



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 95 OF 2019

GKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Ritah M. Amwayi, Senior Resident Magistrate, delivered on 5th day of August 2019 in Mombasa Chief Magistrate Court Sexual Offence Case No. 55 of 2017).

J U D G M E N T

1. The appellant GKK preferred the appeal herein from the conviction and sentenced in Mombasa Chief Magistrates Court Sexual Offence Case No. 55 of 2017.
2. The appellant had been charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of Sexual Offences Act No. 3 of 2006.
3. The particulars were that on diverse dates between 25th day of June 2017 and 29th November 2017 in Jomvu Sub-county within Mombasa County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MWM a girl aged 14 years old.
4. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The grounds of appeal are:-
 - i. That the learned Magistrate erred in both law & fact in convicting the appellant on insufficient evidence which did not meet the threshold of proof beyond any reasonable doubt.
 - ii. That the learned Magistrate erred in law & fact by convicting the appellant on insufficient and untenable evidence.
 - iii. That the learned Magistrate erred in law & fact in relying on evidence that was not before the court.
 - iv. That the learned trial Magistrate erred both in law & in fact in convicting the Appellant when the evidence on record was manifestly insufficient; inconsistent and had glaring gaps incapable of sustaining a conviction.
 - v. That the learned trial Magistrate erred in law & fact in convicting the Appellant against the weight of the evidence on record.
 - vi. That the learned Magistrate erred in law & fact in failing to give due and adequate consideration to the appellants evidence in defence.
 - vii. That the learned Magistrate erred both in law & fact in that she did not properly consider the evidence given by both the prosecution and the Appellant respectively.
 - viii. That the learned Magistrate erred in law & fact in that she did not at all take into account the evidence and submissions made by the Appellant.
 - ix. That the learned Magistrate did not consider the contradictory evidence given by the prosecution witnesses.

x. That the trial Magistrate erred in fact in not considering the mitigation put forward by the Appellant.

xi. That the trial Magistrate erred both in laws & fact by sentencing the appellant to 20 years imprisonment.

5. The prosecution's case was that the complainant, a step daughter to the appellant was repeatedly defiled by the appellant who then intended to chase her away with the mother if she revealed what had been going on. She said that after defiling her the appellant would give her a drug to swallow and tell her to go and shower.

6. That on 29th August 2017 when the Appellant called to tell her he was coming she didn't wait for him, so she escaped and when her mother returned and found she was not at home when she returned she (PW 2) slapped her. PW 1 went away and stayed at the house of some 2 boys who wanted to take her back home and she declined when her uncle went for her and she was taken to her aunty's place. She revealed to her mother what had been happening.

7. PW 2 took her to hospital and on examination on PW 1 was found to be having a broken hymen with vagina abrasions. Dr. Salim said who filled P3 form said that age of the injury could not be ascertained due to repetitive/multiple incidences of the offence. PW 4 investigated the offence and preferred charges against the appellant.

8. The appellant on defence claimed that the Complainant used to sleep on the sitting room while he spent the nights in the bedroom with the Complainant's mother and it was not possible to defile her in that house. Appellant said that the urge suspected he had extra marital affair and that is when they had a severe conflict towards end of November 2017.

The appellant said the investigating officer never questioned him about the incident. He denied having defiled his step daughter. He said he had no feuds with the Complainant. He said it is PW 2 who framed him and told her to frame him.

10. The appeal was canvassed by way of written submissions. The appellants submissions. The Appellant submitted that his rights under Article 50(2) (K) of 250(4) the constitution were violated. He submitted further that evidence of the every eye witnesses PW 1 who was a minor did not have her evidence interrogated or corroborated as per Section 124 of the Evidence Act. He argued that provisions of Section 19 of The Oaths & Statutory Declaration Act Cap 15 Laws of Kenya were not complied with to confirm that the Complainant understood the nature of an oath. The court was urged to find that omission was fatal to the prosecution case.

11. The Appellant also submitted that he was not properly identified as the offence was committed at night and it is not clear how many people lived in that house and the source of light to warrant a positive identification. The Appellant also submitted that the circumstances under which he was arrested were unclear as he was in custody according to PW 4. P.C. Jackline Oruki by the time PW 2 and the Complainant went to report to police. His explanations that he had differed with PW 2 and that he was arrested prior to P3 and PRC forms being filled and that this was a cooked up story.

12. On issue of sentence, the Appellant argued that Section 8(4) does not provide for mandatory minimum sentence, it only provides for liability. He said his case is deserving of the exercise of discretion in meting out sentence and he should be considered.

13. The Respondent on the other hand submitted that ingredients of the offence of defilement i.e. age, penetration and identification of the suspect were proved by the prosecution. The Respondent argued that no error was made in the failure to conduct voire dire examination as the same is required for a child who is of tender years which translate to a child who is ten years and below according to the definition in the Children's Act.

14. The Respondent also submitted that the Appellant and his counsel did not make an application to have PW 1 recalled for purposes of cross examination and the issue was never brought to the attention of the trial court and it is brought up as an excuse to defeat justice. The Respondents urged the court to order for a retrial if it is inclined to agree with Appellant that his rights were infringed.

15. This court has considered the manner in which Hon. E. Mutunga SRM recorded the evidence of the prosecution witnesses and find that it will serve the justice of the day if the evidence of the complainant and her mother is taken a fresh to enable the appellant to properly challenge the same by way of cross examination.

16. From the record of the trial court PW 1 was testifying when at some point believe the prosecuting counsel Atieno said 'No objection' and then court adjourned the matter to 19/04/2018. On 19/04/2018 the mother of the Complainant took the witnesses box and nothing was said about the incomplete evidence of PW 1. It was the duty of the prosecution and the court to make sure PW 1 completed testifying and defence given an opportunity to cross examine her for her testimony to pass the test of what evidence is.

17. Since it was not the fault of the Complainant that she did not complete testifying, it will be prejudicial to uphold the appeal for failure to lay a basis in the prosecution case. This matter to go back to the Chief Magistrate to allocate for retrial.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS

14TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

COURT

Mention on 28/10/2021 before the Chief Magistrate for re-trial.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Mr. Mulamula for Respondent

Appellant – Present in person

Hon. Lady Justice A. Ong'injo

Judge