



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 102 OF 2010

LESIT, J

MOHAMMED ABDULAHI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

*(BEING AN APPEAL FROM SRM'S COURT ISIOLO CRIMINAL CASE
NO. 1196*

OF 2009 BEING JUDGMENT AND SENTENCE OF MR. M. MAUNDU P. M.

DELIVERED ON 11TH MAY, 2010.)

JUDGEMENT

1. The Appellant **MOHAMMED ABDULAHI** was convicted with one count of Defilement contrary to section 8(1) as read with 8(3) of Sexual Offences Act No. 3 of 2006. He was found guilty, convicted and then sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal. He has raised the following grounds of Appeal:
 - i. **That the learned trial magistrate erred in law and fact by relying on evidence of PW2 PW3 PW4 and PW5 which was uncorroborated.**
 - ii. **That the learned trial magistrate erred in law and fact by ignoring the essence of the doctor's evidence which was so vital to the outcome of the case.**
 - iii. **That the learned trial magistrate erred in law and fact by ignoring the evidence of the investigation officer which kept me off the scene of crime.**
 - iv. **That the learned trial magistrate erred in law and fact by overlooking the feigned innocence of the complainant who in real sense was very conscious of the engagement between us (complainant and appellant.)**
 - v. **That the learned trial magistrate erred in law and fact by failing to estimate the guilt or innocence of the appellant noting that he presented himself to the police.**
 - vi. **That the learned trial magistrate erred in law and fact by disputing the defense of the appellant and imposing a harsh and deterrent sentence upon him.**
2. The facts of the prosecution case are that the complainant a girl of 15 years at the time was student at [particulars withheld] in S on the 14th November 2009 the complainant did not return

- home after the evening prayers her mother who was PW2 reported the disappearance to the area chief who was PW4. The Complainant was eventually found on the 17th November at M in the house of PW7.
3. According to the complainant she stated in mid-September 2009 she met the Appellant who told her that he loved her. They did not meet again until the 14th November, 2009 when they met at about 8.15 pm and both of them went to M class which was a single room with no one inside. She narrated that the Appellant asked her to remove her clothes and she removed her underpants the skirt and both had sex. She said that the Appellant promised to marry her and that they both went to live in a house at M where they stayed together as man and wife for 3-4 days. She said that the police found her in that house and arrested her.
 4. The Appellant denied this offence and informed the court that one D who is married to his uncle called him and told him of a girl who had dropped out of school and advised him to marry her. The Appellant stated that he refused to marry the girl because he did not know her and because of the many diseases these days he felt that he did not want to marry a person he did not know. He said that on the 14th November he left S for M where he booked a room and slept in a lodging. He said that the next day he called D his Aunt asking for money to go to Garissa. The Appellant stated that his aunt directed him to PW7 to go and stay there so that she could send him money the following day. The appellant said that indeed he went to the PW7 house where he was given a key to a room where he spent the night. The following day he returned the key to PW7. He then went to his uncle's herd and got a goat which he intended to raise fare to travel to Garissa. That is when he heard the news that Police were looking for him in company of a girl. He went to the police station to find out only to be arrested. He denied that he knew the complainant before and denied defiling her.
 5. This is the first Appellate Court and as expected of us by law I have subjected the evidence adduced before the lower court to a fresh analysis and evaluation while bearing in mind that I neither saw nor heard any of the witnesses and have given due allowance. I am guided by the court of appeal in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 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 that fact that the trial court has had the advantage of hearing and seeing the witnesses.”

6. I have carefully considered this appeal. It is opposed. On the Appellants part he submitted that he did not get justice in the lower court because the complainants were Boranas and they testified against him because he was a Somali. The Appellant submitted that the complainant told the court that he did not defile her and that the doctor also confirmed that the complainant was pregnant and it was not him who impregnated her as she was four months pregnant at the time of examination. The Appellant stated that he did not have any sex with the complainant.
7. Miss Mwangi for the state urged that the evidence adduced before the learned trial magistrate was sufficient to sustain the charge and that all the ingredients of the offence were proved. The learned state counsel submitted that the evidence of PW1, 2, 3, 4 and 7 was well corroborated and supported the defilement charge. Miss. Mwangi urged that the sentence of 20 years imprisonment was the minimum for the offence charged and she urged the court to dismiss the appeal. The

- Appellant has raised several pertinent issues in this appeal I will deal with each of them in sequence. The Appellant has contended that the evidence of the prosecution witnesses PW2 to 5 was not corroborative. PW2 was the mother of the complainant who said that her daughter disappeared from home on the 14th November, 2009 and was only found by PW4 on the 17th November 2005. PW4 confirmed that he found the complainant in a house at M on the 17th. PW7 was the owner of the house where the complainant was found. PW5 was the teacher where the complainant went to school and his evidence was that after the complainant left school on 13th November she never went back the following Monday. He said that on the 17th PW2 reported to her that the Complainant was missing and that as a result he informed the authorities including the ministry.
8. The evidence of PW3 was very critical PW3 was the Clinical Officer who examined the complainant on the 18th November 2009. His evidence was that upon examining the complainant, he found that she was 16 weeks pregnant (4 months). On interviewing her she gave a history of having two sexual partners that her first partner had sex in August 2009 and that she had had sex with the 2nd partner between 14th and 16th November 2009. PW3 assessed the age of the complainant as 15 years.
 9. The evidence of PW3 contradicts the complainant's evidence in material particulars. According to the complainant she had never had any sexual intercourse with any person until 14th November 2009 when she slept with the Appellant she also testified that she went to stay with him for 3 or four days at M where Police and the Assistant Chief found and arrested him.
 10. The evidence of the clinical officer was that the complainant was 4 months pregnant at the time of the examination on 18th November 2009 that means that her alleged sexual encounter with the Appellant on the 14th November 2009 could not have been the cause of her pregnancy. Since in her evidence the complainant said that she first saw the Appellant in Mid-September 2009 but had no contact with him the only explanation that can be made is that she was already expecting by the time she met the Appellant.
 11. There was other evidence by PW7 which also creates doubt in the evidence of the complainant. PW7 told the court that one D who is her in law because their children had married one another told the court that she received a call from her at 8 pm on the 16th November, 2009. PW7 testified that D told her that she had sent her brother who had eloped with a girl so that he could assist him with a place to stay. PW7 testified that indeed the Appellant went to him seeking for a place to stay and she gave him a room where he spent the night. PW7 said that the Appellant was alone when he went to her, that he slept alone and that the next day he was still alone when he returned the key to her. PW7 stated that he only heard about the complainant on the evening of 17th November when he learnt that she had been arrested in her house with her children. She however stated that she never saw the complainant at all and did not know her.
 12. PW7'S evidence contradicts the complainant's evidence because it shows that the complainant was not staying with the Appellant on the 16th and 17th of November as she claimed in her evidence. PW7's evidence tends to show that the complainant was not living at her home and was not with the Appellant at part of the time she alleges she lived with him.
 13. The Appellant has insisted that he did not live with the complainant at any one time and neither did he have sexual intercourse with her. The evidence of PW7 has provided critical corroboration to the Appellants version of the story because his statement in defence that he spent at a house provided by PW7 on the night of 16th November, 2009 most importantly PW7 Corroborated the appellants story that he was alone on the evening of 16th November and on the morning of 17th November.
 14. The learned trial magistrate in his judgment concluded

“Taking into account all the evidence on record I am fully convinced that the accused person eloped with the complainant on the 14th November 2009. Accused person took the complainant. They engaged in sexual intercourse for the period they lived together as husband and wife in M. I have no reason to doubt this evidence otherwise why would the accused person elope with the complainant if it was not to make her his wife.”

15. The learned trial magistrate misdirected himself as to what constituted proof of the offence charged and the standard of proof required. There was so much inconsistency in the prosecution case that required to be resolved before a conviction could be entered. I have highlighted those inconsistencies in the evidence. I find that they cannot be resolved. They go to the substance of the case. The inconsistencies create doubt in the credibility especially of the complainant in this case. I find that the benefit of this doubt ought to have been given to the Appellant.
16. Having carefully considered this appeal I find that the conviction was not safe and should not be allowed to stand. I find merit in this appeal and therefore allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 23rd DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE