



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 99 of 2011

JOHN GICHERU KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Naivasha Criminal case No. 1836 of 2010 by E. Boke SRM dated 5th April 2011).

JUDGMENT

The appellant, John Gicheru Kariuki, was charged that on the 23rd day of July, 2010 at Kitiri Village Engineer Location of Nyandarua South District within Central Province he caused his genital organ (penis) to penetrate the genital organ (vagina) of SWK a girl aged 9 years.

The trial court upon considering the evidence presented before it found that the offence was proved beyond reasonable doubt, convicted the appellant and sentenced the appellant to life imprisonment.

Aggrieved by the conviction and sentence the appellant brought this appeal challenging the decision of the trial court on the following summarized grounds:

- 1) that the case was not proved beyond reasonable doubt;
- 2) that the evidence of the prosecution witnesses was contradictory and inconsistent;
- 3) That the learned trial magistrate erred by convicting him on evidence of mistaken identity.

Learned counsel for the appellant submitted that the investigating officer failed to avail the victim's clothes for the court's observation and that that failure was fatal to the prosecution case; that there was bad blood between the complainant's mother and the appellant and that the evidence of the prosecution witnesses was contradictory. He further submitted that the appellant was not examined to determine whether there was evidence to link him to the offence and that the trial court erred in disregarding the appellant's defence despite the same having been confirmed by his witnesses.

Counsel for the respondent while conceding the appeal submitted that the trial court failed to evaluate the appellant's defence; including the evidence by his witnesses confirming his *alibi* defence. Instead the trial court misdirected itself by shifting the burden of proof to the appellant.

This being a first appeal, it is the duty of this court to re-evaluate the evidence, presented at the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify.

The complainant (SW) told the trial court that on 23 July 2010 while going home from school she met the appellant who held her hand and pulled her to his house; that she was in the company of other children but the children did not see her being held by the appellant as they were ahead of her. The appellant removed her pants and lay on her. She felt pain at her private parts (vagina) and cried. After he finished, the appellant told her not to tell anybody what he had done to her.

P.W.1, the complainant's mother, told the court that on the material day the complainant arrived home at 3 pm as opposed to 1 pm. When she asked her why she was late she (the complainant) told her that the appellant had defiled her. She noticed that the complainant had blood on her clothes. She took her to Nyayo Ward Hospital for treatment.

P.W.4, Ruth Wanjiku, treated the complainant a day after the date of the alleged incident, on 24th July, 2010. She noticed that the complainant's hymen had been broken and that there was discharge but no spermatozoa.

P.W.3, Dr. Erick Tereri, examined the complainant on 27th July, 2010 and noted that the injury on her body was 5 days old. He observed that the complainant's hymen was broken and that she had bruises on the labia. He concluded that the complainant was defiled.

P.W.5, P.C Jackson Kathumbi arrested the appellant and charged him.

In his defence the appellant told the court that on that day, 23rd July 2010, he went to work some 7 to 8 Kilometres away; that he remained at his place work till 4 p.m. His evidence was confirmed by the evidence of witnesses (D.W.3, Samuel Matheri Hongo, and D.W. 4, Samuel Gachingo Muira). D.W.3 testified that he had hired the appellant and some other nine (9) young men to carry posts for him on 22nd and 23rd July 2010; that the appellant was on duty from morning to evening on those days; and that lunch was provided at the premises. D.W. 4's testimony confirmed that they were working for D.W.3 on the material day and that the appellant had no opportunity to commit the offence. He suspected that the appellant was framed up owing to a family grudge.

That was the evidence upon which the trial court found the charge against the appellant proved beyond reasonable doubt and convicted him.

From the evidence I find as a fact that the appellant was defiled. The issue for determination is whether the appellant was the person who defiled the complainant.

There was no eyewitness to the offence. The prosecution witnesses, particularly the nurse and the doctor, gave contradictory evidence regarding the possible date of the offence. The complainant and her mother gave contradictory evidence on whether they knew the appellant before. They also gave contradictory evidence on what happened after the offence. P.W.1, for instance, told the court that he did not physically know the appellant. The complainant on the other hand told the court that she knew the appellant as he used to come to their home with their father. Whereas P.W.1 told the court that it was her husband who took the complainant to hospital on the material day, the complainant told the court that she was taken to hospital by both parents. According to the evidence of the doctor the injuries sustained by the complainant were 5 days old which put the date of offence at 22nd as opposed to 23rd. The nurse told the court that the offence occurred on 24th July, 2010.

Owing to the glaring inconsistencies in the evidence before the trial court and given the fact that the appellant's alibi was not in any way shaken by any of the prosecution witnesses, I find that there was no sufficient evidence to link the appellant to the alleged offence. Consequently, I quash the conviction set aside the sentence and set the appellant at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 28th day of September, 2012.

W. OUKO

JUDGE