



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 76 OF 2016

BENJAMIN KITONYO MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being original conviction Criminal Case (Sexual Offence No. 21 of 2016)

Judgement that was delivered on 11th November, 2016 at Mutomo –

Principal Magistrate's Court, by Hon. S.K. Ngii-RM)

J U D G E M E N T

1. The Appellant herein, was charged and convicted of the offence of attempted defilement Contrary to **Section 9(1) (2) of the Sexual Offence Act Number 3 of 2006 vide Mutomo Principal Magistrate's Court Sexual Offence Number 21 of 2016.**

The particulars of the main charge upon which the Appellant was convicted are that on 7th September, 2016 are that, at Ikutha within Kitui County, he intentionally attempted to defile a girl (name withheld) aged 13 years by attempting to cause his penis to penetrate her vagina.

2. The Prosecution's case against the Appellant in the Lower Court was mainly based on direct evidence which was tendered through six witnesses presented.

3. A brief summary of the evidence tendered before the trial court, indicates that the Complainant was a girl aged 13 years at the time of trial and this fact was established by age assessment report dated 9/6/2016, tendered as exhibit 8 and a P3 form tendered as Prosecution Exhibit 5. The Complainant or the Victim of the offence testified that the Appellant who she knew well, went to their house at night when they she was asleep with her younger sibling who also testified as Prosecution Witness 2. The two kids testified that the Appellant first knocked at their door and when they declined to open he looked for a stick which he used to drill the mud house the kids slept and forced open the door, before dragging the complainant out to a grave yard where he made attempts to defile the girl. The rescue of the girl came from one KN (Prosecution Witness 3), who was an uncle to the victim. According to the evidence of Prosecution Witness 3, the Appellant first went to where his house was which was next to the house where the victim and her siblings slept and that, the Appellant inquired from him whether he had seen his cattle. He further testified that, the Appellant then proceeded to where the girl slept and started forcing it open and that his attempts to stop him was met with threats from the Appellant and this forced him to go and seek help from his brother MN (Prosecution Witness 4), who rushed to the scene and rescued the girl. They later took the girl to Ikutha Police Station where the officers swung into action and had the Appellant arraigned.

The police recovered the skirt worn by the victim, which was later tendered by the Investigation Officer (Prosecution Witness 6 P.C. Martin Ochola) as Prosecution Exhibit 1).

The skirt produced in court, as Prosecution Exhibit 1 had a visible tear. The stick used to drill a hole on the wall to enable the intruder gain access to a latch used to lock the door was tendered as Prosecution Exhibit 3. The house broken into, was photographed and the photographs were tendered as *Prosecution Exhibits 2 (a) (b) and (2)*.

4. It is undoubtedly clear from the proceedings and the judgement of the trial court, that the exhibits tendered by the prosecution were crucial to the prosecution's case.

5. The Prosecution also relied on the evidence of a Clinical Officer (Prosecution Witness 5 –Daniel Mulwa) who testified and told the trial court that he examined the victim and noted an injury to the right cheek and Complaint of pains on the right shoulder. He tendered the P3

form as Prosecution Exhibit 5 and treatment notes as Prosecution Exhibit 4.

6. When placed on his defence, the Appellant gave unsworn statement of defence, defended himself stating that, on the material date he spent time preparing his farm and that after work he went to Kanyangi where he was confronted by members of Public and arrested on suspicion of committing an offence.

7. The trial court upon evaluation/assessment of evidence tendered, found that the Prosecution's case had been proved beyond reasonable doubt and found that the Appellant dragged the complainant out after breaking into their house and was about to rape her after subduing her but for the emergence of Prosecution Witness 4 at the scene who rescued her from imminent defilement. The Appellant was then convicted and sentenced to serve 10 years' imprisonment.

8. He felt aggrieved by both the conviction and sentence and lodged this appeal raising the following grounds namely: -

- i. That the evidence adduced by the prosecution was marred with contradictions, inconsistencies and full of fabrications.
- ii. That the investigating Officer did not visit the scene of crime to get more information to support his case.
- iii. That the Prosecution did not prove its case to the required standard to warrant his conviction.
- iv. That his defence was good but dismissed unfairly.

9. In his written submissions, the Appellant has poked holes on the charge sheet presented at the trial court contending that there is inconsistency on the dates when the incident occurred, pointing out that the charge sheet indicates that the offence occurred on 7th January, 2016, while the evidence tendered indicates that the offence occurred on 7th September, 2016. He submits that he was convicted on a defective charge sheet and urges this court to overturn the conviction on that ground and relies on *Burunya & Others versus Uganda (1968) EALR page 123*. This court however, notes that the Appellant in his petition of appeal failed to raise this ground and has only raised it in his written submission without leave of this court to rely on new additional ground(s) as provided under **Section 350 2(b) (iv) of the Criminal Procedure Code**.

10. The Appellant also submits that, his identification as the culprit was not well established, stating that Prosecution Witness 1 referred to him as "Matuku" and that the witness did not pick him out from an identification parade.

11. He avers that, Prosecution Witness 3 testified that he left the situation getting worse, as he went to alert his brother and that he did not follow his brother to the scene to witness the incident. According to him, this showed that the witnesses were lying.

12. He avers that, Prosecution Witness 3, Prosecution Witness 4 and Prosecution Witness 6 (Investigating Officer), contradicted each other. He however does not point out where the contradiction lies but avers that Prosecution Witness 6 did not investigate the case fairly, adding that the charge was serious enough to warrant a thorough investigation.

13. The Appellant also contends that, the evidence of the medical officer indicates that the Complainant was aged 13 years on 6th September 2016, and that she was examined on 9th September, 2016 which according to him, means the victim was taken for treatment three days after the incident. This in his view, shows that the prosecution's case was not proved to the required standard. He says the Complainant gave the name "Matuku" as the person who attempted to defile her. He submits that the charge sheet should have reflected his true name with alias "matuku" to prove that he was the one who committed the offence because the Complainant did not know him well enough. He further submits that; the Prosecution did not prove well all the ingredients of the offence though he has not cited what those ingredients are.

14. The Respondent has opposed this appeal. Mr. Okemwa, learned Counsel from the Officer of the Director of Public Prosecution, insisted that the evidence tendered at the trial were consistent. He conceded that proving a case of "an attempt" is difficult but despite the difficulty, they were able to establish the *mens rea* or the fact that the Appellant intended to commit the offence.

15. The State further submits that, the evidence of Prosecution Witness 1 demonstrated the element of *actus reus* because, it demonstrated that the Appellant went to where the victim slept and drove a stick through a mud wall of their house and opened the latch that locked the door before dragging the victim to a graveyard with a view to defiling her.

16. The Respondent further denies that, the Prosecution's case had contradictions and gave an example of consistency where the Complainant testified that the Appellant put sand in her ears and mouth which evidence was corroborated by the Investigation Officer who testified that when the victim was taken to the Police Station, she had dust on her head, ears and mouth.

17. The State further points out that, contrary to the Appellant's assertions, the Investigation Officer visited the scene and carried out comprehensive investigations. It contends that the age of the victim was proven and that the Appellant was identified well by an alias name.

18. This court has considered this appeal and the response made by the State/Respondent. This appeal has basically raised two issues for determinations which can be summarized as follows:

- i. Whether the Appellant was positively identified.
- ii. Whether the Prosecution's case was proved beyond doubt.

19. In his first ground of appeal, the Appellants states that the prosecution's case was marred with inconsistencies and fabrications and has submitted that, he was not positively identified and faulted the absence of alias name in the charge sheet.

20. I will begin with the question of identification. This court has gone through the evidence tendered by the prosecution and find that this fact was fully established and proved beyond doubt. The Complainant (Prosecution Witness 1) heard the Appellant talking outside the house with her uncle and clearly identified him. She said "..... he called out my name L. I identified the voice as that of one Mutuku....." I overheard him converse with my uncle outside asking if there was a stick outside within the compound. Using a stick, he drilled a hole between the door and wall near the frame though he opened the inner latch of the door."

The complainant further went to state that the intruder had a torch and used it searching for her as she hid under the bed from where she finally discovered her hideout and frog marched her outside and to a grave yard where he lifted her skirt and removed her pant. The victim narrated to court that, the skirt she was wearing was black in colour and got torn in the process. That torn skirt was tendered as Prosecution Exhibit 1. The Complainant insisted on being challenged under cross examination by the Appellant that she knew him well as Matuku. She said: -

"I knew his voice. The accused is known to me as Matuku Kitonyo".

21. The evidence of Prosecution Witness 1 on identification was well corroborated by Prosecution Witness 3 (KN) who said the Appellant on the material date and time first went to his house which was next to where the Complainant and her younger sister (Prosecution Witness 2) slept. He talked to him and he stated that the Appellant went to his house three times asking if he had seen his cattle. He then threatened him when he tried stopping him from the true mission he had at that homestead that night, because it is clear that, what took him there was something else other than missing cattle.

The same evidence was corroborated by Prosecution Witness 4 MN who testified that the assailant had a torch that he switched it off when he noticed that he was about to be nabbed.

22. This Court finds that the evidence tendered by the Prosecution on identification was sufficient. The Appellant was fully identified through voice and visually by more than one witness. The fact that he was known by alias name "Matuku" does not negate the fact that he was identified fully if anything, it shows that he was well known in the locality and there was no doubt that he was the culprit particularly in light of the evidence of Prosecution Witness 1 and Prosecution Witness 3.

23. I am also not persuaded by the Appellant's assertion that, the Prosecution's case was marred with inconsistencies and "fabrications." I have carefully gone through the evidence and like the Prosecution/Respondent points out, the evidence tendered by all the Prosecution's witnesses were very consistent. To begin with evidence of the Complainant (Prosecution Witness 1), she overheard the Appellant conversing with his uncle (Prosecution Witness 3) outside the house as she slept with her younger sibling (Prosecution Witness 2). Prosecution Witness 3 testified that, before the Appellant headed to the house where the kids slept, he inquired from him whether he had seen his cows. He stated that he had conversation with the Appellant before the Appellant went and tried to force the door open to gain access to where the Complainant was. The Complainant's evidence was clearly consistent with the narrative given by Prosecution Witness 4.

24. The evidence of the investigating officer (Prosecution Witness 5) who visited the scene and took photographs of the house and later processed them and tendered them as exhibits. His evidence was quite consistent and corroborated evidence of the Complainant. He tendered the torn black skirt worn by the victim as Prosecution Exhibit 1. The trial court noted that, the skirt was torn, which is consistent with the force or violence meted out by the Appellant as he embarked on his mission to defile the girl. I have seen the said photographs tendered in evidence. I have also seen the sketch plan (Prosecution Exhibit 7 (a) and 7 (b) of the homestead or the crime scene, and I am satisfied that the Investigating Officer, contrary to what the Appellant states, did a commendable job in carrying out the investigation. He visited the scene and did a comprehensive job in compiling evidence which I find consistent and corroborative of what the other prosecution's witnesses stated. The Investigating Officer even recovered the stick used by the Appellant to drill the wall in order to access the latch locking the door. The trial court in his judgement evaluated the evidence well and having re-evaluated the same, my findings are similar, with that of the trial court.

25. The Appellant has pointed out that the charge sheet had defects because, the dates on the particulars do not correspond to the dates given by the Prosecution's Witness. As I have observed above, this ground of appeal was incompetently raised without leave and even if it had been raised properly, I still find that the Appellant's contention is not factual. He says that, the charge sheet indicates that the offence was committed on 7th January, 2016, but a cursory look at the charge presented to the trial court, shows that the material date is indicated as 7th September, 2016.

I of course note that all Prosecution's Witness during trial testified that the material date was 6th September, 2016. The trial court in its judgement also noted the variance but found the same insignificant. The only error made by the trial court was when it found that the error was curable under **Section 214 (2) of the Criminal Procedure Code**. In my view, the error was insignificant as it did not materially affect the substance of the evidence tendered. Therefore, the error was curable under **Section 382 rather than Section 214 of the Criminal Procedural Code**. It is my considered view, that the error by the prosecution in drafting the charge sheet in respect to when the incident took place was insignificant and did not occasion any prejudice to the Appellant in anyway. That is perhaps why in his petition of appeal, he did not raise the ground as one of his grounds in this appeal.

26. I am also not persuaded by the Appellant's assertion that, his defence was not considered by the trial court. His defence as pointed out by the Respondent was apart from being unsworn was brief and really did not reveal much or aid the Appellant in any way.

27. I have also re-evaluated the evidence tendered by the prosecution which I have highlighted above and find that the prosecution's case against the Appellant was overwhelming. The evidence tendered in my view, not only proved that he committed the offence of attempted defilement contrary to **Section a (1) of Sexual Offence Act** but also caused malicious damage to property by drilling a hole in the house occupied by the Complainant. He further assaulted the victim as evident by the P3 form (Prosecution Exhibit 5). The prosecution could have

preferred several counts if it desired to do so. Drilling a hole in someone house regardless of the fact that it is made of mud is a crime.

He should therefore, count himself lucky that, that perspective was not investigated and action taken. In the face of the above, his assertion that the prosecution fabricated a case against him obviously lacks any basis because, if the prosecution or the police wanted to fix him, then they could have preferred more charges against him which they did not.

This court finds that, due to the violence visited upon the young girl demonstrated by torn skirt, bruise scar on her cheek, and the threats directed at the victim's uncle, the Appellant's intent at defiling the girl was unmistakable. He was certainly a man possessed with an unlawful mission. To defile the girl and had Prosecution Witness 4 not arrived on time to rescue the victim, he could have accomplished his illicit intention of defiling the victim, given that he had already forcefully removed her pant after tearing her skirt and lowering his trousers. I am satisfied that the prosecution proved beyond doubt that he committed the offence.

28. On sentence, the trial court imposed a sentence of ten years which was the minimum sentence prescribed by law but given the circumstances of the case, this court finds that the trial court was a bit lenient with the Appellant. He certainly deserved more jail term.

Dragging a child forcefully, hiding under a bed is traumatizing enough, but going ahead to try to attempt to defile her on a grave yard is even worse, especially given that the whole ordeal took a while. This court finds that the Appellant exhibited some level of impunity when he threatened the victim's uncle who was trying to be protective of his nieces. That mitigating factor called for a more deterrent sentence than the minimum sentence prescribed by law (*Section 9 (1) (2) of the Sexual Offence Act*) and it is on that basis, that I hereby set aside the ten years' sentence imposed by the trial court. The Appellant is hereby sentenced to serve 15 years in jail, with a view to giving him sufficient time in the correctional facility to reform and transform so that he does not pose danger to the young and vulnerable children once he finishes his jail term.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RD OF MAY, 2021

HON. JUSTICE R. K. LIMO

JUDGE