conviction. Learned state counsel submitted that PW3 found the Appellant on top of the complainant. That the evidence of PW1, 2 and 3 was well corroborated. Counsel urged that PW4 the Clinical Officer's evidence who examined the complainant found she had bruises on the walls of her private parts and presence of semen. There was no semen. However, the doctor explained that same was not unusual.
6. In regard to the sentence, Learned State Counsel urged that the Learned Trial Magistrate found that the Appellant was not remorseful. She also urged that the sentence was in accordance to the law.
7. I have considered this appeal and have subjected it to a fresh analysis and evaluation bearing in mind that I did not hear or see the witnesses and giving due allowance for that, I am mindful of the Court of Appeal decision in **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters Vrs Sunday Post [1958] E.A 424.”

8. The facts of the prosecution case are that the Appellant who is a neighbor of PW1 went to her house and asked to be allowed to send the complainant, D G, PW2 to his house. The complainant's mother allowed her daughter to be sent. After a few minutes PW1 heard the complainant crying at Appellant's house which was only 70 meters away. PW1 sent her other daughter who is an adult D PW3 to check. She too started making noise. That is when PW1 went to Appellants house and found the complainant on his bed with her under pant placed on the bed. The Appellant had his trouser lowered. He then pulled up his trousers and ran away.
9. The Appellant gave a sworn defence in which he said that the complainant's family alleged that his brother had killed their father and so threatened to have him charged. He stated that he was fixed by the complainant's family just because he was their neighbor. He denied committing the offence.
10. The first ground raised by the Appellant was that the evidence of identification by PW1, 2, and 3 was not supported by a first report and ought not to have been believed. He further raises issue with failure to call certain witnesses. These are the arresting and Investigating Officers of the case.
11. The Appellant is correct. The prosecution did not call any evidence from the police, either the arresting and or the investigating Officer. The only witnesses called were family members and the Clinical Officer who examined the complainant.
12. On the issue of identification and weight of the prosecution case the learned trial magistrate observed as follows:

“There is strong, consistent and reliable evidence by PW1, PW2 and PW3 that it is the accused who asked for PW2 from her mother, to go with her to his house so as to send her. He was allowed to do so, and for the time the two were together he had an opportunity to commit the alleged offence. PW2 gave sworn testimony. She narrated vividly and firmly what the accused did to her. He pulled her into the house, removed her pant, lowered his trousers and went on her. He penetrated her, making her feel pain and scream. Her cries attracted PW3, and then PW1 and then PW-1, who all found the accused half naked.”

13. The learned trial magistrate’s finding that the Appellant was found red handed with the complainant on his bed is confirmed in the evidence of both PW 1 and 3. PW3 found appellant on top of the complainant. More importantly however, is the fact that before that the Appellant had gone to the complainant’s home where he found PW1, 2 and 3. He asked PW1 for her daughter the complainant because he wanted to send her. Soon thereafter the complainant was found in a compromising position with the complainant inside his house by PW3 and later PW1.
14. The issue of identification does not arise in this case. The Appellant is well known to PW1, 2 and 3 being a neighbor, further the Appellant specifically asked PW1 for the complainant in the guise he wanted to send her to his house. Soon thereafter he was found alone with her on his bed. There is no likelihood of mistaken identity. I also find that there is no chance of any possibility that the case was a fabrication against the Appellant. The evidence against the Appellant was direct evidence. The circumstances prior to incident and those of fact he was the only person with the complainant after she was taken away from him cumulatively point irresistibly to the Appellant as the only person who had the opportunity to commit the offence.
15. PW4 the Clinical Officer found that the complainant had fresh bruises on the vaginal wall. She had been defiled. There was no one else who could have committed the offence other than the Appellant. I agree with the learned trial magistrate that witnesses were truthful and evidence consistent.
16. The complainant’s age was given by her mother as 9 years. The complainant also told the court during the voire dire examination that she was 9 years old. Even though the appellant has not raised this as an issue, I find that the evidence adduced by the prosecution sufficiently establishes that the complainant was 9 years old and therefore the offence contrary to section 8(2) of Sexual Offences Act corresponds to the correct age group within which the complainant falls and therefore the Appellant was correctly charged under those provisions.
17. The failure to call the arresting officer and the investigating officer was a serious omission. However, I do not think it is fatal to the prosecution case. I would justify an adverse inference that the reason the two were not called as witnesses was because their evidence would tend to be adverse to the prosecution case.
18. The reason for this is best explained in the holding

In **BUKENYA & OTHERS** LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

19. The Investigating and Arresting Officers will not add much value to the prosecution case. This is because the evidence against the Appellant was direct evidence of three witnesses. They gave consistent evidence. The absence of Investigating Arresting Officers has no effect to the evidence adduced by the prosecution as it was sufficient to support the prosecution case and to sustain the conviction. I find no substance on this point.
20. The Appellant complains that his defence was not given due to consideration. I have perused the judgment on record. I have confirmed that the learned trial magistrate set out the Appellant’s defence in full. He then analyzed the defence vis a vis the prosecution case before arriving at a conclusion that it was a sham and rejected it. Clearly the learned trial magistrate gave detailed

- attention to Appellants defence before rejecting it.
21. I have on my part considered his defence and do find that he denied committing the offence and alleged that the case was a fabrication. I find that the evidence against the Appellant was both cogent and overwhelming. I find no fault on the conclusion reached by the learned trial magistrate that the defence should be rejected and Appellant convicted of the offence charged.
 22. I have come to the conclusion that the Appellants appeal has no merit. I uphold the conviction and confirm the sentence.
 23. The appellant appeal is rejected.

DATED SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE