



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 332 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 4628 of 2007 dated 6th July 2010 in the Chief Magistrate's Court at Thika by Hon. L. Gicheha - SRM)

BARACK ZAMANDU JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant Barack Zamandu Juma was convicted for the offence of defilement of a child contrary to Section 8(1)(3) of the Sexual Offences Act 2006.

He has appealed to this Court against the said conviction and sentence. The initial Memorandum of Appeal attacked the conviction on inconclusive evidence, fabrication of charges and disregard for the defence made and finally, that the case was not proved. The sentence imposed was stated to be manifestly harsh and excessive.

When he was furnished with the certified proceedings and he filed Amended Supplementary Grounds of Appeal. These were:-

1. That the learned trial Magistrate made a crucial error in both law and facts and grossly misdirected herself by basing his conviction in reliance on PW2 and PW3 whereas their evidence was full of contradictions and inconsistencies making it unsafe to secure a conviction.
2. That the burden of proof was not discharged by the prosecution as would be expected.
3. That there was violation of section 150 of the CPC as some of the essential witnesses were not summoned by the prosecution.
4. That the Appellant's conviction was based on mere speculation.
5. That the learned trial Magistrate failed to adhere to the provision of Section 169(1) of the CPC more so in relation to his defence statement.
6. That the sentence is harsh and excessive having regard to the evidence on record.

The Appellant stated that the doctor who examined PW1 did not come to court in person and that he was compelled to ask questions as far as the examination of complainant went. He stated none of the questions were answered by the doctor. He doubted that the person who testified was even a doctor. He stated that in his defence he called a grounds man who acted also as a Gate keeper and night watchman. The grounds man said that there was no one in the compound at the time Appellant is said to have called the complainant. The school had only one entrance. The Appellant said that the grounds man saw the Appellant going home with his colleagues and that there was no one else in the compound.

The Appeal was opposed. Learned State Counsel appearing for the Respondent Mr. Njeru said that the evidence was sufficient to prove the offence of defilement. There was medical evidence that the girl was penetrated. There is also evidence that she told her mother she had sex with the Appellant. She claimed they were lovers. The fact that she was his lover may have enticed her to alter her evidence to say he removed her clothes, touched her breasts, vagina and kissed her. There is medical evidence there was sexual activity thus defilement was proved. If defilement is proved the Court should pass a sentence of 20 years. If the Court believes that the teacher only touched the minor's breasts and other parts then a conviction under Section 11(1) be entered. He did commit an indecent act with a child if the evidence of the child is believed. There was contact of his mouth and hands with the breasts and genital area. The Court should retain the 15 years as minimum sentence under Section 11 is 15 years. He was a man in authority, he took advantage of the trust. He is supposed to mentor the student but instead he abused that trust. He does not deserve lenience. He urged that a person charged with defilement of a girl under 15 years may be convicted of an offence under the Sexual Offences Act.

The Appellant rebutted the submissions of the State Counsel by stating that he was trusted by everybody and the complainant maintained that she was only touched in her private parts. He urged the Court to note those were mere allegations. He said there were people behind this and they implicated him and that he had done nothing to the lady.

As the Court of first Appeal, I have to consider the evidence once again and weigh it to see if the conviction was safe and the sentence lawful. The Appellant has made heavy weather of the exoneration he is said to have received from the complainant PW1. She stated in her testimony, and I quote,

I recall 22/10/08 at 7pm. I was in school with my teacher the accused. The other children had gone home. I had been left because the accused had told me to wait for him. The accused was in the office. The accused did bad things to me. Yes the accused told me to wait for him. I waited for him in the school compound. The other pupils went home at 5pm. I waited upto 7pm. The accused then called me to the office. The accused was alone in the office. The accused told me he loved me. I also told the accused I loved him. Then the accused removed my PE Kit that I was wearing. He also removed my pant. Both these clothes reached my feet bottom. The accused then lifted my uniform dress up to the waist. Then the accused was wearing a trouser and shirt. The accused then touched my breasts and my vagina. That went on for about 2 minutes. I then went home and told my mother what happened. I still love the accused. No, the accused did not do anything else apart from touch me where I have said. This is treatment card. I produce it as Exhibit. (Ex. No. 1) I was treated. I was given drugs. Then we reported matter to Ruiru Police Station. I was given P3 form. It is this one. (MFI -2) I made my statement to police. Then the accused was arrested.

She responded during cross-examination by the Appellant that he is the one who had told her to remain behind. Her testimony was as follows:

You escorted me home.....You removed my clothes but you did not play sex with me and you did that when we were in school.

When she was re-examined by the Prosecutor she said:

The accused did not sleep with me. He touched my breasts and also my vagina. He also kissed my lips.

PW3 was the Clinical Officer who examined the complainant and filed the P3 Form. In her testimony she stated that she is the one who examined PW1 when she came to Hospital. The Appellant did not ask the witness any question. He therefore is not candid when he states that he was compelled to ask her only some questions as the one who ought to have testified did not come. He spoke of a male doctor. Nowhere in the evidence and treatment records is a male doctor indicated. The one who examined the girl at the

Ruiru Sub District Hospital is the one who testified. There is no iota of truth in the challenge by the Appellant against the medical evidence adduced.

The exculpatory facts and the inculpatory facts are part of the evidence the learned trial Magistrate considered in coming to her conclusion that PW1 was fond of the Appellant and thus shielded him from testimony PW1 could adduce. The medical evidence revealed there was sexual contact proximate to the evening the Appellant had spent with PW1. That secured the conviction. The sentence meted out was 15 years.

As regards sentencing, the fundamental purpose of sentencing is to contribute, along with other crime prevention initiatives, to the respect for the law and the maintenance of a just, law-abiding citizenry by imposing adequate sanctions which achieve the following objectives:-

- (a) denunciation of unlawful conduct;
- (b) deterrence of the offender and other persons from committing offences;
- (c) remove offenders from society, where necessary;
- (d) rehabilitation of offenders;
- (e) facilitate reparations for harm done to victims or to the community; and
- (f) promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Sentences meted out must be proportionate to the gravity of the offence and the degree of responsibility of the offender. When a court that imposes a sentence it should also take into consideration the lack of remorse, a sentence could be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender such as repetitiveness. Without limiting the generality of the foregoing, where there is evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim a sentence can be enhanced. The Appellant in this case was a teacher to PW1. He held a position of trust. The mother of PW1 even thanked him for dropping the girl home! He abused that trust. His sentence was proper. I can only interfere with the sentence if there is cause. Section 354(3) provides:

354 (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(a) in an appeal from a conviction -

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

Having carefully considered the Appeal and the submissions made by the Appellant as well as the response by State Counsel for the Respondent I find that there is no merit in the Appeal. I will not interfere with the conviction or sentence as there are no sufficient grounds to do so. The conviction was safe and the sentence lawful. I dismiss the Appeal in its entirety.

Dated, signed and delivered this 28th day of November 2013

Nzioki wa Makau

JUDGE