REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 84 of 2011

(From the original conviction and sentence in criminal case no.17 of of 2011 in the Chief Magistrate's Court at Kilifi before R.K. Ondieki – SRM)

JALI KAZUNGU GONA…….....……APPELLANT

VERSUS

REPUBLIC.....….....……RESPONDENT

JUDGMENT

1. The Appellant was tried before the chief magistrate's court in Malindi having been charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the Sexual Offences Act. The Particulars of the charge were that on the 21st day of October, 2010 at Kilifi County at the Coast Province, committed an act which caused the penetration of his genital organ namely penis into the genital organ namely vagina of BP a child aged 15 years.

2. He was convicted and sentenced to serve twenty years imprisonment. The Appellant now brings this appeal against conviction and the sentence on the basis of 6 amended grounds of appeal and the 4 supplementary grounds namely:-

I. That the honourable trial magistrate erred both in law and in fact for convicting and sentencing me by relying upon a charge-sheet which was fatally defective and its authenticity and origin are questionable.

II. That the trial magistrate erred both in law and in fact for finding me guilty of defilement without seeing that I was mistaken for the criminal, given the fact that :-

(a) None of the witnesses (I.e PW1 and Pw3) who alleged to have witness the incident led to my arrest.

(b) PW1's assertion that I was the one who defiled her when I was in the dock amounted to 'dock identification' as no identification parade was conducted after my arrest more than two months after the alleged incident.

(c) Pw1 (the girl) did not have prior knowledge of her defiler and that she was him for the first time during the incident and *(sic)*

(d) Those who took part in my arrest did not witness the said incident and were not even called to testify in which description and information they used to identify me as the girl's attacker.

III. That the honourable trial magistrate erred both in law and in fact by convicting and

sentencing me on reliance of evidence which was marred by glaring contradictions , fabrications and inconsistencies.

IV. That the honourable trial magistrate erred both in law and in fact for allowing the prosecution to close its case yet other essential witnesses had not yet testified hence contravention of the law.

V. That the honourable trial magistrate erred both in law and in fact for failing to see that the doctors evidence, including the p3 form did not support the charges of defilement.

VI. That the honourable trial magistrate erred both in law and in fact for disowning my truthful evidence merely because it was unsworn.

VII. That the trial magistrate erred both in law and in fact in convicting and sentencing me yet my guilt was not proved beyond reasonable doubt. The prosecution case was also not proved beyond reasonable doubt.

VIII. That the girl was not sworn after the voire dire examination established that the girl was able to differentiate between truth and falsehood.

IX. That the sentence of Twenty (20) years imposed upon me is harsh excessive and uncalled for given the circumstances.

X. That the trial magistrate erred in law and fact for dismissing my truthful defaces evidence. *(sic")*

3. The State opposed the appeal and relied on the evidence adduced in the lower court . The Appellant elected to rely upon his two sets of written submissions. As mandated to do, I have anaylsed the evidence in the trial in order to form my own conclusions. See ***Okeno V R [1972] EA 322*** . I have also taken into account the fact that the trial court had the benefit and opportunity of seeing the witnesses and observing their respective demeanour in order to assess the credibility.

4. The Prosecution evidence was that the Accused accosted the Complainant on the 21/10/2010 at about 3.00 p.m at the sea-shore. She had gone to purchase fish. He demanded to know her name but she declined to tell him. That he produced a knife and pulled her next to a big stone before undressing and defiling her.

5. Pw3 was an eye-witness to the incidence and knew the Appellant several years. He also knew the Complaint since she was born. The p3 form that was subsequently filled confirmed vaginal penetration. It indicated that there were tears in the vagina and the hymen was broken indicating that the complainant had been defiled. Pw6 produced a clinical card indicating that the Complainant was born on 3/4/95. The Appellant's defence was that he was arrested on 6/1/11 and taken to the police. That he was in the dark as concerning the charges and that he had a grudge with Pw3 over a debt of ksh. 1, 500/-.

6. The complaint that the charge sheet was incurably defective ought to be addressed first. It has been held before that if the defectiveness of the charge sheet prejudices fair trial, that is, it embarrasses or prejudices the accused person's endeavour to prepare his defence to the charge then the conviction fails see :***Daniel Achoki –v- Republic , Court of Appeal at Kisumu, Crim App 6 of 2000, eKLR*****.** Further, in ***Yongo Vs. Republic 1983 KLR 319*** it was held that a charge is defective under Section 214(1) of the Criminal Procedure Code where the charge does not accord with the evidence adduced at the trial or where it gives a misdirection of the alleged offence in the particulars.

7. The Appellant argues that the date in the Occurence Book is shown as 29/5/1/2011 in the Charge-sheet yet the incident was said to have been reported four days later that is on 25/10/10. He further points out that the time of committing the offence was omitted and so was the day he was arraigned in court. He argues that the charge-sheet gives different information from the evidence at hand.

8. Section 134 of the Civil Procedure Code qualifies a charge sheet as sufficient if it contains, a statement of the specific offence with which the accused person is charged, together with particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 137 of the Civil Procedure Code indicates that a charge/information, must commence with a statement of the charge describing the offence then followed by the particulars of the said offence. The charge-sheet at hand discloses the nature of the offence and is framed in such a way as to describe the offence and lay out its particulars. The aforesaid provisions of the law do not provide that the time of commission/omission of the offence must be scripted ,save that it provides that it 'shall be sufficient to describe a place, time or thing …...so as to indicate with reasonable clearness the place, time or thing..... referred to. Neither is the day of arraignment in court required to be indicated, which incidentally in this charge-sheet is indicated as 6/1/2011.

9. Does the evidence as concerning the date of reporting to police tally with what is written on the charge-sheet? It appears not. Does this anomaly in any way make the charge-sheet incurably defective? I do not think that is the position as the charge-sheet herein sufficiently discloses the nature of the offence and the particulars thereof. He also submits that the charge-sheet is fake as it does not bear the signature of officer in charge and the stamp of the police station. This has no bearing on defectiveness of the charge sheet as it is not a requirement under the Criminal Procedure Act Section 137.

10. The Pw1, a minor, was taken through a *voire dire* examination and the trial court found that the minor understood between truth and falsehood. The examination though not recorded in question and answer form as it shows that the trial court was mindful of the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15. The court was entitled to receive unsworn testimony from the minor. Hence it was proper for the Pw1 to give unsworn evidence.

11. The evidence reveals that the Complainant did not know the Appellant prior to the incident. No identification parade was carried out. Dock identification has hardly any probative value. See ***Gabriel Kamau v R (1982-88) KAR 1134***. However, Pw3, who was an eye witness to the incident and had known the Appellant previously, recognised him and caught him in the act. In fact, the Appellant made the complainant that there existed a grudge between them as concerns proceeds from the sale of fish: a telling sign that Pw3 knew him.

12. The incident is said to have occurred at about 3 O'clock in the afternoon. Pw3 recognised the Appellant. It has been established that there is no better identification than that of recognition, as opposed to mere identification see ***Anjononi V Republic [1980] KLR 54.*** Pw3's testimony sufficiently corroborated that of Pw1. Whereas it is true that the 'informer' was not summoned to court nor was Samuel,who informed the Complainant's father, it has long been established that a fact need not be proved by more than one witness and the fact that needs proving at this point is whether or not the Appellant was the assailant. See **Section 143 Evidence Act, Cap 80,** and the court of appeal finding in**Benjamin Mbugua Gitau vs Republic [2011] eKLR.**

13. To further this point, Samuel would repeat Pw3's evidence and since it is not stated that he witnessed the incidence, his evidence would probable have been hearsay evidence. Also, Pw3 testified that he informed the other fishermen who warned the Appellant to keep-off the seashore. How else would he have informed them who the Appellant was unless he knew him in the least. Furthermore, it should be pointed out that the Appellant did not put it to the Pw3 that their 'existing' grudge had a bearing on the particular testimony he gave so as to cause a dent on his credibility as a witness.

14. The medical evidence was given by Pw 5 a medical office attached at Kilifi District hospital who filled the P3 form produced in evidence as exhibit 1. Pw5 confirmed that vaginal penetration had occurred and that there were tears in the vagina and that the hymen was broken. This medical evidence further confirmed what Pw3 saw. The appellant was properly convicted.

15. The estimated age of the complainant on the p3 form is indicated as 13 years and on the child health card, Exhibit 2 produced by Pw6 indicates that the Complainant was born on 3/4/95. This has a bearing on the sentencing which the Appellant states is excessive. The Children's Act *No. 6 of 2006*

defines a child as *'any human being under the age of eighteen years' and where actual age is not known it means 'apparent age'. The trial court took the apparent age to be that of a child. Both the p3 form and the child health card butress the fact that the complainant was a child at the time of the incidence.*

16. Section 8(3) provides that "a *person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."* The child health card gives a better guidance as to when the child was born which is about 15 years and a few months before. Hence the sentence was legally sound and I find no reason to interfere with it.

17. In conclusion I am satisfied that the conviction and the sentence are legally sound and uphold the same. The Appeal is unmeritorious and therefore stands dismissed.

Delivered and signed this **23rd** day of **November, 2012** in the presence of the Appellant, Mr. Kemo for the State.

Court Clerk – Aisha

C. W. Meoli
JUDGE