REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 323 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 4390 of 2008 dated 18th August 2010 in the Chief Magistrate's Court at Thika by Hon. M. R. Gitonga - SPM)

JOHNSON KARIUKI KURIA……..……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

The Appellant John Kariuki Kuria was convicted for the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced upon conviction to serve 10 years custodial sentence.

He has appealed to this Court against the said conviction and sentence. In the Appeal, he set out *inter alia* Grounds as follows:-

1. That I am deeply remorseful.
2. That my mitigation and defence was ignored by the learned trial Magistrate.
3. That this is a case of malice and fabrications.
4. That the trial was conducted in an unprocedural manner in that the alleged complainer never came to testify.
5. That the prosecution miserably failed to establish a case against him.

He was furnished with the certified proceedings and filed an Amended Grounds of Appeal. The grounds were given as follows:-

1. That the lower trial Court erred in holding that the Appellant defiled the complainant without considering that as the key witness she never testified in Court hence the prosecution case was not proved beyond reasonable doubt.

2. That the lower trial Court erred in holding that the recoveries of blood stained sheet bed sheet, torn pants and knife go to support that the offence indeed took place, not to mention medical reports without observing that the alleged recovery was tainted with doubt.

3. That the lower trial Court erred in holding that the evidence of PW1 was corroborated by that of PW4 without considering that there was need for further investigations such as medical examination of forensic nature as stipulated in Section 36(1) of the Sexual Offences Act No. 3 to clear shadows of doubt.

4. That the lower trial Court erroneously held that Appellant's defence was mere denial and shifted the burden of proof on the Appellant without considering the same lies with prosecution hence Section 107 of the Evidence Act (Cap 80) was not complied with.

The Appellant stated that the failure by the complainant to testify was fatal. The Appellant relied on the Supreme Court Manila case of **The People of the Philippines vs. Generoso Sujetado y Emerllarin G. R. No. 103967** where the Supreme Court of the Philippines held that failure to produce a moral certainty in the mind of the Court would lead to acquittal.

The Appellant before me also raised an issue regarding the testimony of PW1, PW2, PW3 and PW4 stating that their evidence was not clear and convincing. Their story, he said, smacked of concoction rather than the narration of the truth. He asserted that the prosecution failed to present proof beyond reasonable doubt. He held that because the complainant failed to testify in Court the charge cannot stand. He stated that no forensic or DNA test was done to establish beyond reasonable doubt that he defiled the victim. He submitted that the burden of proof was shifted to him. He stated that on strength of **Osiwa v. R [1989] KLR 469** he was under no obligation to prove his alibi. He said that the trial Magistrate erroneously rejected his unsworn statement without giving cogent reasons and that the same was not rebutted by the Prosecution.

The State through Mr. Njeru, learned State Counsel opposed the Appeal. He submitted that the evidence was sufficient and was properly considered. The complainant never gave her evidence and the Court noted that it was the family of the Appellant that had taken her to Western Kenya. He urged that there was sufficient evidence that the Appellant sexually abused the complainant who told her teacher how her cousin had sexually abused her. The complainant was taken for examination and she was distressed. The Appellant as he abused her threatened her with a knife, she was found bleeding in her private parts. The doctor confirmed that she was penetrated. The items recovered were recovered in the house in the presence of the Appellant as the two shared a roof. She stated where the knife and panty were kept and these were recovered. The complainant was threatened and she was vulnerable in terms of Section 31 of the Sexual Offences Act. The evidence she would have given was given by intermediaries – her teacher PW1 and the medical reports, police investigation and the clothing recovered. PW1 had no grudge against the Appellant. The family of the complainant did not testify and the teacher should be congratulated as the family tried to scuttle the trial. Regarding the authority cited from the Philippines, Mr. Njeru stated that it was not binding on the Court and should be disregarded.

In a brief reprise, the Appellant stated that the prosecution and the Court had opportunity to arrest those who caused the complainant not to attend Court. He stated that the evidence tendered was not true.

The case before me is peculiar for the simple reason that the complainant did not testify. In many criminal cases conviction can be secured even where victim does not testify. Such cases include murder and manslaughter as well as defilement of children of extremely tender age. Thus, failure by the victim of a defilement case to give evidence is not necessarily fatal to the prosecution case provided that there is other cogent evidence to support the conviction. The position was taken in the case of **Patrick Akol v. Uganda CR. Appeal No. 23 of 1992 (S.C)** (unreported). I am persuaded that the failure by the complainant to testify was not fatal to the prosecution case. There was clear and cogent evidence to support the conviction. The case in the Philippines though merely persuasive on legal arguments does not aid the Appellant. In the case before the Philippines court was one where the evidence of witnesses did not hold up and the victim was quite promiscuous and that affected the weight of evidence. The Magistrate in the case below, from which this Appeal flows, had no doubt about the testimony heard and in this case the weight of evidence was overwhelming and consistent.

I have evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate and find that the said Magistrate did not err either on the law or facts. Notwithstanding the failure by the prosecution to avail the complainant the conviction was safe and the sentence of 10 years lawful. I find no merit in this Appeal and dismiss it in its entirety.

Dated, signed and delivered this 29th day of November 2013

Nzioki wa Makau

JUDGE