REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 137 OF 2012

PETER MUREITHI MUCHIRI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU (T.M. MWANGI – P.M) IN CRIMINAL CASE NO. 335 OF 2011 DELIVERED

ON 5TH APRIL 2012)

JUDGMENT

PETER MUREITHI MUCHIRI the appellant herein was on 5th April 2012 convicted by the Principal Magistrate Gichugu on one count of attempted defilement contrary to ***Section 9 (1) (2) of the Sexual Offences Act*** and one count of assault causing actual bodily harm contrary to ***Section 251 of the Penal Code***. He was sentenced to serve ten (10) years imprisonment for attempted defilement but discharged under ***Section 35 Penal Code on the assault charge.***

He has now filed this appeal against conviction and sentence raising the following grounds:-

1. ***That he pleaded not guilty***
2. ***That the trial magistrate erred in law and in fact by failing to consider that PW3 who alleged that he witnessed the act was lying because the Medical officer told the Court that PW1 was not defiled***
3. ***That the learned trial magistrate erred in law and in fact by failing to consider that he was not taken to hospital for examination***
4. ***That the trial magistrate erred in law and in fact by failing to consider that no exhibits were produced in Court***
5. ***That the trial magistrate erred in law and in fact by relying on un-corroborated evidence.***
6. ***That the trial magistrate erred in law and in fact by failing to consider that his rights were violated as he was kept in custody for almost a week before being charged in Court***
7. ***That the trial magistrate erred in law and in facts by failing to consider his defence and mitigation.***

The State through Ms Kambanga, State Counsel, supported both the conviction and sentence stating that the appellant was infact caught by PW3 while lying on top of complainant and there was therefore sufficient evidence upon which a conviction could be founded.

I have considered the grounds of appeal together with the written submissions and oral

submission by both the appellant and the State Counsel.

This being the first appellate Court, I must consider and evaluate the evidence afresh and draw my own conclusions on whether or not the appellant's conviction was sound. And while so doing, I must remember that the trial Court had the advantage of hearing and seeing the witnesses during the trial.

The complainant DWN testified as PW2 and gave her age as 13 years following a voire dire examination in which the trial Court found that she understood the nature of a oath and was competent to give sworn evidence. She told the Court that at about 6 p.m. on 13th June 2011 as she was walking home from school near a forest, someone held her from behind, covered her mouth and dragged her into the bushes. He then removed her pants and biker and lay on her telling her that if she screamed, he would throw her into the nearby Nyamindi river. He fondled her private parts while hitting her head. She screamed and M(PW3) arrived at the scene and arrested the person who she said was the appellant herein. He was arrested and taken to Kiamutugu A.P. Post while she went to hospital. She stated that her private parts were not injured.

M G (PW3) testified that he works at the complainant's home and on the material day at about 6.30 p.m. her employer PW (PW2) arrived home and enquired if complainant had arrived and on being told that she had not, she told him to search for her as she had heard screams in the bush. When M went to the bush, he saw appellant lying on the complainant struggling with her. The complainant's pants were lying on the ground. Upon seeing M, the appellant tried to run away but M pursued and arrested him while screaming. Members of the public arrived at the scene and beat up appellant who was then taken to Kiamutugu Police Post.

PW (PW1) is mother to complainant and guardian to M (PW3). She testified that as she walked home that evening, she heard screams in the valley of river Nyamindi, but could not see who was screaming. Upon arrival at her home, she found that complainant had not arrived yet and so she sent M (PW3) to go and look for her and meanwhile, she called complainant's school and was told she had left half an hour earlier. Moments later, the complainant arrived home and told her that the appellant who is their neighbour had dragged her into the bush, removed her pants and was lying on her when M arrived, rescued her and arrested the appellant. She went to the scene and found appellant being beaten by members of the public. She prevailed upon them not to beat him and he was tied up and taken to Kiamutugu A.P. Post while the complainant was taken to Kianyaga Sub-District Hospital where the doctor confirmed that she had a swelling on her head but had not been defiled.

P I (PW4) is a block leader in [Particulars withheld]. On the material day at about 7 p.m, he received a call from PW1 that her daughter had been defiled. He went to the scene and found appellant under arrest on allegation that he had wanted to defile the complainant. He called for a motorcycle which took appellant to Kiamutugu Police Post where he was handed over to P.C. PHILIP OTIN (PW5) of Kianyaga Police Station who charged the appellant after investigations.

STEPHEN NGIGI (PW6) a Clinical officer at Kianyagga Sub-District Hospital said he examined the complainant and found no evidence of sexual intercourse but found that she had a head injury which he classified as harm as per the P3 Form (Exhibit 1).

The appellant in his un-sworn statement in defence said he was arrested for nothing adding that the complainant's aunt had wanted to employ him but he refused and she got annoyed and framed this case against him. He added that the complainant was coached.

I have considered and evaluated the evidence as I should. Although the trial magistrate did carry out a voire dire examination before allowing the complainant to testify, it is clear that that was not necessary because the complainant gave her age as 13 years and the P3 Form (Exhibit 1) also shows that indeed she was that age. the complainant was therefore not a child of Tender years who is defined in the ***Children's Act*** as one who is under the age of ten years. However, that did not prejudice the appellant

at all.

Appellant has raised issue with the fact that he was convicted on un-corroborated evidence and further, that medical evidence disclosed that complainant had not been defiled. The charge facing him was attempted defilement and so the lack of evidence to prove defilement did not matter. On the issue of corroboration, a trial Court is entitled to convict on the evidence of a single witness (i.e. the alleged victim) if satisfied that the victim was speaking the truth. In this case, the trial magistrate did examine the complainant who he found understood the nature of an oath. He was therefore satisfied that she spoke the truth. Besides, in his judgment, the trial Court said the following with regard to the prosecution witnesses who of course included the complainant:-

" ***I saw, heard and observed the respective demeanours of the witnesses. Prosecution witnesses were truthful, honest, steadfast and credible as opposed to DW1 whom I found to have been dishonest, evasive and cunning in his statement"***

Having made that finding with respect to the demeanour of the complainant, among other witnesses, the trial magistrate was entitled under ***Section 124 of the Evidence Act*** to base his finding of guilt on that evidence bearing in mind that the complainant was not a child of tender years. In anycase, if there was need for the corroboration of the evidence of complainant, it was to be found in the testimony of M PW3 who said as follows:-

"When, I arrived at scene, I saw a pant on the ground and saw my sister one D N (PW2). I saw accused lying on her and when accused turned he saw me. I saw him. When he saw me he wanted to run away and I held him but he broke free and ran and he ran and as he was running he fell"

The evidence of M was sufficient corroborative evidence if any was needed. By dragging the complainant into the bush, removing her pants, lying on her and threatening her not to scream, the appellant could only have been preparing to have sexual intercourse with the complainant without her consent.

The appellant further takes issue with the trial magistrate for not considering his defence and mitigation. The record shows that the trial magistrate did consider both. In his judgment, the trial magistrate having weighed the evidence on both sides found that the appellant's defence was " ***a sham and a bare denial of the offence"***. And before sentencing him, the trial magistrate made the following notes:-

" I have considered gravity of offences and mitigation by first offender"

Clearly therefore, the trial magistrate was alive to the fact that the prosecution had described the appellant as a first offender and also what appellant had said in mitigation i.e. that he worked for his grandmother for whom he fetched water.

Finally, the appellant has appealed on the ground that his Constitutional right was violated since he was kept in custody for a week before being charged. The record shows that he was arrested on 13th June 2011 which was the same day of incident. He was taken to Court on 15th June 2011. The Constitution mandates that an arrested person must be charged not later than twenty four (24) hours after arrest and if the twenty four hours end outside ordinary Court hours, then on the next Court day – see ***Article 49 (1) (f) of the Constitution.*** It is not stated what day 13th June 2011 was but it is clear that he ought to have been taken to Court on 14th June 2011 unless the Court was not open on that day. That notwithstanding, the Court of Appeal has now stated that violation of a Constitutional right will not necessarily result in a trial being declared a nullity and that an accused can seek damages in a Civil Court – ***JULIUS KAMAU MBUGUA VS REPUBLIC C.A CRIMINAL APPEAL No. 50 of 2008***

For my part, having considered the evidence on both sides, I am satisfied that the trial magistrate

was entitled to arrive at the decision which he did. The evidence against the appellant was overwhelming and it would be a travesty of justice to reach any other conclusion other than that of guilt. I accordingly up-hold his conviction by both counts as there was medical evidence to confirm that the complainant was injured on her head during the incident.

On sentence, the law provides for a term of imprisonment of ***"not less than ten years"***. The trial Court was enjoined by law to impose that sentence. It is a legal sentence.

Ultimately therefore, I find that this appeal lacks merit and I dismiss it.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013

28/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel present

Language – English/Kiswahili

COURT: Judgment delivered this 28th day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013