REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 47 of 2012

DAVID MUTISYA KIVALA……...…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Mwingi Principal Magistrate's Court Criminal Case No. 1181 of 2008)

JUDGEMENT

1. David Mutisya Kivala (the appellant) was charged, tried and convicted on the main charge of attempted defilement contrary to section 9 (1) and (2) of the Sexual Offences Act by Principal Magistrate at Mwingi. He was jailed for 10 years. He had been charged with the main count of attempted defilement and an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The offence is alleged to have been committed on the 10th December 2008 at (place withheld) in Kyuso District of Kitui County within Eastern Province. The victim is **E.W.P.** a girl aged eleven years. The appellant has appealed against the conviction and sentence and has raised six grounds of appeal reproduced below:

i. The learned trial magistrate erred in fact and law by failing to acknowledge the appellant did not commit the offence of defilement and indecent act with child (sic) as charged in lower court.

ii. The learned trial magistrate erred in law and fact by failing to appreciate the appellant's defence.

iii. The learned trial magistrate erred in law and fact when he considered the P3 form evidence tendered by clinical officer when P3 form was to be filled by medical officer (sic).

iv. The sentence meted on (sic) the appellant is harsh and excessive.

v. The learned trial magistrate erred in law and fact by failing to take into consideration of (sic) the appellant's defence.

vi. The learned trial magistrate misdirected himself and erred in law and fact when he failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellant.

2. Counsel for the appellant also made oral submissions during the hearing of this appeal. He submitted on contradictory evidence that the medical report refers to rape and defilement when this has not been proved and also that the evidence of PW3 was that of a minor yet the court did not conduct a voire dire

examination to confirm that the witness understood the nature of oath.

3. The appeal was opposed by the learned state counsel who submitted that where the court forms an opinion that a witness is intelligent enough, a voire dire examination is not necessary. He submitted that a charge of attempted defilement was proved; that the evidence of PW3 and PW5 was clear that the appellant was found lying on PW2; that the trial magistrate considered all the evidence including the defence.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (**see Uganda Court of Appeal Criminal Appeal No. 122 of 2005 Silagi Buroro Gordon v. Uganda** and **Okeno v. Republic [1972) E.A 32).**

5. The prosecution case was supported by evidence of five witnesses. Their evidence reveals that on 10th December 2008 **E.W.P (PW2)** was walking home around 5.00pm. She was coming from picking food for supper from her mother **R.K.K (PW1)** at Ngomeni town. She came across the appellant who was beside the road near his farm. The appellant was PW2's neighbour and was known to PW2. The appellant asked PW2 where she was coming from and also about the whereabouts of PW1 her mother. It is the evidence of PW2 that the appellant was carrying a panga and catapult. The appellant took the food PW2 was carrying and threw it away. He then held PW2's hand and pulled her while warning her against screaming or he would beat her. He took her to some bushes, knocked her down and tore her under pant. He removed his trousers and lay on top of her. PW2 was screaming for help. Her screams attracted **K.P.M (PW3)** who is her brother and **Musyimi Mbuvi (PW5).** PW3 and PW5 had been searching for PW1's donkey near the appellant's farm. They went towards the source of the screams and found the appellant lying on top of PW2. PW5 pulled the appellant away from PW2. The appellant picked his panga and chased PW3 and PW5. He then ran away.

6. PW3 and PW5 went to inform PW1 and later they reported the matter to Ngomeni Police Post. They were accompanied by a police officer to the appellant's home where they found him. He was arrested and taken to the Police Post. The record indicates the arresting officer as APC Vonza who did not testify. The evidence of **PC Geoffrey Kemboi (PW4)** confirms receiving the appellant at Ngomeni Police Post from APC Vonza on 10th December 2008 at about 8.00 pm. This is the same day the offence is alleged to have been committed. PW4 also received a report of what had happened. He also confirmed having received a torn under pant from PW1. The under pant, identified as belonging to PW2, was produced in court as exhibit 1. The evidence of PW3 and PW5 was that PW2 had left her under pant at the scene and it was collected after the appellant was arrested.

7. In his sworn defence, the appellant testified that on the date in question in the morning he saw goats in his farm and he decided to go and seal the opening in the fence to stop goats from straying to his farm. He decided to go to a nearby bush for a short call and while there he saw two young men going towards him carrying a knife intending to stab him. He picked his panga and upon seeing it the young men moved backwards. They told him they would kill him since he had made love affair (sic) with their friend. They left him and ran away. He further testified that after finishing sealing of the openings he went home. While there he saw a police officer in company of the owner of the goats, a woman, and told him to go to the police station. He told the court that he is 70 years old and cannot perform sexually. He said he was charged so that goats may continue grazing on his land and destroying his crops. He named PW1 as the owner of the goats.

8. The trial magistrate considered this evidence together with the defence of the appellant and found that the offence of attempted defilement had been proved beyond all reasonable doubts. He rejected the defence of the appellant and convicted him. I have reviewed all the evidence. The appellant did not identify who the two young men he is referring to were. He however identified PW1 as the owner of the goats that he alleges had been straying to his farm and destroying his crops. I find it strange that the appellant, who was represented throughout the trial in the lower court, did not cross examine witnesses on the issue of straying goats and destroyed crops. The closest the examination on this issue came to was when PW1 was cross examined about a land dispute with the appellant which she denied. The appellant's

defence is not believable and I likewise reject the same.

9. On grounds two and five of appeal, both are similar, it is my finding after careful consideration of all the evidence, more specifically the defence, that the trial magistrate gave it due consideration and rejected it. Those grounds of appeal have no merit and must fail. On ground one, the trial magistrate took into account all the evidence and found that the main count of attempted defilement had been proved and convicted on it. He did not consider the alternative charge of indecent act with a child and this is in order. The only anomaly being that the trial magistrate did not mention that having found the appellant guilty on the main charge, there was no need to consider the alternative charge. Ground one also is misplaced since the offence facing the appellant in the lower court was attempted defilement and alternative charge of indecent act with a child and not defilement.

10. On ground three, the record shows that the P3 form was produced by PW4 the Police Officer. There is nothing on record disclosing the background leading to the production of the P3 form by PW4. Was it because the officer who examined PW2 was not available? This is not explained. However the record does not show that the defence objected to the production of the P3 form. My view on the matter is that all the evidence points to an attempted defilement and this is what the medical evidence in the form of P3 form confirms. Even if this were not the case, **Section 77 of the Evidence Act** provides that:

(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

11. My understanding of this section is that it is not necessary for the expert maker of such a report to produce the evidence. The court may summon the maker of an expert report for cross examination when necessary. In view of this it is my finding that ground three has no merit. On the excessive sentence it is my finding that this ground too is not meritorious. Section 9 (2) of the Sexual Offences Act prescribes the penalty for attempted defilement to a term of not less than 10 years imprisonment, this being the minimum sentence under that section.

12. I have considered the submissions by counsel for the appellant that the trial magistrate did not conduct a voire dire examination on PW3. It is not a legal requirement to examine all child witnesses where the trial court is of the opinion that the child is intelligent and can testify. Section 19 (1) of the Oaths and Statutory Declarations Act specifies that it is children of tender years who should be subjected to a voire dire examination to confirm if they understand the nature of oath. A child of tender years is defined by section 2 of the Children's Act as a child under the age of ten years. Both PW2 and PW3 were aged 14 years and 13 years at the time of testifying. The age of PW2 is placed at 12 years at the time of the offence.

13. Finally on ground six the appellant challenges the trial magistrate for relying on contradictory evidence. Are there contradictions in the prosecution evidence that make the conviction unsafe? I have reviewed the evidence of PW2, PW3 and PW5 and find their evidence agree on all material particulars. I find the evidence of PW2 agreeing with that of PW3 and PW5. The same evidence was narrated to PW1 who was not at the scene and also to the police. I find this evidence without contradictions that could affect the prosecution case. Perhaps it could be said that there are contradictions in the evidence of PW2 that the appellant was pushed by PW5 and that of PW3 and PW5 that PW5 got hold of the appellant and pulled him away from PW2. To my mind this does not destroy the prosecution evidence that the appellant

attempted to defile PW2. The other area that can be termed contradictory is the evidence whether PW2 was found sitting or sleeping. PW1 says she found PW2 sleeping while that of PW3 is that PW2 was found seated on a chair. I find this contradiction not affecting the credibility of the rest of the evidence especially that touching on the attempted defilement.

14. Before concluding, I wish to address an issue that the appellant has not addressed in his appeal. The record does not indicate that the trial magistrate complied with section 211 (1) of the Criminal Procedure Code which provides as follows: **"At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."**

15. The Coram for 19th April 2011 is as follows:

RULING

It appears to the court that a prima facie case has been sufficiently made out which requires the accused to answer.

H.M NYABERI SRM

COURT – Ruling delivered dated and signed in the presence of the accused. Accused advocate absent. Defence hearing on 21/6/2011. Bond extended.

16. The record does not show, during subsequent proceedings, that the court addressed the issue of section 211 Criminal Procedure Code. The record shows that defence case did not take off until 10th November 2011 at 12.40am when the appellant was sworn before he gave his evidence. There is no record of how the defence chose that method of testifying. The defence closed its case without calling any witnesses. Did failure by the trial court to comply with the provisions of section 211 of the Criminal Procedure Code fatal to the prosecution case? To my mind the test to be applied in a case where the trial court fails to comply with the requirements of section 211 Criminal Procedure Code is whether such failure has occasioned injustice on the part of the accused person **(see Daniel Chege Kamundia & two others v. Republic 2006 eKLR)**. In this case the appellant had legal representation throughout the trial. After the court found that the appellant had a case to answer, the appellant gave evidence under oath and he denied involvement in the offence he was being tried for. The defence closed its case without calling a witness. Thereafter, counsel for the appellant made detailed written submissions. The object of section 211 Criminal Procedure Code in my view is to prepare an accused person to avoid a situation where he may incriminate himself during cross examination if he were to choose to testify under oath **(see Patrick Ngesa Ogama v. Republic [2006] eKLR).** In my considered view, there is no miscarriage of justice in this case and the appellant was correctly convicted. My only comment being that I fault the trial magistrate for being casual in the manner proceedings were conducted especially in recording of coram and evidence.

17. In conclusion, it is my considered view that there is ample and credible evidence to prove that the appellant committed this offence. My considered view is that I have no reason to doubt the evidence of the prosecution witnesses and therefore I have no reason to disturb the findings of the trial court. I hereby confirm the conviction and sentence being the minimum under section 9 (2) of the Sexual Offences Act. The appellant is elderly but our justice system treats all offenders equally. This appeal is hereby dismissed. The appellant will continue to serve the sentence imposed by the trial court. Order accordingly.

Stella N. Mutuku, Judge

Dated, signed and delivered this 26th day of November 2012.