REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 150 of 2005

P K M ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in Criminal Case No. 1812 of 2004 of the Senior

Resident Magistrate's Court at Nanyuki dated 13th May 2005 by Miss R. N. Muriuki – S.R.M. – Nanyuki)

J U D G M E N T

On 23rd December 2004 P K M, the appellant herein appeared before the Acting Senior Resident Magistrate's Court at Nanyuki charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. He also faced an alternative count of Indecent Assault of a female contrary to section 144(1) of the Penal Code.

The appellant pleaded not guilty to both counts. However following a full trial, the learned trial magistrate found him guilty of the main count, convicted and thereafter sentenced him to 25 years imprisonment. It is that conviction and sentence that has triggered this appeal. In his petition of appeal, the appellant laments that the sentence imposed was manifestly harsh and excessive considering the mitigating factors, that he was convicted on contradictory and uncorroborated evidence, that there was no direct and independent evidence offered by the prosecution and finally that the Doctor who examined the appellant was not availed in court to testify.

Briefly the prosecution case was that on 17th December 2004, P.W.1 G N, a grandmother to the complainant (P.W.2) and a mother in law to the appellant was at her home when the complainant went to relieve herself in the toilet. As she was urinating she started crying. P.W.1 inquired from her what the problem was. It was then that the complainant said that she had been defiled by the appellant the previous day. On this day the complainant, aged 8 years had apparently gone to the appellant's house. The appellant happens to be her step father. The appellant gave her some pieces of sugar cane. Thereafter P.W.2 decided to go back to her grandmother's place. When she reached the gates the appellant suddenly held of her, and took her back inside the house. He put her on the bed, removed her underpants, covered her mouth and then defiled her. The complainant could not scream for assistance as the appellant covered her mouth with his hard. When done, he allowed her to leave warning her of dire consequences if she was to tell anybody about the incident. Indeed he threatened to kill her.

At home she informed P.W.1 regarding the incident when P.W.1 asked her why she was crying and holding her stomach as she urinated. P.W.1 then checked the complainant's private parts and noticed that

she had been injured, was bleeding and her underpants soiled. P.W.1 then took the complainant to the police, reported the incident and then took her to hospital. Subsequent thereto, the complainant was issued with P3 form that was duly completed. The appellant was then arrested and charged.

Put on his defence, the appellant in a sworn statement stated that on the day of the alleged offence, whilst at home with other children, P.W.1 came to him and demanded that he surrenders to her the other two children of her daughter. The daughter had passed on and left with the appellant two other children that they had sired together. The appellant refused to part with the children and as a consequence, a quarrel ensued. P.W.1 then left in a huff proclaiming that she would teach him a lesson. She would ensure that the appellant was locked away and she would then inherit his land. The appellant denied that he defiled the complainant and stated that he never met with the complainant on that day. The appellant maintained that the charges were fabricated and that he was a victim of P.W.1's machinations.

In support of the appeal, the appellant submitted that from the evidence on record, the complainant was all along staying with P.W.1, her grandmother. It was therefore possible that she was molested at her grandmother's house. That the complainant was examined by P.W.4 who never found any spermatozoa in her vagina meaning therefore that she was not sexually assaulted. The appellant also submitted that there were crucial witnesses who were never called to testify such as neighbours and also a doctor who examined him and found that he was not infected with gonorrhea. Finally the appellant maintained that the case was a frame up and his defence was not properly considered.

On his part the state through **Mr. Orinda,** learned Principal State Counsel opposed the appeal. Learned counsel submitted that the learned magistrate had the right principles in mind regarding how to deal with the evidence of a minor and he duly warned himself. Counsel further submitted that corroboration of the evidence of the complainant was found in the medical evidence of P.W.4 and also P.W.1. Though the appellant advanced the defence of fabrication, the same was duly considered by the learned magistrate at length and rightly rejected. Counsel further submitted that the offence was at the appellant's house at about 1 p.m. So the issue of the complainant staying with her grandmother does not arise. On spermatozoa, learned state counsel submitted that presence of spermatozoa is not mandatory requirement in sexual offences. With regard to failure to call any of the appellant's neighbours as witnesses, counsel submitted that there was nothing that the said neighbours would have testified to that was not said by P.W.1 and P.W.2. In any case no prejudice was occasioned to the appellant by such failure. Finally on failure to call the doctor who examined the appellant, learned counsel submitted that the appellant was examined many days later by a different doctor and in different hospital.

As the first appellate court it is my duty to subject the evidence tendered in the trial court to fresh and exhaustive evaluation so as to reach my own decision as to whether or not the conviction of the appellant can be sustained. In doing so I must however bear in mind that unlike the trial court, I did not have the benefit of observing the witnesses as they testified and make allowance for that. **(see Okeno v/s Republic (172) E.A. 32).**

It is apparent from the record that the conviction of the appellant turned on the evidence of the complainant. This is a child of tender years. She was actually aged between 8 – 9 years. Evidence of a child would in ordinary circumstances require corroboration. However pursuant to the recent amendment to section 124 of the Evidence Act, the requirement for corroboration is no longer necessary. The section as amended by act No. 5 of 2003 provides:

"……. **Provided that in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the child is telling the truth ……."**

This was the position as at the time of the appellant's conviction. The section of the law has again been amended by Act No. 3 of 2006. The latter amendment had the effect of deleting the words "***a child of tender years who is"*** and substituting therefore the words "***alleged victim"*** and by deleting the word "***child"*** wherever it appears thereafter and substituting therefore the words "***alleged victim."*** The effect

of this subsequent amendment is that the section applies to all sexual victims and is not limited to child victims as had been case previously. However this recent amendment does not concern us in these proceedings.

The trial court was therefore entitled to enter a conviction on the evidence of the complainant alone if it was satisfied that the child was telling the truth. The trial magistrate did indeed form the opinion that the complainant was a witness of truth. This how the learned trial magistrate delivered himself on the issue.

"…….**.. I did not find this evidence to be a fabrication. The evidence of the complainant was consistent and credible and she struck me as a person who was speaking the truth ……"**

On this basis therefore, the appellant's conviction cannot be faulted. Further, this is a finding on the credibility of a witness by the learned magistrate having observed her demeanor. This court as an appellate court can only upset such finding if it is satisfied that no reasonable tribunal would have come to such a finding. See **Ogot v/s Muriithi (1985) KLR 359** & **Republic v/s Oyier (1985) KLR 5353.** I have no reason to impugn the finding. Indeed on my own independent evaluation of the evidence of the complainant, I have no doubt given the details she gave regarding the incident, that she was a witness of truth.

In any event, if there was need for corroboration, that corroboration as correctly argued by the learned state counsel was found in the evidence of P.W.1, the grandmother and P.W.4 the clinical officer, who examined the complainant after the incident. The complainant after the incident why she was crying while holding her stomach as she urinated, the complainant immediately told her that she had been defiled by the appellant. P.W.1 then examined her and noted that she had been injured in her private parts, was bleeding and her underpants were soiled. These injuries were confirmed by P.W.4 who found upon examination that the complainant had a perforated hymen with bruises on the labia majora. P.W.4 testified that the perforated hymen and bruises and presence of gonorrhea led him to conclude that there was sexual intercourse and the complainant had been defiled.

The complainant testified clearly that he had been to the appellant's house the previous day. She gave a detailed account as to what transpired. This account could only have come from a person who was a witness or victim of the incident. At her age, I doubt whether she had such a fertile mind as to conjure up an imagined story of this magnitude. That is what the appellant wanted the court to believe. Further I doubt that P.W.1 would subject her granddaughter to such extensive injuries as a way of fabricating the case against the appellant. The basis for the fabrication of the case is not even clear. On one hand the appellant says that the case was fabricated against him by P.W.1 so that she can take away his children and in the same breath he says that the case is fabricated so that he can loose his land to P.W.1. I find it inexplicable that the complainant who had been brought up by the appellant would suddenly turn against him for no apparent reason and frame him with the case. This defence of fabrication was considered at length by magistrate and rightly rejected contrary to the submissions of the appellant that it was given wishy washy treatment. I have looked at the defence myself and cannot find any substance in it that would displace the cogent prosecution evidence.

The appellant also faults his conviction on the basis that when the complainant was examined, no spermatozoa was found meaning therefore that she was not sexually assaulted. The spermatozoa could only have been found in my view if there was evidence that the appellant ejaculated during the incident. There was no such evidence. In any event where is the requirement that in every case of defilement or indeed any sexual offence, for a conviction to result, spermatozoa must be found in the victim upon examination. It is also possible for the assailant to use a condom, in which event no spermatozoa could be found within the victim. The appellant also states that because he was not found to be suffering from gonorrhea on examination, he could not have defiled the complainant who upon examination was found to be infected with gonorrhea. However the answer to this submission is found in the testimony of P.W.4. He stated:

"…….**.. You were brought to the hospital many days after and the tests done on you did not reveal anything. Since you came to the hospital far much later you may have gone for treatment.**

You had no sexually transmitted infection……..”

From the foregoing the fact that the appellant was found not to be infected with gonorrhea many days later does not in my view advance the appellant’s case any further.

The appellant also takes the view that several crucial witnesses were not called to testify. To him his neighbours and the doctor who initially examined him should have been called. Section 143 of the Evidence Act is emphatic “…… ***No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact…..”*** After all what matters in each particular case is not the quantity but the quality of evidence. See **Kihara v/s Republic (1986) KLR 473**. What would the neighbours have said? They never witnessed the incident. Similarly, what would the doctor who examined the appellant earlier on have said that was not said by P.W.4. Finally, nothing stopped the appellant from summoning such witnesses if he felt that they would advance his case in any way. I think that for all the foregoing reasons, I am persuaded that the appellant was convicted on solid and cogent evidence. I would therefore dismiss the appeal on conviction.

As regards sentence, it was the view of the learned state counsel that it was on the high side but opted to leave the issue to the court. The appellant was sentenced to 25 years imprisonment. The offence carries maximum sentence of imprisonment for life plus hard labour. I am aware that an appellate court can only interfere with the sentence if it is shown to be unlawful, harsh and manifestly excessive. See **Stephen Ondieki Nyakundi, C.A. No. 5 of 2005 (unreported).** The appellant in his first ground of appeal alludes to the fact that the sentence imposed was harsh and excessive.

The appellant was a first offender and although the learned magistrate justified the sentence by saying that he had considered the gravity of the offence and that cases of defilement of minors is on the increase and must be discouraged or stopped in society, I am however of the view that the sentence of 25 years imprisonment was harsh and manifestly excessive.

On my own evaluation of the facts, the circumstances of the case and the law, I think a sentence of 8 years imprisonment will serve the ends of justice. Accordingly I will to the limited extend allow the appeal on sentence. In the end the appeal on conviction is dismissed. However the appeal on sentence succeeds to the extend that the appellant shall now serve 8 years instead of 25 years imprisonment. This sentence shall be accompanied with hard labour. The learned magistrate had omitted to impose this aspect of the sentence. The omission has now been corrected.

Dated and delivered at Nyeri this 31st day of May 2007

M. S. A. MAKHANDIA

JUDGE