



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 286 OF 2010

LAWRENCE KAHUMBU

MUGAMBIAPPELLANT

Versus

REPUBLIC.....RESPONDENT

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JUDGMENT

The appellant herein LAWRENCE KAHUMBU MUGAMBI was tried on a charge of *defilement contrary to section 8(2) of the Sexual Offence Act No. 3 of 2006* with an alternative count of *indecent act with a child contrary to section 11(1) of the same Act*. At the end of the trial the appellant was convicted on the main charge and sentenced to life imprisonment. Being aggrieved he preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition of Appeal:-

- 1. THAT the learned resident magistrate erred in law and fact in convicting on circumstantial evidence.***
- 2. THAT the learned Resident Magistrate erred in law and fact in adopting the procedure meant for trial in the High Court on alibi.***
- 3. THAT the learned Resident Magistrate erred in law and fact in shifting the burden on proof on alibi from prosecution to the appellant.***

4. THAT the learned Resident Magistrate erred in law and fact shifting the burden of proof in the entire trial from prosecution to the appellant.

5. THAT the learned Resident Magistrate erred in law and fact in allowing the prosecution to amend the charge sheet after they had called their final witness hence denying the appellant his right to ample time for preparation of defence.

6. THAT the learned Resident Magistrate erred in law and fact in proceeding with the trial in absence of the defence counsel at some point hence denying the appellant his right to legal representation.

7. THAT the learned Resident Magistrate erred in law and fact in not noting that the trial was prosecuted by unqualified prosecutor.

8. THAT the learned Resident Magistrate erred in law and fact in convicting despite wanting medical evidence.

9. THAT the learned Resident Magistrate erred in law and fact in convicting upon a defective charge sheet.

When the appeal came up for hearing Mr. Nganga argued grounds No. 1 to 4 together and grounds 5 and 6 together. Before considering those grounds it is important at this stage to give the brief back ground of the case that was before the trial court. A total of six witnesses testified in support of the prosecution's case. G.K. (PW 1) a child aged 9 years, told the trial court that on a certain Thursday in the year 2007, she was sent to the shops by her aunt. She alleged that she met the appellant outside a shop. The appellant is said to have asked PW 1 her name and what she wanted to buy. PW 1 is said to have purchased an avocado fruit before leaving for her aunt. PW 1 said the next day she met the appellant again standing on the footpath leading to PW 1's school. PW 1 said the appellant held her by the hand and forcefully took her to his house. The appellant is said to have removed a knife threatened PW 1 with dire consequences if she ever screamed. He is alleged to have removed PW 1's school uniform, made her lie on his sofa, unzipped his trouser and defiled her by inserting his penis in her private parts. PW 1 is said to have felt great pain before going unconscious. When she regained her conscience the appellant told PW 1 to dress up and leave for her aunt's place after giving her Ksh.100/=. It is said the appellant promised to be giving PW 1 Kshs. 200 regularly. PW 1 went home but did not find her aunt. She did not tell her aunt what had happened to her because she had already taken a bath. It is said that the following Monday the appellant used threats to force PW 1 to again go to his house where he defiled her before releasing her to go to school. When PW 1 arrived at school, her teacher questioned her as to why she did not go to school on Friday. It is said PW 1 told the teacher that she was sick and that she had gone to hospital for treatment. The same trend of events continued for a long time until the year 2008. PW 1's teacher questioned PW 1's aunt on the source of money the complainant had. PW 1 later revealed to her aunt what was happening to her. She took her aunt to the appellant's house but found it shut. The aunt took PW 1 for treatment at Nanyuki District Hospital and before further visiting the Appellant's house. It would appear PW 1 was sent by her aunt to keep on checking the appellant's house. One day PW 1 went into the appellants house and before he closed his door the police arrived. C.N. (PW 2) retold the story given by PW 1. Bernard Kipkori (PW 4) and Julius Kosgey (PW 3) were Administration Police Officers who visited the appellant's house to arrest him. Richard Kateiye (PW 5) produced the medical report he prepared on the complainant. In his report, PW 5 said PW 1's hymen was torn. PW 5 formed the opinion that PW 1 had sexual intercourse in the past.

The appellant (DW 1) on his part testified and tendered the evidence of four witnesses. The appellant denied knowledge of PW 1. He said he only came to know about her at the time of his arrest.

The appellant stated that PW 2 was his girlfriend before their relationship went sour in 2008. He produced a work schedule showing that he rarely came to his house.

Chris Munyoki D.W.2, stated that on the date, DW 1 was accused of having defiled PW 1 he was with him taking some alcohol. Lawrence Kariuki (DW 3) stated that he lived with the appellant and did not see a child visit that house. Senior Sergeant Maxwell Shionja (DW 4) produced a document showing that DW 1 and DW 2 did not leave their place of work between 2006 and 2008. J.M.K. (DW 5) produced P.W.'s schools register showing that the complainant (PW 1) did not miss school on the dates she alleged she was in the appellant's house.

Having given in detail the history of this appeal, let me now deal with the Appeal. Mr. Makura Learned Senior State Counsel conceded the appeal. Mr. Ng'ang'a urged this court to reject the evidence of PW 1 on the basis that they were not credible. I have carefully considered the evidence of PW 1. Her evidence shows that she cheated her teacher that she did not attend school because she was sick. She also claimed that she was given money by somebody called M.K. That was also a lie. The evidence of the school Register indicated that the complainant did not miss school as she alleged. Her evidence is not credible hence the same cannot be trusted. Her evidence needed to be corroborated in the circumstances of this case. I have also looked at the medical evidence. The clinical officer indicates that the complainant's hymen was broken. In the report, it is indicated that the complainant had sexual intercourse in the past. There is no evidence that the appellant was ever examined to establish the nexus between him and the offence. The other issue also which was glaring in the proceeding is that the appellant was prosecuted by a police officer of the rank of a constable. There was no evidence that he was Gazetted to conduct such prosecutions.

In sum, I am convinced that the case against the appellant was not proved to the required standards of beyond reasonable doubt. I have entertained some doubts which should be given in favour of the appellant. Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant should be set free forthwith unless lawfully held.

Dated and delivered this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Makura for the State and Mr. Ng'ang'a for the Appellant.