



PETER KIMEU KIMALYA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the conviction and sentence in Resident Magistrate's Court Criminal Case No. 103/2008 by Hon. A.W. Mwangi, Ag. SRM on 26/1/2009)

JUDGMENT

Peter Kimeu Kimalya, hereinafter “*the appellant*” was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual offences Act before the Senior Resident Magistrate’s Court at Kithimani, particulars being that on 12th February, 2008 , at [...] Village, [...] he defiled **N.M.** a child aged 8 years. The appellant denied the charge and was soon thereafter put on trial.

Four (4) prosecution witnesses testified on behalf of the prosecution. Briefly, the prosecution’s case was that on 12th February, 2008, PW1 who was a minor and the complainant in the case, went home from school and found the appellant who was an employee in their home. The appellant then took her to a bedroom and defiled her. When done, he left. PW2 who is the complainant’s mother went home later that day and found the complainant bleeding from her vaginal area and walking with a lot of difficulty. She took her to a private hospital and later to Mwingi District Hospital where she was treated. Following treatment her P3 form was filled by PW3, a clinical officer. He concluded upon examination that the complainant had been defiled. Her hymen was freshly torn and at the time of examination, she was still bleeding from her private parts. Both the complainant and her mother (PW2) positively identified the blood stained dresses and underpants that the complainant wore on the material day. Upon further investigation by PW4, the investigating officer, the appellant was then arrested and charged with the offence.

In his defence, the appellant gave an unsworn statement and did not call any witnesses. He admitted that he was the complainant’s father’s employee and that on a certain day, the said employer asked him to accompany him to Mwingi Hospital and they then went to the police station. The appellant never knew why he was taken to the police station instead.

The learned magistrate having evaluated the evidence on record by the prosecution and defence was satisfied that the case against the appellant had been proved to the required standard. She accordingly entered a conviction against the appellant and sentenced him to life imprisonment.

This conviction and sentence triggered this appeal. The appellant complained that his conviction and sentence could not be sustained because, his identification was suspect, the discrepancies and contradictions in the prosecution evidence were not resolved in his favour as required, the prosecution case was not proved beyond reasonable doubt as required, vital witnesses were not called, his defence was not given due consideration and finally, the sentence imposed was harsh and excessive.

When the appeal came up for hearing before me on 14th June, 2012, the appellant chose to argue the same

through written submissions. I have carefully read and considered them.

The appeal was opposed. **Mr. Mwenda**, learned State Counsel submitted that the appellant was positively identified by the complainant, there was no history of animosity between the complainant, her family and the appellant as would have precipitated a frame up. On the whole, the prosecution case was watertight and counsel therefore urged me to dismiss the appeal.

Before venturing into considering the merits or otherwise of the appeal, I think it is necessary to set out what I consider to be the approach, function and duty of the first appellate court in connection with this appeal. An appeal from subordinate to an appellate court to this court is by way of a retrial. However, the appellate court is not bound necessarily to accept the findings of fact by the subordinate court but must reconsider the evidence, re-evaluate it and make its own conclusions, although always bearing in mind that it had not had the advantage of the trial court in seeing and hearing witnesses.

In this case the trial court had 2 issues to determine:-

- Whether the complainant was defiled, and if so,
- Whether it was the appellant who had done so.

Dealing with the 1st issue, the evidence of PW2 and PW3 has given me considerable anxiety on this aspect of the matter. It leaves doubt in my mind as to whether really the complainant was defiled. PW2 who was the complainant's mother testified that when she asked the complainant at first why she was crying, the complainant told her that she had been pierced by a stick in her vagina. In her own words-

"...she told me she had been pierced by a stick on her vagina..."

The complainant further described to her how she was injured. Apparently and in her own words-

"she told me that she had sat on a stick and it had injured her."

I am unable to agree with the trial court's finding that what the complainant stated above was borne out of her reluctance to tell the truth. There was no basis or evidence on record to support such finding. Similarly, the holding by the learned magistrate that there were threats issued to the complainant by the appellant so as not to disclose the truth was not founded on any factual or evidential basis. The complainant throughout her testimony does not at all allude to such threats being issued. The complainant was a child then aged 8 years. Children at that age ordinarily do not know how to lie. In any event, the allegations of defilement were first raised by the clinical officer (PW3). According to PW2 again;

"The child was examined and I was told that was a rape case..."

One wonders how she could not have known that fact yet she had initially been told by the complainant's grandmother before examination. As for the clinical officer, he is recorded as saying thus;

"... the grandmother told me that the girl had been molested by one known to her..."

Pausing here for a moment, what time did the complainant disclose to the grandmother, who was not even called as witness, that she had been defiled? Was it after the examination as opined by PW2 or before as narrated by PW3? Such lingering doubts would have been cleared by calling the grandmother as a witness. Obviously, failure by the prosecution to call her as a witness occasioned prejudice to the appellant.

Is it possible that the injuries sustained by the complainant could actually have been caused by the complainant being pricked in her vagina by a stick? That possibility was not wholly ruled out. However, I think that since the clinical officer had been told of defilement while taking down the medical history of

the complainant, it was easy for him to come to such conclusion. But, there was PW2's evidence which suggested that the complainant had been injured by a stick. Further when the complainant testified, the magistrate noted that the complainant was not expressing herself freely. Yet the proceedings were being conducted in camera. That being the trial court's observation, I doubt whether the learned magistrate's finding in her judgment that;-

“She struck the court as an honest witness and her evidence remained consistent even in cross-examination by the accused person...”

had any factual basis. Looking at the complainant's evidence, one is struck with the details which come through. That cannot be the evidence of 8 years old. To me, it appears that her evidence was actually rehearsed. I doubt whether what the complainant said was the truth. The assertion by PW2 that the complainant was threatened by the appellant not to mention to anybody what had occurred between them never came through the testimony of the complainant. The complainant was best placed to testify to that fact as opposed to PW2. It is possible that the injuries suffered by the complainant could have been caused by a stick pricking or piecing her vagina. I will resolve the doubt so created in favour of the appellant.

I am therefore satisfied that the conviction of the appellant in the circumstances was not based on watertight evidence. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH DAY of JULY 2012.

ASIKE-MAKHANDIA
JUDGE