



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 215 OF 2009

LESIT, J.

MARCAS KARIUKI.....APPELLANT
VERSUS
REPUBLICRESPONDENT

(From Original Criminal SRM's court No. 770 of 2009 Chuka; P. Ngare Esq.)

JUDGEMENT

The appellant Marcas Kariuki was convicted of one count of defilement contrary to section 8 (1) and (2) of the sexual offence Act No. 3 of 2006. He was sentenced to serve 25 years imprisonment. He was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant has raised four grounds of appeal inspection which are as follows:

- 1. THAT the learned trial magistrate erred in law and fact in law and fact in failing to observe that there was no exhibit produced in court.**
- 2. THAT the learned trial magistrate erred in failing to find that the prosecution failed to avail vital witnesses for a just decision.**
- 3. THAT the learned trial magistrate erred in failing to observe that the charge and conviction was backed by the weigh of evidence adduced.**
- 4. THAT the trail magistrate erred in dismissing the unsworn defence without giving any cogent reasons for the same.**

In his submissions before the court during his appeal, the appellant urged the court to reduce the sentence of 25 years on grounds it was too harsh.

The appeal is opposed. Mr. Kimathi the learned state counsel urged that the evidence be adduced by the prosecution through PW1 and PW2 approved beyond reasonable doubt who defiled the complainant. In regard to the sentence, Mr. Kimathi urged that still the child was three years old; the court should revise the sentence and order for imprisonment for life.

The facts of the prosecution case as follows:

The prosecution called 6 witnesses. The mother of the complainant as PW2. PW2 was therefore an intermediary within the meaning of the Sexual Offence Act No. 3 of 2006, herein after referred to as the Act. It was the prosecution case that the complainant, a child of three years, spent the day in question in the company of other children near a grandmother's place. The grandmother was PW3. At about 1.30pm, PW3 the complainant went to her in the company of the accused and both reported that they were leaving for the complainant's home, and that the accused was escorting her home. PW3 said that the accused had also been at her home that day. According to PW2, the complainant's aunt who was a sister of her (complainant's) father was married in the accused's home. The accused was therefore not a stranger to any of them. After the accused and the complainant left PW3's home at 1.30pm, the complainant was delivered by the accused to her mother, PW2 at about 3.30pm. Both PW2 and 3 corroborate each other's evidence that the accused left PW3's home with the complainant and took her to her mother, PW2 two hours later.

When the accused left the complainant with her mother, the complainant urinated on herself, something she had never done before. It was when her mother asked her what the matter was that the complainant informed her mother that the accused had taken her to Nduma's Coffee plantation, that he had removed his pants, and that he had laid on top of her, and that she was feeling pain on her private parts. PW2 testified that on hearing that, she removed the complainant's pants and observed her child noted that she had blood stains and mucus substance on her pants. She also observed her parts but could not see any visible injuries. PW2 washed her daughter's pants while PW3 washed the child.

PW2 stated that she waited until her husband returned home that day and informed him what the complainant had told her. The accused was called and according to PW2 he admitted that he inserted his penis onto the child's private parts after laying her down on the ground on the coffee farm. PW2 testified that the accused had explained that at time he merely inserted it in a small way but not much because as he explained, he had stopped immediately the child started crying.

PW2 went to the area Chief's Camp where she found two AP's, PW4 and 5. She reported to the case and was advised to take the child to hospital. The child was taken to hospital and examined. PW1 produced the P3 form in the findings made after medical examination of the complainant. The findings were:

Tenderness and swelling on her private parts Hyme intact, No discharge of blood observed Vagina swab revealed presence of epithet cells, No spermatozoa seen under microscope DTC was negative, She was covered with anti retroviral drugs.

PW1 also produced the treatment notes on the complainant on the 9th June 2009. The findings then were:

Possibility of injunction of private parts caused by sexual, No blood stains or tears seen, Possibility of penetration due to inflamed left minora.

PW1 testified that the results of medical examinations on the complainant confirmed evidence of sexual assault.

The accused person gave unsworn statement. He denied committing the offence. The accused however admitted that he had been questioned concerning the defilement of the complainant, and that he had denied the allegations leveled against him. The accused admitted that he was also taken to the Assistants Chief and questioned about it and that he had denied the charges. The accused said that he was charged for no reason at all.

The accused called one witness that is his mother. The mother's testimony was that she left her son at home at 20 minutes to 1 o'clock on the material day. She stated that later on, one Gitonga took the accused to go and repair his radio at his home. DW2 testified that within 20 minutes, Gitonga's wife PW2 went to her and accused her son, the accused, of defiling her child.

I have considered this appeal and I have subjected the evidence adduced before the learned trial magistrate to a fresh analysis and evaluation while bearing in mind that I did not hear or see the witnesses, and giving due allowance for that, I am mindful of the court of appeal decision in the case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first Appellate Court is given as follows:

“ An appellant on first appeals entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala V. Republic [1957] EA 570.). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

When the appellant argued the appeal he urged the court to reduce the sentence passed against him. Before considering that request I did consider the grounds of appeal raised in the petition. In the first ground the appellant contended that no exhibits were produced in court in support of the charge. That is far from the truth. Two exhibits were produced by PW1. The first was the P3 form, PExh. 1(a). This document was filled by PW1 on 3RD OF July 2009 at the time he examined the complainant. In his report he said he formed the opinion that the complainant had been sexually assaulted. The complete findings of the doctor is contained in this judgement.

The second document was the treatment notes of the complainant dated 9/7/2009. These were filled by the doctor who treated the complainant on the day the offence of committed. The doctors findings according to the treatment notes were that there was inflammation of the minora with possibility of penetration.

I find that the appellant’s contention that no exhibits were produced in support of the case was incorrect. There were medical notes and forms produced which established that the complainant had been sexually assaulted on the 9/7/2009, which is the date in question. Nothing therefore turns on this ground.

The second ground raised by the appellant in his petition was that the prosecution failed to avail vital witnesses in support of their case. The prosecution called 6 witnesses. In **BUKENYA & OTHERS VS UGANDA 1972** EA 549, which deal with the issue of essential witnesses it was observed as follows:

“ The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

I find that the evidence adduced by the prosecution was sufficient to sustain a conviction. I do not believe that there were any vital witnesses left out by the prosecution. All vital witnesses testified. The ones not called would not have added any value to the prosecution case. Nothing turns on this ground.

The third and fourth grounds raised in the appellant’s petition challenge the weight of the evidence adduced by the prosecution and the rejection of the appellant’s defence by the learned trial magistrate. I will consider both grounds together.

I have considered the judgement of the learned trial magistrate. I find it well a balanced judgement. The learned trial magistrate addressed all the important issues pertaining to the charge against the accused.

The learned trial magistrate correctly found the evidence of the intermediary, PW2 in this case, was admissible under section 2 (1) of the Act. Under that section an intermediary is defined as follows:

“ intermediary” means a person authorized by a court, on account of his or her expertise or

experience, to give evidence on behalf of a vulnerable witness and may include a counselor, guardian, children's officer or social worker;

The evidence of the intermediary established the identity of the person who assaulted the complainant.

The evidence of both PW2 and PW3 clearly established that the accused person collected the complainant from PW3 and 2 hours later delivered her to PW2. Quite apart from what the complainant told her mother, there is material corroboration in the evidence of PW2 and 3 that it was the accused person who was with the complainant at the time the offence was committed. There is also corroboration from the evidence of PW2 that the child complainant reported the incident immediately to her and that prior to her report to PW2, PW2 had herself noted that the child was uncomfortable and was in pain when passing urine.

I also find that the observation made by both PW2 and 3, that the child's part had blood and mucus substance was a further corroboration of the fact the complainant was a victim of a sexual assault.

The learned trial magistrate also dealt with the issue of the age of the complainant and correctly observed that the charged brought fell within the section cited in the charge. In regard to the medical report the learned trial magistrate correctly found that the conclusion reached by the medical witness was that the complainant had been sexually assaulted. I am satisfied that the learned trial magistrate correctly addressed her mind to the issue and the other issue whether a penis would constitute a blunt object and whether there was penetration.

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

The prosecution has adduced medical evidence to show that there was penetration of the complainant's private part, through the evidence of PW1. The treatment notes shows that there was an inflammation of the left minora, which is the opening of the vagina. This is proof, according to the doctor that there was a penetration to that area of the complainant's body.

When the accused was confronted first by PW2 and 3, and eventually by the police officers, his reaction was that he had not fully inserted his organ into the complainant. Under section 2 (1) of the Act penetration is complete even where it is partial insertion of the genital organ. The prosecution therefore fully established that the offence charged was committed.

The learned trial magistrate fully considered the appellant's statement in defence and found that he had distanced himself from the action complained of. The learned trial magistrate found that the appellant did not deny having escorted the complainant from PW3's to PW2's homes. I agree with the learned trial magistrate's conclusion that the prosecution had established that the appellant was the only person who had the complainant between 1 and 3 pm. I do agree that the prosecution had proved that the appellant had both the opportunity and the time to commit the offence. I find that the appellant's defence was fully considered before it was rejected.

In regard to the sentence a person convicted for the offence under section 8 (1) & (2) of the Act is liable to imprisonment for life. The appellant was imprisoned for 25 years imprisonment. That was an error on the trial magistrate's part. The appellant ought to have been sentenced to life imprisonment. I will consequently set aside the sentence of 25 years imprisonment and substitute it with life imprisonment and order that the appellant should serve a sentence of life imprisonment.

In the result the appellant's appeal against both the conviction and sentence has no merit and is dismissed accordingly. In addition the appellant will now serve a term of life imprisonment.

Dated, signed and delivered this 7th day of April 2011.

LESIIT, J.

JUDGE.