



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Criminal Appeal 14 of 2009

(From original conviction and in Criminal Case No. 858 of 2007 sentence of the Senior Resident Magistrate's Court at Kilifi before Hon. J. Nduna –SRM)

ELIJAH KATANA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Elijah Katana (the appellant) was convicted on a charge of defilement of a girl contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006. He had pleaded not guilty to the charge, and after due trial in which prosecution called five witnesses whilst appellant was the only defence witness, he was sentenced to serve 15 (fifteen) years imprisonment.

The charge was based on particulars that on 26th day of May 2007 at about 8.00pm in Kilifi District he had carnal knowledge of B.K a girl aged 13 years.

Bi told the trial court that she is a pupil in Std 3 at K Primary School – being aged 13. On 26-5-07 she was going to sleep at her sister's place from her mother's house when she met the appellant. He dragged her and when she shouted for help, he threatened to kill her. He removed her underwear and took her to a bush, undressed her and

“as he wanted to put his manhood in me, I screamed and he ran away. He put the manhood in me ...I had injuries on my private parts.”

She reported the matter to her mother who informed police and appellant was arrested.

On cross-examination PW1 said:

“It was dark, I was along the path”

She explained that her sister's house was just 60metres away and that there is a hotel and a drinking place nearby and that appellant was alone. She further stated on cross-examination that appellant put his manhood inside her twice and she bled. She did not immediately tell her sister because appellant had told her not to tell anyone and she also washed her blood stained clothes, saying she had never had sex before.

On re-examination PW1 said:

“It was dark. I know him from his voice, there was a curtain also at the door of his place where alcohol is sold. From the light I saw him.”

PW2 M K (the complainant's mother) can only recall that on a certain day, her daughter went home saying she was having fever and she was unable to walk. PW1 said she had been defiled by Elijah – PW2 got this information a week after the incident.

Pc Patrick Situma (PW5) received the report and issued the young girl with a P3 form. He was informed that the defilement had taken place three days earlier and she had washed her clothes. The report he booked was that complainant had been defiled by the appellant and another. She was examined by Dr. Gachui (PW4) who told the trial court that the girl was 13 years old, her private parts were normal, there were no tears and lacerations and only had yellow foul smelling discharge.

On cross-examination he stated:

“The P3 describes the victim as an adult. I have confirmed by way of age assessment that she was 13 years old”

According to the doctor, there was no injury and the girl did not have a lab report yet his answer on cross-examination was *“The injuries were concluded to be harm.”*

The appellant in his defence which was unsworn told the trial court that he did not commit the offence – the greater part of his testimony described events of the day when he was arrested.

The trial magistrate found that the appellant was properly identified by the complainant as he was someone well known to her and that:

“It was in the evening as complainant was going to sleep at her sister’s house, some short distance from her mother’s house... For 2 persons to engage in sex, they must come close so as to have their bodies coming into contact. In almost all cases, unless the accused has covered his face, which was not the case here, identification by the complainant is easy. I do not find any probability of mistaken identity.”

He found that from PW’1s testimony her reference to manhood meant penis and inside meant vagina and there was penetration of the genitalia and complainant bled. As to the evidence of PW2 that PW1 only informed her about the incident one week later, the trial magistrate found that the mother knew that her daughter was unwell shortly after the incident and took her to hospital but it was not until after week that the daughter confided in her that one Elijah had sexually assaulted her. He was persuaded that appellant did penetrate complainant’s vagina which resulted in her bleeding and that from the evidence of Dr. Gachui, the genitalia was not intact and the trial magistrate concluded as follows:

“According to the complainant it was her first time to have sex. I take it that the accused forcefully and unlawfully took away her virginity and thereby committing the offence of defilement.”

Appellant contested these findings on grounds that:

- 1) The trial magistrate failed to consider that the sole evidence was that of the complainant which was not supported by any evidence showing that appellant was the culprit.
- 2) The trial magistrate erred by failing to consider that the evidence of the doctor did not show whether there was any penetration.
- 3) The trial magistrate failed to consider that no eye witness
- 4) The trial magistrate failed to consider his defence which created doubts to the prosecution case.

In his written submissions introduced some issues which were totally unrelated to the grounds of appeal but I have undevoured to sieve out what is relevant to this appeal. He submitted that the P3 form did not show when complainant was taken to hospital and that PW’1s sister who is mentioned was not called as a witness and that this shows a clear case of conspiracy and malice as the matter was just framed up. That in fact the medical evidence proved his innocence as doctor said complainant’s genitalia were normal. He queries the opportunity for favourable identification saying complainant confirmed it was dark and that she recognized his voice. Appellant also asks this court to note the apparent contradiction in the evidence of PW1 as she had initially said that when appellant wanted to insert his manhood inside her, she screamed and he ran way then later she claimed he put his manhood into her, twice. Appellant relies on the case of Agustino Njoroge Ritho v R Cr. Appl. No. 99 of 1986 (NRB) which held that contradicted evidence is unreliable.

The appeal is opposed and the counsel for the State, Mr. Naulikha submitted that the minor was able to demonstrate to the trial court that she

knew the appellant by name and called him Elijah.

On identification, it is apparent that the incident took place under cover of darkness. The only form of identification stated by complainant is that she recognized appellants voice. It is not clear what words appellant uttered and at what point, so as to make the complainant recognize the voice as appellant's. It was also not demonstrated to the trial court how many times complainant had interacted with appellant so as to recognize his voice in the dark unmistakably, was it a whisper, harsh address, shouts, appealing – how did he address her?

It seems the trial magistrate with all due respect decided to reconstruct the whole scenario based on assumptions that since the sexual act involves close body contact, then it can only mean that complainant clearly saw the appellant – this is not from the evidence on record – at no point did PW1 refer to recognizing the appellant by physical appearance due to proximity. Was there any source of light mentioned in her evidence?

The decision in Choge v R gives good guidance on voice identification – although it is recognized form of identification court must test with certainty and determine that there was no mistake as voices may be similar or even imitated especially under cover of darkness. There is also the issue as to whether the appellant actually inserted his manhood inside her – or whether she screamed, and he ran away. She does not say he later came back, but almost in the same breath she says that he inserted his manhood into her twice and she bled.

The truth about these two apparently contradictory positions could only be cleared by medical evidence. From the typed record, the evidence of Dr. Gachui was that:

“Her private parts were normal. No tears and no lacerations. She only had a yellow foul smelling discharge. The injuries were concluded to be harm...there was no injury.”

I have looked at the original handwritten record of the trial court- which is in tandem with the typed proceedings – so the trial magistrate misdirected himself in making a finding, that the doctor had recorded complainant's genitalia not intact – that was not the evidence of the doctor. There was no evidence of penetration or insertion of any object into her genitalia so that would seem to suggest that the correct position was what she had initially stated in her evidence in chief.

Yes there was a foul smelling yellow discharge whose cause was not disclosed by medical evidence – whether it was a bacterial or viral infection or whether it was caused by sexual activity or poor hygiene remains unclear and can't from the basis of saying that appellant had penetrated her.

Certainly section 124 of the Evidence Act recognizes the stealth with which such offences are committed and in that spirit allows courts to accept a child's uncorroborated evidence after appropriate caution by court, but in this situation all other evidence, including part of PW1's own evidence negates what she subsequently stated about the incident.

I do not agree with the learned Counsel for the State that the minor demonstrated adequately opportunity for identification or that the offence took place at all.

The upshot is that the conviction was unsafe and is quashed.

The sentence is therefore set aside, and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated 17th February 2010 at Malindi.

H. A. Omondi
JUDGE

