



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 7 OF 2020

KIOKO NDUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. R. Amwayi, Senior Resident Magistrate,

delivered on 28th January 2020 in Mombasa Chief Magistrate's Court

Sexual Offences Case No. 68 of 2018).

J U D G M E N T

1. The Appellant was charged and convicted for the offence of attempted defilement contrary to Section 9(1) and 9(2) of the Sexual Offences Act No. 3 of 2006 in Mombasa CMC S.O.C. No. 68/2018. Upon undertaking the appellant Hon. R. Amwayi S.R.M. The appellant was sentenced to serve 10 years imprisonment.

2. The appellant was aggrieved by convictions and he lodged his petition of appeal on the following grounds:-

(1) That the trial magistrate erred in law and fact in convicting the appellant and sentencing him to ten years imprisonment without considering that the case at hand was a mere fabrication.

(2) That the trial magistrate erred in law and facts by convicting the appellant without considering that the 10 years sentence meted on him was harsh and excessive.

(3) That the trial magistrate erred in law and facts by convicting the appellant without considering that the age of complainant was not proved which a congruent element was in the present case rendering the present case rendering his conviction unsafe.

(4) That the trial magistrate erred in law and facts by convicting the appellant without considering that the case was full of massive contradictions and discrepancies and thus a conviction could not have been arrived at.

(5) That the trial magistrate erred in law and facts by convicting the appellant without considering that the prosecution case was not proved beyond all reasonable doubt.

(6) That the trial magistrate erred in law and facts by convicting the appellant without considering his reasonable mitigations.

4. The appellant urged the court to allow his appeal and set aside sentence.

5. The prosecution case was that PW3 found the complainant and the appellant on a mattress in the bedroom and the complainant didn't have her underwear and skirt and the appellant only had his boxers on. He gave appellant the maize he had sent him to buy and the appellant cut for him a piece and also sent him to go and buy soap with the change left Kshs. 10/= from buying maize.

6. PW3 rushed to go and report to the mother where she was at the kiosk. On return they did not find the complainant. She had gone to her grandmother's place as she feared her mother PW2 would beat her.

7. PW2 went to report the matter to police and also took PW1 to Likoni Sub-County Hospital where P3 form was duly filled. PW2 also produced certificate of birth for PW1 – Exp 2. PW1 testified that appellant pulled her into his house after sending 2 of her brothers to buy maize and he put her on his bed. She said that before he could remove his clothes her brothers got in abruptly and she stood and ran to her grandmother's place.
8. PW1, PW2 and PW3 said appellant was their long-term neighbour. She said the appellant removed her clothes and that he threatened her so that is why she didn't scream. She said her mother was selling vegetables. She said her mother didn't beat her.
9. PW2 said that appellant had never wronged them for the five years they lived together. PW2 said they had never borrowed anything from the appellant and that they are sponsored by good Samaritans who but for them everything including books and pens. He said he found his sister naked in appellant's house and appellant was there. He said he was not coached and has never colluded with his mother. He said that Mama Dula, Mama Michelle and Baba Michelle were present when he reported to his mother. He said what he said in court was what he recorded in his statement.
10. PW4 P.C. Julia Mwangi from Likoni Police Station investigated the complaint of attempted defilement. She recorded statements and escorted the complainant to hospital. PW4 summoned the appellant to the station for interrogations and he denied the allegations, but based on statements of complainant and PW3 she charged him after PW1 and PW3 identified him as the assailant.
11. PW5 Victor Obanda Were a Clinical Officer from Likoni Sub-County Hospital produced treatment notes and P3 form filled in respect to complainant. He also produced Post Rape Care Form.
12. When accused was placed on defence and he gave sworn statement and said that a lady neighbour went to attack him in his house while armed with a panga and he ran out of the house. He reported to his landlord but when he wanted to go and report to police the landlord told him he would speak to the lady neighbour first. That when the neighbour continued to threaten him he went to police station to report and while waiting the investigating officer took him to the office after the lady neighbor made phone calls. That inside the office he was asked to explain why he was at the station but before he could explain a lady officer was called and told to lock him in the cells and later his finger prints were taken. He was then taken to court and charged but he denied charges. He said that he has differences with woman neighbor as he refused to have a relationship with her and she started coming back home late in the night and demanding he opens for her.
13. He said his lady neighbor had children who knew him very well and referred to him as uncle. He said he had no bad relationship with the complainant.
14. The appeal herein was canvassed by way of written submissions. The appellant's submissions were that he was not accorded fair hearing as per Article 50(2) and 93) of the Constitutions of Kenya 2010 since he was not assigned an advocate by the state.
15. He further submitted that it is not clear which medical officer filled the medical details since reference number is not indicated.
16. He said that PW3 confirmed that appellant quarreled once with his mother PW2 and that was an admission of grudge which made him to be prosecuted wrongly.
17. The appellant further argued that his defence was not considered and that he was supposed to benefit from the least severe punishment prescribed for an offence. He further submitted that the sentence was manifestly harsh and excessive on the circumstances.
18. The Respondent's submissions were to the effect that evidence of PW1 that appellant attempted to defile her is corroborated by that of her brother PW3 who found PW1 lying on the mattress with no skirt or underwear. With the appellant on the bed with her.
19. It was submitted that appellant was luckily interrupted by PW3 in his attempt to defile the minor. That he had undressed her, laid her on the mattress and threatened her into silence with her on the bed. The evidence as to his intentions was clear.
20. It was argued that the appellant was well known to the witnesses as they had been neighbors and that there was no evidence of grudge as the offence was witnessed by PW5.
21. On issues of unfair trial Respondent counsel submitted that appellant actively participated in the trial and thoroughly cross examined prosecution witnesses and even made an application for recall of witnesses.
22. On sentencing the Respondent relied on the authorities of **Charles Ndirangu Kibue –vs- Republic** where the Supreme Court of India in state of **M.P. –vs- BabluNatt** was quoted with approval to support the position that the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the Morale of the society should be severely dealt with.”
23. It was submitted that the trial court considered the appellant's mitigation and sentenced him to 10 years imprisonment it was argued that the sentence meted out is neither excessive nor harsh considering circumstances under which the offence happened where appellant send away the minor's siblings so as to violate her. The Respondent urged the court not to disturb the sentence and should uphold the conviction and dismiss the appeal.
24. Having reevaluated and reanalyzed the evidence in the trial court's records well as the judgment of the trial magistrate and in considerations of the grounds of appeal and submissions by respective parties the issue for determination is whether the prosecution proved beyond reasonable doubt that that appellant attempted to defile the complainant.
25. PW3 found his sister naked on a mattress with the appellant in the appellant's bedroom when he went to deliver the maize the appellant

had send him and his brother to buy.

26. PW3 went and reported to his mother who was at the kiosk what he had seen. PW1 confirmed the appellant forced her into his house after sending her brother away to buy maize and he undressed her and made her lie on a mattress in his bedroom. She said the appellant threatened her with a knife and she could not scream. Luckily her brother PW3 returned and entered the house abruptly and found the appellant before he defiled her. That she dressed up and ran away to her grandmother's place.

27. The evidence of PW1 and PW3 as to attempted defilement was corroborated. There was no need of medical report as the appellant had not succeeded in committing the crime he intended to commit against the complainant.

28. Claims by the appellant that there was a grudge between him and PW2 was discounted by PW3 who said the quarrel between appellant and PW2 was on claims they harbored bedbugs in the estate. Appellant said that he had no dispute with PW1 and PW3 who used to refer to him as uncle Kioko. The incident happened when PW2 was at a Kiosk selling vegetables but is PW3 who went to call her on finding appellant with his sister in his house and she was naked.

29. On the appellant's defence, it may have been plausible but issues raised were never raised with the prosecution witnesses. Those raised like PW2 wanting to have a relationship with him were denied by PW2. PW3 also said that they were being sponsored by a Good Samaritan and they had never borrowed anything from the appellant.

30. It is my considered view that the appellant's appeal on conviction lacks merit and the same is dismissed.

31. As regards sentencing the sentence meted out is provided for under sections 99(1) and (2) of the Sexual Offences Act No. 3 of 2006. The only consideration that this court feels obliged to make is factoring his remand period in the sentence. Thus appellant will serve 10 years jail term from 11th September, 2018.

32. Orders accordingly.

33. 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT /ONLINE THROUGH MS TEAMS, THIS 22ND DAY OF JULY, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Ms. Karanja for Respondent

Appellant – No appearance

COURT

Copy of judgment to be delivered to appellant.

HON. LADY JUSTICE A. ONG'INJO

JUDGE