



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 162 OF 2012

SAMUEL WARUI KARIMI APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S
COURT AT BARICHO (J.N. MWANIKI – P.M) IN CRIMINAL CASE NO. 514 OF 2011
DELIVERED ON 6TH DECEMBER, 2011**

JUDGMENT

This appeal was listed before me for hearing during the Judicial Service Week pursuant to the Honourable Chief Justice's Gazette Notice No. 13601 of 4th October 2013.

The appellant was tried and convicted by Baricho Court Mr. J.N. Mwaniki for the offence of attempted defilement of LW a child aged 12 years contrary to **Section 9 (1) and (2) of the Sexual Offences Act**. The offence is said to have been committed on the night of 28th July 2011 in Kirinyaga South District. Upon conviction, the appellant was on 6th December 2011 sentenced to fifteen (15) years imprisonment.

It is against that conviction and sentence that he filed this appeal raising eight (8) grounds of appeal which may be summarized as follows:-

1. ***That he pleaded not guilty***
2. ***That the trial magistrate erred in law and in fact by failing to consider that he was not taken to hospital for medical examination to ascertain whether he had actually tried to rape the complainant***
3. ***That the trial magistrate erred in law and in fact by relying on un-corroborative statements. PW4 said a different account over the alleged crime contrary to what PW1, PW2 and PW3 had told the Court***
4. ***That the trial magistrate erred in law and in fact when he failed to consider that the examination (sic) Medical officer contradicted the statement of PW1 by saying that complainant was sexually assaulted yet PW1 said she was not raped***
5. ***That the trial magistrate erred in law and in fact when he forced him to start the hearing of the case un-prepared and the prosecution failed to provide him, with witness statements which he only received after the case had been completed and the trial magistrate denied him an opportunity to re-examine the witnesses***
6. ***That the trial magistrate erred in law and in fact when he failed to consider that the alleged phone he was using to light the house was not produced***

7. ***That the trial magistrate erred in law and fact by not considering that PW1, PW2 and PW3 contradicted the statement of PW6 who was the Investigating officer who said PW1 was 16 – 17 years yet PW1 and PW3 said she was 12 years***
8. ***That the trial magistrate erred in law and in fact by failing to consider his sworn defence which was not shaken by the prosecution.***

I have considered the grounds of appeal and the appellant's written submissions.

The appeal was opposed and Ms Kambanga State Counsel submitted that the appellant was arrested in the complainant's house in circumstances that showed he had gone there for ulterior motives. She urged me to dismiss the appeal on conviction and sentence.

The complainant testified that she was aged 12 years at the time of the incident. A medical report produced as Exhibit 6 stated that she had not attained the age of 18 years following the examination of x-ray reports. She said on the night in question, she was asleep alone when someone broke into the house and went to her bed armed with a panga using the light of the mobile phone. She recognized the intruder as WARUI who lives in the same village. He removed his trousers and tore her skirt, petticoat and pants and attempted to have sexual intercourse with her but she screamed and MBURIA (PW2) went and rescued her. She said the appellant was the person who attempted to rape her and that he was armed with a panga (Exhibit 1). She also identified her skirt, petticoat and pants – see Exhibit 2 to 4 respectively.

JAMES MBURIA MURIUKI (PW2) testified that on the night in question, he heard screams coming from the adjacent room so he called his neighbour WACHIRA (PW3) and then went to complainant's room where the screams were coming from. They pushed the door open and found the appellant armed with a panga trying to struggle complainant whose skirt and petticoat were torn. The appellant had no trouser. They arrested the appellant and took him to the Administration Police Camp at Kangai. This evidence was corroborated by that of SAMUEL WACHIRA NJIRU (PW3). Both of them knew the appellant prior to this date.

Appellant was handed over to Police Corporal BONIFACE IRERI (PW4) of Kangai Police Camp on the same night and the complainant told him that appellant had broken into her house, tore her clothes and removed his clothes while armed with a panga and when she screamed, her neighbors rescued her.

ING (PW5) the complainant's uncle said he is her guardian and had rented a room for her and on the material night he went to her room upon hearing her screams and he found the appellant under arrest and she said he had attempted to defile her. He was taken to Police together with her torn clothes and panga.

Police Constable KIGEN (PW6) said he escorted complainant to hospital for age assessment and her age was assessed as not having attained 18 years. He also visited the scene and found that complainant's room was adjacent to other rooms.

In his defence, the appellant said he knew the complainant and that on night of 28th July 2011 he closed his work and while walking home, he was attacked and his phone, coat and wallet taken by persons who said he had used offensive language against them. He was taken to the Police where it was alleged he had defiled a child. He said WACHIRA (PW3) and M were among those who arrested him.

This being the first appellate Court, I must consider the evidence in the lower Court, evaluate it and draw my own conclusions though always bearing in mind that unlike the trial magistrate, I did not have the benefit of seeing or hearing the witnesses – **OKENO VS REPUBLIC 1972 E.A 32 and also PANDYA VS REPUBLIC 1957 E.A 336.**

From the above evidence, the recognition of the appellant is not in doubt. He was well known both to the complainant and the other witnesses who found him in the complainant's house soon after she

raised the alarm by screaming. The ground that complainant's evidence was not corroborated is not well founded. Complainant said she was twelve years and her uncle (PW5) also stated in cross-examination that complainant was aged 12 years at time of the offence. She was therefore not a child of tender years. Appellant has taken issue with the fact that although the complainant said she was 12 years old, the medical examination report put her age at 16 – 17 years. That was not really fatal to the prosecution case because he was charged under **Section 9 (1) (2) of the Sexual Offences Act**. That section creates the offence of attempted defilement with a child. A child is defined in the **Children's Act** as anyone **"under the age of eighteen years"**. Therefore whether the complainant was aged 12 years (as stated by herself and her uncle (PW5) or between 16 – 17 years (as per the age assessment report) was not really fatal to the prosecution case. The evidence of MBURIA (PW2) and WACHIRA (PW3) was corroborative enough because they found the appellant in the room without trousers and the complainant's clothes torn moments after the screams.

Appellant says he was not medically examined. The charge facing him was an attempt. No one said he raped the complainant and so there was no need to have either him or the complainant examined. What the prosecution needed to prove was that he attempted to defile the complainant. From the evidence of the complainant as ably supported by PW2 and PW3, there can be no doubt that the appellant could only have been attempting to defile the complainant. He broke into the complainant's room armed with a panga. Then he went to her bed, tore her skirt, petticoat and pants and removed his trousers. His intentions could only have been to defile the complainant and he was clearly intent on accomplishing that intent until the complainant screamed and PW2 and PW3 intervened. The steps he took that night could only have been in furtherance of his intention to defile the complainant and there was no reason given to the trial Court or even to this Court why the complainant and her witnesses would give false testimony against him. The appellant himself confirms that WACHIRA (PW3) was among those who arrested him thus lending credence to the evidence of PW2 and PW3 that they in fact arrested him at the scene. The trial magistrate was satisfied that his defence was dislodged by the credible prosecution evidence against him. From the evidence on record, the trial Court was entitled to arrive at the finding that the case against him was proved. It cannot therefore be correct to state, as he does in his appeal, that his sworn defence was not shaken by the prosecution case. Neither can it be true that the trial Court denied him statements or an opportunity to cross-examine the witnesses. The record shows that he cross-examined all the witnesses and at no time did he complain to the trial Court that he did not have the witnesses statements. The fact that the phone he was using as a torch was not produced in trial is really not fatal because his recognition and arrest at the scene moments after the offence was not in doubt. He was in fact handed over to CPL IRERI (PW4) on the same night of the incident. From the evidence, the appellant's conviction was inevitable and I accordingly dismiss his appeal on conviction.

On sentence, Section 9 (2) of the Sexual Offences act provides as follows:-

"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

In imposing a sentence of fifteen (15) years imprisonment, the trial magistrate took into account the prevalence of such offences especially against minors. The sentence was itself lawful and I see no reason to interfere with it.

The up-shot of the above is that the appeal against sentence and conviction is hereby dismissed.

B.N. OLAO

JUDGE

22ND OCTOBER, 2013

22/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – Kiswahili/English

COURT: Judgment delivered this 22nd 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

22ND OCTOBER, 2013