



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: Fred A. Ochieng J.]

HCRA NO. 69 OF 2012

HARON KUBATI KHATITI- :::::::::::::::::::::APPELLANT

=VERSUS=

REPUBLIC :::::::::::::::::::::RESPONDENT

***[Being an appeal from the judgment of Hon. D.K. Kemei,(PM) delivered on 16th May, 2011,
at the Chief Magistrate's Court Eldoret in Criminal Case No. 3326 of 2010]***

JUDGMENT

HARON KUBATI KHATITI, the Appellant herein, was convicted for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. He was then jailed for 20 years.

In his appeal, the Appellant submitted that the case against him was not proved beyond any reasonable doubt.

Mr. Mutai, the learned advocate for the appellant, submitted that there was contradictory evidence concerning the date and the place where the Appellant was arrested.

Whilst the trial court held that the Appellant was arrested on 3rd June, 2010, at the scene of crime, the Appellant pointed out that the incident took place on 2nd June, 2010.

Thus, if the Appellant was arrested on the day following the incident, he could not have been at the scene of crime.

Meanwhile, the lady who had allegedly seen the Complainant sitting on the Appellant's bed, had said that the Appellant had been seen leaving his room whilst holding condoms. That implies, in the Appellant's understanding, that the arrest would have been shortly after the incident took place on 2nd June, 2010.

So, if P.W.6 arrested the Appellant on the following day, the Appellant submitted that the two sets of evidence, concerning his arrest, were contradictory.

In answer to the appeal, **Mr. Mulati**, learned State Counsel, submitted that on the date when the complaint was defiled, the Appellant was first arrested by some youths.

However, it was not until the following day that the police re-arrested him.

As far as the Respondent was concerned, it is the date when the police re-arrested the Appellant that was cited as the formal date of arrest. In effect, the Respondent saw no contradictions about the date of the Appellant's arrest.

The Respondent also submitted that the evidence adduced by the prosecution, proved the case against the appellant beyond any reasonable doubt.

In reply to the Respondent's submissions, the Appellant pointed out that the prosecution had indicated that he was handed over to the police on the same date when he was arrested. Therefore, if the young men arrested him on 2nd June, 2010, that is the same date when they handed him over to the police.

Being the first appellate court, I have re-evaluated all the evidence on record. The starting point was the charge sheet, which stated that the offence was committed on 2nd June, 2010.

P.W.1 is the Complainant. She testified that on 2nd June 2010, she went to the home of S (P.W.3). At that home, P.W.1 found the Appellant, who was looking after cows.

P.W.1 said that the Appellant took her into a house, where he removed her under pants. P.W.1 went on to testify as follows:

“He also removed his and he lay on top of me, and he fucked me (alitomba)”

According to P.W.1, the Appellant disappeared from the area after he had defiled her. Therefore, PW.1 said that she did not know the persons who went to arrest the Appellant.

P.W.2 is the Complainant's mother. She received information about the incident on the next day. She then took her daughter to the hospital, for medical check-up.

P.W.2 was aware that her daughter had gone to visit S (P.W.3), and also that the Appellant used to work for P.W.3.

P.W.3 testified that the Appellant used to be her employee. P.W.3 left the Appellant at her house on 2nd June, 2010, when she went to buy fertilizers from Eldoret town.

When P.W.3 got back home, P.W.4 informed her that P.W.1 had emerged from the Appellant's room, in the company of the Appellant.

As P.W.4 had noted that P.W.1 was walking with difficulty, both P.W.3 and P.W.4 checked the Complainant's private parts. The two ladies noted that the Complainant's private parts were swollen and reddish.

According to P.W.4, who is a neighbour to P.W.3, she had gone to P.W.3's house to buy milk. However, P.W.3 was not at home.

As P.W.4 was hearing some loud music coming from the kitchen, she called out. At that point, the Appellant came out, holding some condoms.

The Appellant then returned the condoms to his pocket, as he went to get milk for P.W.4.

Suddenly, a young girl emerged from the house of the Appellant. But just before the girl emerged, P.W.4 had noticed her, as the said girl was sitting on a bed, inside the house.

It was the testimony of P.W.4 that the young girl was walking with difficulty, prompting P.W.4 to suspect that the Appellant had defiled her.

P.W.4 phoned P.W.3, and alerted her about her suspicions. The two ladies then examined the Complainant, and found that her vagina was swollen and reddish.

During cross-examination, P.W.4 said that at the time she got to the house where the Appellant was, there was no other person, save for the Complainant.

P.W.5 is a medical doctor. She examined the Complainant and found that there was redness and laceration of the hymen. However, the doctor did not see any discharge. The Complainant's hymen was torn.

P.W.6 is a police officer attached to the Kapsoya Police Station. He re-arrested the Appellant at the Kuinet A.P. Post. He did so on 3rd June,2010.

After the Appellant was put to his defence, he gave sworn testimony. He confirmed that he had worked for P.W.3. His evidence was that on 1st June, 2010, he asked for his wages, as he desired to go home. P.W.3 promised to pay him on the next day, but did not do so. Instead, P.W.3 promised to pay him on 3rd June,2010.

P.W.3 did not honour her word on that date or on the next day. Later, on 14th June, 2010, a crowd attacked the Appellant, without telling him what he had done. The crowd then frog-matched the Appellant to the nearby police post.

In a nutshell, the Appellant attributed his arrest to the fact that he had demanded his wages from P.W.3.

During cross-examination, the Appellant said that he was arrested at the home of P.W.3, for whom he had worked as a herdsman. He also said that he used to, occasionally, milk his said employer's cows. However, the Appellant denied committing the offence.

Being the first appellate court, I have re-evaluated all the evidence on record. I have also taken into account the submissions canvassed by both the parties.

I note that although the typed record shows the Appellant as saying that he was arrested on 14th June,2010, the hand-written record actually shows that the correct date (cited by the Appellant) was 4th June,2010.

That is significant because the charge sheet indicates that the Appellant was arrested on 3rd June,2010.

The Arresting Officer, P.W.6 also testified that he arrested the Appellant on 3rd June, 2010. He did so at the Kuinet A.P. Post.

The Appellant also said that the crowd that arrested him, took him to the nearby police post.

It is not clear whether what the Appellant talked about was the same A.P. Post that P.W.6 testified about. But it is clear that the Appellant was arrested by a crowd of people.

P.W.3 described those who arrested the Appellant as "*village youths*". But when was the

Appellant arrested?

He said it was on 4th June,2010, whilst the charge sheet cites the date as 3rd June, 2010.

Meanwhile, the incident in issue, took place on 2nd June,2010. The Complainant testified that she followed the Appellant outside the house where she had been defiled.

That testimony was corroborated by P.W.3. However, the Complainant said that the Appellant disappeared from the scene, after the incident. As the Appellant was said to have disappeared, the Complainant did not know the people who arrested him.

If the Appellant had disappeared from the scene, he could not have been arrested at the same place. The converse is equally true; that if, (as P.W.3 said), the Appellant was arrested at the scene, then he could not have disappeared from the scene.

The circumstances surrounding the Appellant's mode of arrest are thus unclear. However, if that factor were to be considered alone, it may not have had a major significance, in my considered opinion.

P.W.3 said that when she left her house, to go into Eldoret town;

“ I had left the accused and the girl alone in the home as I left for town”.

But during cross-examination, P.W.3 said;

“Yes, I left you alone in the house, while the girl always comes from school by 1 p.m.”

If the Complainant was already at the home of P.W.3 by the time that witness left for town, it cannot also have been true that the Appellant was alone when P.W.3 left for town.

It is thus not clear whether the Complainant got to P.W.3's house after P.W.3 had left for town, or if P.W.3 left the Complainant in her house.

The Complainant said that she was escorted to the hospital by P.W.3. But the girl's mother (P.W.2) said that she is the person who escorted her daughter to the Moi Teaching and Referral Hospital.

Meanwhile, P.W.4 said that the Complainant was ***“rushed”*** to the hospital, at about 4 p.m..That would mean that the Complainant was taken to the hospital on 2nd June,2010.

But the girl's mother and the police officer (P.W.6) who escorted the girl to the hospital, both said that that was done on 3rd June, 2010.

I also note that the Complainant said that she was eight (8) years old. P.W.4, who testified that she saw the complainant as she was leaving the Appellant's house, also said that the Appellant was about eight (8) years old.

However, the medical doctor testified that the Complainant was twelve (12) years old.

Meanwhile, the charge sheet indicated that the Complainant was nine (9) years old. The Prosecution did not make any attempts to reconcile or to explain the discrepancies in the age of the Complainant.

In the result, I find many issues which called for clarification from the prosecution. As no such clarification was provided, I hold the considered view that it would be unsafe to uphold the conviction. I therefore allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF NOVEMBER, 2013.

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FRED A. OCHIENG
JUDGE.