



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 63 OF 2013

IVIA MUSEMBIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 253 of 2012 in the Principal Magistrate's Court at Kyuso - E.M. Mutunga (RM) on 14th May, 2013)

JUDGMENT

The Appellant, Ivia Musembi was tried, convicted and sentenced to serve twenty years imprisonment for defilement contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2003. It was alleged that on 27th November, 2012 at [particulars withheld], Tseikuru District in Kitui County the Appellant caused penetration of the sexual organ of N G a girl child aged 12 years using his male sexual organ.

The Appellant being dissatisfied with the conviction and sentence has appealed to this Court.

When the appeal came up for hearing on 16th October, 2013 the Appellant informed the Court that he was relying both on the petition of appeal filed on 17th June, 2013 and the amended petition of appeal dated 15th October, 2013.

A perusal of the two documents reveals that the grounds of appeal are the same and can be summarised into three namely that the medical evidence did not support the offence of defilement; the circumstances prevailing at the time of the alleged offence were not conducive for identification of the complainant's alleged attacker; and the trial magistrate did not consider the Appellant's defence and more so his alibi.

This being the first appellate Court, my duty as was explained in **OKENO v REPUBLIC [1972] E.A 32** is to reconsider the evidence, evaluate it and arrive at my own conclusion. In doing so, I must give due allowance to the fact that I neither saw nor heard the witnesses testify.

The complainant (N.M.) testified as PW1 and told the Court that on the material night she was sleeping alone with other children since their grandmother who used to sleep with them was not around. Her brother, PW2 M M was asleep in a separate house. The complainant told the Court that the Appellant went and removed her biker and pants and inserted his manhood in her sexual organ. She started crying and her brother asked the Appellant what was going on and the Appellant told him that she was crying over nothing. The complainant told the Court that she was having sex for the first time on that night and she bled from her private parts. She also informed the Court that she identified the Appellant using moonlight as she knew him prior to the incident.

PW2 told the Court that on the material night he was listening to a radio in his house when the Appellant went and ask him which house he was sleeping in. After answering him, the Appellant went away. He later heard the complainant crying and went to the house she was sleeping in. He enquired from the Appellant what was happening and the Appellant informed him that the complainant was crying over nothing. The Appellant then walked out of the house and went away. It was then that the complainant informed him that the Appellant had defiled her.

PW3 M M informed the Court that she was the grandmother of the child. She told the Court that on 27th November, 2012 she left home at around 11.00 p.m for burial arrangements at another homestead. When she came back the following day she was informed that N.G. had been defiled by the Appellant. She wanted to inspect the child's private parts but the child refused to be examined. She noted that the complainant was limping. She went and reported the matter to the police. The complainant was taken to hospital. During cross-examination PW2 told the Court that she saw bloodstains on the complainant's lessa and at the hospital she was informed that there was a tear in the girl's sexual organ.

PW5 Jeremiah Kalola is the clinical officer who examined the complainant. He informed the Court that although the girl's hymen was intact there was evidence of an infection with a sexually transmitted disease. On cross-examination he informed the Court that the infection could have been caused by deposit of sexual juices without any penetration.

In his defence the Appellant testified that he was asleep in his house with his wife on the material night. He told the Court that about a week prior to the alleged incident he had quarreled with the complainant's mother over grazing land. He attributed his tribulations to the land dispute.

DW2 M M told the Court that the grandmother of the complainant and the Appellant had a long-running boundary dispute.

In proceeding to convict the Appellant, the trial magistrate stated in her judgment that:-

“I have therefore come to the conclusion that the complainant was penetrated, am satisfied that she was slightly penetrated as per P3 form produced in court. It follows that penetration however slight it is sufficient to sustain the charge of defilement.”

This conclusion is not supported by the medical evidence. The treatment card which was produced together with the P3 form shows the hymen was intact and there was no tear. The P3 form contains the same information. The clinical officer (PW5) told the Court there was no penetration.

The evidence of PW5 clearly contradicts that of the complainant who told the Court she bled. That means there should have been tears which ought to have been seen by the doctor. PW3 also told the Court that she saw blood on the complainant's lessa. This also contradicts the evidence of PW5. The grandmother of the child told the Court that the medical officer told her the complainant had injuries in her private parts. This cannot be true because the treatment card clearly shows there was no tear. Secondly, and this goes to completely damage PW3's credibility is the fact that PW3 told the Court it is not her but her husband who took the complainant to hospital. At what stage then did she have the alleged conversation with the medical officer?

Considering that there was no evidence of penetration, one cannot say that the Appellant defiled the complainant. From the evidence of PW1 and PW2 it can be said that the Appellant performed an indecent act on the complainant. However, there are doubts created in the Court's mind about this. I have already shown that the complainant was not truthful when she claimed that she bled and she was injured. I doubt if she can be believed when she says that the Appellant went to their home on the material night.

The Appellant argued that the trial magistrate did not consider his alibi. According to **Black's Law Dictionary, 9th Edition** at page 85 alibi is said to be:-

“A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a

location other than the scene of the crime at the relevant time.”

It is noted that the Appellant did not tender such a defence. His witness did not state that he was with him at the time of the alleged offence.

The Appellant also argued that the trial magistrate did not consider his defence and that of his witness. According to the Court record, it is shown that during cross-examination the complainant stated that she was not aware of any land dispute. This ought to have alerted the prosecutor that the Appellant's defence was to the effect that there was a grudge between him and the family of the complainant. The prosecutor ought to have specifically put this question to PW5 so as to clear the air. The Appellant and his witness told the Court that the case against him could have been fabricated owing to the land dispute he had with the complainant's family. The magistrate only stated that the Appellant was untruthful but there is no comment on the evidence of DW2. Considering the contradictory evidence adduced by the prosecution, one cannot rule out the fact that the charge against the Appellant could have been fabricated.

Considering the evidence adduced in this case, I find that there may not have been any contact between the Appellant and the complainant on the material night. The benefit of doubt should have been given to the Appellant. I therefore allow the appeal and set aside the sentence and conviction. The Appellant is therefore set at liberty unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT