REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 40 of 2012

GEORGE GITONGA MBITHI…………………………………….APPELLANT

VERSUS

REPUBLIC…………………………………………………….RESPONDENT

Formerly High Court of Kenya at Malindi Criminal Appeal No. 142 of 2010 being an appeal from conviction and sentence of Resident Magistrate Hola (M.O Obiero) in Hola SRM's Court Criminal Case No. 33 of 2009

JUDGEMENT

Introduction

1. George Gitonga Mbithi (the appellant) was tried, convicted and sentenced on 22nd July 2010 by the Resident Magistrate Hola to twenty years imprisonment for the offence of defilement of a girl aged between twelve and fifteen years. Being dissatisfied with the conviction and sentence, he has preferred this appeal. Initially the petition of appeal was filed in the High Court of Kenya at Malindi and was given No. 142 of 2010. The file was later transferred to Garissa High Court for hearing and disposal upon establishment of the High Court at Garissa.

Facts

2. **E.K** (PW1), a school going girl in class seven and aged fourteen years, lived with her parents and siblings in (name withheld). Sometime in June 2009 the appellant who was a neighbour whose wife had delivered requested the mother of PW1 to allow PW1 to go to the appellant's house to help the appellant's wife with household chores because they did not have house help. PW1 would return home at 9.00pm. In mid June 2009 the appellant employed a house help named Beatrice but because PW1 became friends with Beatrice she continued to go to the appellant's house. The appellant used to follow her and tell her that he loved her and wanted to have sex with her. PW1used to decline but sometime in July 2009 the appellant gave PW1 Kshs 500 and told her to accompany him to a room used as store for church equipment. PW1 accepted and while in the room the appellant removed her inner pants and he removed his trousers half way, placed her on the floor and inserted his penis in her vagina and had sexual intercourse with her. She experienced pain and bled. Thereafter PW1 had several sexual encounters with the appellant who used to give her money. In October 2009 PW1 missed her monthly periods and realized she was pregnant. She informed the appellant who gave her Kshs 2,000 and told her to procure abortion but she did not do it.

3. On 13th February 2010 about 7.00pm PW1 was requested by the appellant's wife to go and assist her

in washing clothes. While going home at about 10.00pm the appellant called her and they went to the same room referred to above and engaged in sexual intercourse. While there **W.S.K** (PW2) who is the father of PW1 found them with the appellant lying on top of PW1 having sex. Both PW1 and the appellant rose up on seeing PW2. The enraged father (PW2) started beating PW1 but she pleaded with him not to beat her. She then disclosed to him that she was pregnant and the appellant was responsible. PW1 left her father and the appellant arguing inside the room. Later the matter was reported to the police; the appellant was arrested and charged.

Grounds of appeal

4. The original petition of appeal filed in Malindi by the appellants counsel raises the following nine grounds of appeal:

i. That the learned magistrate erred in law and fact in finding that the appellant was guilty as charged.

ii. That the learned magistrate erred in law and fact in seeking to rely on the prosecution witnesses' evidence which had no evidential value, was unreliable, manifestly contradictory, uncorroborated and woefully insufficient to sustain a conviction.

iii. That the learned magistrate erred in law and fact in failing to find that the prosecution had not discharged its burden of proof and failing to recognise that guilt was not established beyond reasonable doubt.

iv. That the learned magistrate erred in law and fact by substituting his own assumptions which were not supported in any manner by any evidence on record.

v. That the learned magistrate erred in law and fact by failing to afford the accused an opportunity to have a proper DNA test conducted to ascertain the credibility of the evidence tendered by the prosecution witnesses.

vi. That the learned magistrate erred in law and fact by failing to appreciate and consider that the complainant and the prosecution witnesses had a grudge against the appellant and that they were therefore motivated by malice in building a case against the appellant.

vii. That the learned magistrate erred in law and in fact by sentencing the appellant to twenty years imprisonment.

viii. That the learned magistrate erred in law and fact by awarding a sentence that was manifestly excessive in the circumstances.

ix. That in view of the aforesaid irregularities and manifest inconsistencies the conviction and sentence by the subordinate court is illegal and the failure to afford the accused person an opportunity to defend himself has occasioned him great hardship and injustice.

5. By leave of this court the appellant filed amended grounds of appeal and written submissions. He told the court that he was not aware the advocate, who failed to take up the matter and as a result caused delay, had filed grounds of appeal. He filed nine amended grounds of appeal in which he is asserting that the charge sheet is defective in that it did not clearly state the offence and that the particulars and evidence did not support the charge; that the age of the complainant, which is key in determining the sentence in defilement cases, was not established; that his defence of alibi was not considered; that the trial magistrate lacks jurisdiction to pass a sentence of twenty years imprisonment; that conviction was based on contradictory evidence; that the appellant was denied a chance to take a DNA test to ascertain whether or not he committed the offence; that the trial magistrate failed to summon and compel some witnesses mentioned in evidence; that the medical evidence was unreliable and that there was a grudge between the appellant and the complainant's family.

6. During the hearing of the appeal, the appellant added two more grounds that his right to legal representation was violated by the trial court when it proceeded to hear the case in the absence of defence counsel and that the trial magistrate amended the charge during the time of delivering judgement and this denied the appellant a chance to defend himself. This brought the amended grounds of appeal to eleven. He however did not mention the grounds of appeal filed by his advocate. Without stating specifically that he has abandoned them, they remain on record. I have read the grounds of appeal filed by the advocate and find them based on issues of insufficient evidence, burden of proof not having been discharged by the prosecution, opportunity to take DNA test not having been given to the appellant, harsh sentence and grudge between the appellant and complainant's family. These issues are also captured in the amended grounds of appeal.

7. Learned state counsel agreed with the appellant on the issue of legal representation stating that there is merit in the appellant's contention that his constitutional rights were violated when the trial court proceeded to hear the case in absence of the appellant's counsel.

8. This court is obligated by law to examine all the evidence adduced in the trial court and evaluate the same afresh to inform this court's independent findings. This legal obligation is required of a court sitting on first appeal allowance being given that this court did not have the advantage of observing the witnesses as they testified as to make its own findings in respect to their demeanour.

Issues

9. After considering in detail the grounds of appeal and the submissions it is my understanding that the following issues have been raised for determination by this court:

i. Whether the charge sheet is defective, closely related to whether the trial magistrate amended the charge sheet at the judgment stage.

ii. Whether the appellant's constitutional rights with regard to legal representation, failure to allow DNA test and summoning of compellable witnesses were violated.

iii. Whether the age of PW1 was ascertained.

iv. Whether the defence of alibi was ignored.

v. Whether the trial magistrate has the jurisdiction to try the appellant.

vi. Whether the evidence of the prosecution is contradictory.

vii. Whether the medical evidence was sufficient.

viii. Whether the trial court failed to consider existing grudge between the appellant and PW1's family.

Analysis and determination

10. I have carefully read and analysed the record of the trial court with a view to getting the answers to the issues raised. I propose to handle each issue as follows:

Defective Charge

11. The appellant is saying the charge does not clearly state the offence and that the particulars and the evidence adduced by prosecution witnesses does not support the charge. He is also saying that the charge quotes section 8 (1) (3) of the Sexual Offences Act when there is no such section and that the section quoted is the definition section which does not prescribe the penalty. He relies on **Cr. Appeal No 282 of 2008 Mutinda Mwai Mutana v Republic** to support his contention. The appellant is also saying that the

charge should have been drafted to show "**Section 8 (1) as read with Section 8 (3)".** My considered view is that the charge is not defective on this account. The record from the trial court shows that the charge was amended on 21st April 2010 to read **"Defilement of a girl between the age of twelve and fifteen years contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006".** While it is true that it is not specifically stated Section 8 (1) as read with Section 8 (3), it is my view that by reading the charge it is clear that both sub-sections (1) and (3)of Section 8 are captured. Sub-section (1) defines defilement while sub-section (3) specifies the age of the girl and creates the penalty. The **Mutinda Mwai Mutana case** cited above in support of the appellant's submissions does not assist him because it is different from this case. That case quoted Section 8 (3) which creates the penalty without quoting section 8 (1) that defines the crime. The style of drawing the charge sheet may have left some room for improvement but it is my view that this is curable under section 382 Criminal Procedure Code. It is my considered opinion that there is no injustice occasioned on the part of the appellant in respect of the manner the charge is drawn.

12. Further to the above, it is my considered view that the particulars and the evidence support the charge. The particulars of the charge and the evidence relate to the events that cover the period from June 2009 and 13th February 2010. From my reading of the judgement on page nineteen it is my view that the trial magistrate did not amend the charge. He was expressing his opinion as to the period the prosecution should have concentrated on in his evidence. The trial magistrate narrowed his judgement to the events of 13th February 2010 because in my view he doubted whether the relationship between the appellant and PW1 started in June 2009. I will revisit this issue when giving my views on the evidence of the prosecution.

Violation of appellants constitutional rights

13. The trial court record shows that one Mr. Mayaka was placed on record on 19th May 2010 to represent the appellant. The record further shows that the case proceeded to hearing with PW1 and PW2 testifying after which the prosecutor informed the court that the doctor has been served with summons but was not in court. He sought a warrant of arrest. This was issued and the matter adjourned to 2.00pm. Mr. Mayaka applied for an adjournment to another date citing personal reasons. The trial magistrate refused the adjournment. At 2.30pm Mr. Mayaka was absent and the appellant told the court that his advocate had left. The prosecution told the court that the doctor had not been traced and the matter was adjourned to 26th May 2010. The appellant was told to inform his advocate of the hearing date. Mr. Mayaka did not come to court on 26th May 2010 and no explanation was given why he had absented himself. The appellant asked the court to give him time until 10.00am to wait for the advocate. At 10.20am when the matter was called, the advocate had not come and no reasons had been given. The trial magistrate ordered the hearing to proceed since the doctor was in court. The appellant cross examined the doctor. The hearing was adjourned to 4th June 2010. Again Mr. Mayaka did not attend and the appellant asked for an adjournment which was opposed by the prosecution. Before the court made its ruling on the matter, the accused said he would proceed without the advocate. The court ruled that the advocate was not taking the case seriously and that he was not interested in representing the accused. The court considered that the appellant was ready to proceed in the absence of the counsel the hearing should proceed.

14. On this point the learned state counsel supported the appellant that his constitutional right to legal representation was violated. Article 50 (g) and (h) are emphatic that legal representation is one of the rights to a fair trial. An accused person is accorded this right to choose his own lawyer and where he is not able to the state provides one where substantial injustice would otherwise result. The appellant had a lawyer of his own choosing. According to the record of the lower court, the lawyer did not behave professionally as can be ascertained by the comments of the trial court. He even blatantly disobeyed orders of the court denying him adjournment. The court also shows that the appellant told the court that he would continue without his lawyer. At this stage, two witnesses PW1 and PW2 had testified and the appellant cross examined the doctor and the investigating officer. There is nothing on record to show that Mr. Mayaka ever went back to court, not even during the subsequent hearings or even at the appeal stage. Record shows other advocates coming on record for purposes of appeal and other applications to the High Court Malindi. In my considered view no injustice was occasioned in respect of the appellant since he

cross examined the doctor and the investigating officer and I think he did a better of cross examination than his lawyer did! The case presented to court by the learned state counsel does not assist the appellant's case. That case (**Cr. Application No. 283 of 1998, Mary Okwara v republic**) is distinguishable with the one before me in that in that case counsel for the accused applied to recall the witnesses who had testified in his absence and the court had declined. In the case before me the lawyer never turned up and the accused chose to proceed without him.

15. On the issue of DNA test I have carefully read the record of the trial court. The only time this issue comes up is on 19th May 2010 when counsel for the appellant informed the court that the appellant had applied to court (High Court Malindi) for leave to institute judicial review proceedings to have DNA test carried out to ascertain paternity of the child (yet to be born by the PW1). The defence was asking the court to use its discretion and wait for the outcome of the child to be born in order to take DNA test to ascertain paternity but the court declined to allow this since their High Court in the Judicial Review application did not order stay of criminal proceedings. There is no mention in the proceedings in the lower court pointing to an application for the appellant to have his DNA test conducted to proof whether he committed this offence or not. The court was of the view that the ingredients of defilement can be proved without proof of paternity. I am of the view that if there is evidence to proof that a sexual offence was committed and the offender has been identified, then DNA test may not be necessary. Section 36 of the Sexual Offences Act is discretionary.

16. On compellable witnesses the prosecutor did not call the headmaster of the school where the PW1 attended, nor PW1's mother, sister or one Beatrice who is said to have been the appellant's house help. It is true these are compellable witnesses. The court did not order they be called as witnesses nor did the defence apply for them to be compelled to attend court and testify. Did this violate the rights of the appellant? I do not think so. Even if the prosecutor and the court omitted to call them the defence was at liberty to apply for their being compelled. There is nothing on record to show any application was made by the defence to compel these witnesses to come to court. The defence did not also seek to compel them as defence witnesses. Perhaps the prosecution felt they had enough evidence to base conviction on without calling the witnesses mentioned. My conclusion on the issue of violation of the appellant's constitutional rights, after due consideration of the matter, is that there is no basis of this ground and I find that no injustice has been occasioned to the appellant as explained in this judgement.

Age of the complainant

17. Age of the victim of a sexual offence is crucial because the penalty is pegged on the age. Whether a convicted person under Section 8 (2), (3), or (4) of the Sexual Offences Act is sentenced to life imprisonment, a minimum of twenty years or minimum of fifteen years depends of the age of the victim. The appellant contents that the age of the complainant in this case was not ascertained because it was given as fourteen years and again as fifteen years. PW1 told the court that she was 14 years. PW2 her father said PW1 was born on 28th November 1996. At the time of hearing of this case in May 2010 this would have placed PW1 as under 14 years since she would have turned 14 on 28th November 2010. There is no birth certificate to support this. The medical records (Exhibit 2) shows that PW1's age was assessed at Bura Health Centre and was found to be approximately 14 years. The same age is given on page three of the P3 form while page one of the P3 form shows age of fifteen years. Dr. John Mwangi (PW3) explained in cross examination that the age given by the police was approximate and after assessment it was confirmed as 14 years. My careful consideration of the evidence in regarding the age of PW1 is that there is no reason whatsoever to doubt that PW1 was born on 28th November 1996 as PW2 states. I have no reason to doubt the medical evidence on age assessment that places the age as 14 years my only comment being that the girl was about six months shy of her 14th birthday which still brings her under the provisions of Section 8 (3) of the Sexual Offences Act. In view of this it is my finding that the age of PW1 has been ascertained.

Defence of alibi

18. The appellant claims that the trial court disregarded his defence of alibi. He says that at the time of the

alleged office he was not at the scene of the crime. He says that he informed the trial court that he had evidence to proof he was not at the scene but was advised to keep the evidence until time of his defence. That at the time of his defence, the trial magistrate failed to record the details of the alibi evidence. He says he was at Mororo on evangelization mission as guest speaker at G.R.C Mororo on invitation by one Pastor Mutemi. He also says he had a letter from OCS Madogo Police Station authorising that meeting. My careful reading of the record does not show any record that the appellant had informed the trial court that he had alibi evidence. His mention of this issue came by way of his defence and the evidence of his witnesses. I wonder why the appellant omitted to call Pastor Mutemi who was allegedly hosting him during the evangelization at Mororo or produce the authority from OCS Madogo Police Station as part of his evidence. The evidence of the appellant relating to 13th February 2010 reads: **"On 13th day of February I was not in Bura. I had gone to preach in Garissa. The meeting in Garissa commenced on the 10th February 2010 and ended on 14th February 2010. I went back to Bura in the morning of 15th day of February 2010".** There is no mention of Pastor Mutemi, the OCS Madogo or the G.R.C Mororo where he says the meeting was. Throughout the cross examination of prosecution witnesses and his own defence, there is no mention of or documentary evidence to support his alibi. This is not to mean he cannot raise alibi at the stage of defence.

19. There are several authorities on the issue of defence of alibi. Where an accused person raises this defence, this does not shift the burden of proof from the prosecution to the accused. It is upon the prosecution to check and test that defence. Where the notice is given of the defence of alibi, the prosecution is required to check that evidence and adduce evidence to the contrary if such evidence exists (**See Court of Appeal Cr. Appeal No. 99 of 1986 delivered in November 1988 Chabah & Another v Republic [1998]).** The correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge is for the court to weigh that defence against the weight of the prosecution case (see **Wang'ombe v Republic [1980) KLR 149** and **Ganzi & 2 others v Republic [2005] eKLR)**.

20. The record of the trial court shows that the trial magistrate considered the defence of alibi and weighed it against the evidence of the prosecution. He was satisfied that there was strong evidence from the prosecution to proof case beyond reasonable doubt. This, to me, is the correct approach. On the part of this court, I have carefully re-examined the evidence and re-evaluated the same. I find the evidence of PW1 corroborated by that of PW2 even though in sexual offences it is enough to convict on the evidence of the victim without requiring corroboration if for reasons to be recorded the court is satisfied that the alleged victim is telling the truth (**see proviso to Section 124 of the Evidence Act)**. I take note that PW2 found the appellant on top of PW1. The evidence of PW2 is that after receiving report that PW1 had not returned from the appellant's house around 11.30pm he decided to go and check the storeroom where he had been informed by the appellant's house help the appellant used to meet secretly with PW1. He found PW1 on the floor and the appellant with his trousers half way removed. The two were having sex. They stood up on seeing him and he started beating PW1 his daughter. I want to state here that I have no reason to doubt this evidence. I am aware that one Nehema, the appellant's house help was not called to testify but since PW2 is an eye witness of the events of 13th February 2010 I find no reason to doubt it. This evidence is strong when weighed against the defence of the appellant. The appellant was known to PW2 and he had a touch that night. It is also noted that the appellant did not run away on being found.

Jurisdiction of the trial magistrate

21. The trial magistrate was the rank of Resident Magistrate. The appellant contents that he had no jurisdiction to try and sentence him. He quotes section 7 (2) of the Criminal Procedure Code. I wish to draw the appellant's attention to section 7 (1) (b) which reads as follows:

A subordinate court of first class held by a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006. This settles this issue.

Contradictory evidence, insufficient medical evidence and issue of grudge

22. I will combine these issues and consider them together. On the issue of evidence, I have considered the evidence of PW1. She says from June 2009 to 13th February 2010 the appellant had been having sex with her. As a result she got pregnant. This could be true but the available evidence before 13th February 2010 is not ascertainable. Perhaps a DNA test on the paternity of the child would have settled this issue. What is ascertainable from evidence is what happened on 13th February 2010. PW1 narrated what happened on that day from the time she went to the appellant's house after his wife called her to assist her in washing clothes. The evidence that PW1 used to go to the appellant's house was confirmed by DW2. The appellant however denied that PW1 used to go to his house. The evidence of PW2 confirms that of PW1. The evidence of Dr. Mwangi is that he saw the complainant on 2nd March 2010. He used the notes from the clinical officer from Bura Health Centre to complete the P3 form. PW1 had been seen by the clinical officer in Bura on 18th February and her age assessed and pregnancy tests carried out. From these notes, there were no recent injuries on the genitalia but the hymen had been broken some time back. This evidence coupled with that of PW1 and PW2 confirm that the offence was committed. I have no reason to doubt it. On the grudge, I find no basis of this claim. According to the evidence of DW2 there was no problem between the PW1's family and the appellant or his family. Her evidence is **"we used to have good relationship with Mr. K's (PW2) family. The problem started in the year 2008. It was when (PW1) joined our church".** She does not mention any grudge. I have noted the evidence of PW2 where he says there was a time when the appellant tried to put poison in their food and the matter was reported to the police but I find no basis of existence of a grudge. If any grudge existed which DW2 says none existed, then this has not been established and going by the evidence on record, this court's findings are based purely on the evidence of witnesses.

23. The upshot of my analysis is that this appeal has no merit. I find the evidence supportive of the charges and I find that the prosecution has met the threshold required in criminal proceedings. I must admit that the state did not give this matter much thought supporting the appellant on the issue of violation of his rights on legal representation without submitting on the other issues the appellant has raised. I wish to comment the appellant on his eloquence and elaborate submissions as well as the authorities cited. I wish also to state that I have taken considerable time working on this matter because of the detailed submissions and quoted authorities. After careful and detailed consideration of the issues raised, which I have dealt with in detail, I find no reason to disturb the findings of the trial court. This appeal is therefore dismissed. The appellant will continue serving sentence imposed which is minimum sentence allowed by section 8 (3) of the Sexual Offences Act 2006. I order accordingly.

STELLA N. MUTUKU, J

Dated, signed and delivered this 16th day of October 2012 in open court.