



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 153 OF 2015

GIDEON KIPKOGEI KOSGEI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Appeal from the judgment and conviction of Hon M I G Moranga PM

and sentence of Hon MNK Maroro PM on 5th June 2015

in Adult Criminal Case no. 136 of 2013.)

J U D G M E N T

1. On 5th June, 2015 the appellant herein Gideon Kipkogei was found guilty of the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

2. The record shows that on the 9th April 2015 the trial magistrate indicated that he was on transfer. The accused's counsel indicated that the accused still needed to call 2 witnesses. Without making any determination on that issue, the learned trial magistrate proceeded to give a date for judgment, 3rd June 2015. The judgment was delivered on 5th June 2015 by a different magistrate who also proceeded to sentence the appellant to 25 years in prison. The record does not indicate the name of the magistrate who delivered the judgment nor is it indicated in the judgment. It is not clear how the name MNK Maroro came to be except I guess, by finding out whose hand writing that was.

3. Against this conviction and sentence, he filed his appeal. His undated amended grounds of appeal raised four (4) grounds:

1. That the trial magistrate erred in law and fact by failing to appreciate that the complainant testified that she did not know the appellant and it is incredible that she would have followed the appellant seven kilometers on foot to his house.

2. That the trial magistrate erred in law by failing to appreciate that the prosecution did not produce any document to ascertain the age of the complainant.

3. That the trial magistrate erred in law and fact by failing to appreciate that although the medical officer of health in his examination observed that the complainant had a broken hymen, he did not find there was any masculine discharge on the complainant in the form of semen to indicate that the complainant had been defiled taking into account that the incidence was alleged to have taken place on 08.7.2013 and the examination was done on 09.07.2013.

4. That the trial magistrate erred in law and fact by failing to consider my plausible defence and mitigation thereon without cogent reasons.

4. These grounds were supported by his equally undated submissions The prosecution through Ms. Nyakira made oral submissions in response.

5. The case from the prosecution was that on 9th July, 2013 one VWK then aged fourteen (14) years old and in form one was sent away from school to call her parent because she had spoken to someone over the school fence. The Deputy Head Teacher [particulars withheld] Secondary School gave her the suspension letter to take to her father. Before leaving school, she proceeded to get out of her school uniform and left for her father's place of work in home clothes a hotel in Nakuru town. She never got to speak to him. She left the hotel and went to walk around. She met the appellant whom she did not know before. He reeked of alcohol. He introduced himself as a police officer and

invited her to accompany him to his home in Kiamunyi. They walked from Nakuru Town (around the Water Buck Hotel) to Kiamunyi, more than six (6) kilometers away. They went into a house where the appellant forcefully had sex with her during which she tried to fight him off, even bit his chin. She sat on a stool till morning while he slept on the bed. When she tried to leave he told her that dogs would eat her. The following morning, at 6:00am, he showed her the way to the stage. She then walked up to Showground where she took a boda boda and went home. Her mother paid the boda boda. Her mother then called an aunt by name Mama Judy to whom the complainant recounted what had happened. The aunt gave her some medication. She and her mother then went to Bondeni Police Station, from where they were referred to Provincial General Hospital Nakuru, then to Central Police Station. Both Post Rape Care and P3 forms were completed. She took the police to the house of the appellant and he was arrested. On cross-examination, she told the court she had been given a letter to bring her parents to school the following day. She denied that she had read it and found it was a suspension letter. She said the boy she spoke to over the school fence was not her boyfriend. She said she left her uniform with one Jane as she had worn a $\frac{3}{4}$ trouser under her long school skirt. Jane was to bring her the uniform the following day. That instead of entering the hotel where her father worked, she went 'kupiga maraounds'. That the man she met spoke Kiswahili to her. That she never knew him before. That he told her he was a soldier so she found him trust worthy. That she never told her mother what had happened but told her aunt who gave her medication to prevent pregnancy.

6. Dr. Julius Nondi filled the P3 form on 11th July, 2013 from a post rape care form that had been filled by a nurse on 10th July, 2013. His testimony was that upon examination of the complainant 'there was likelihood of defilement'.

7. The complainant's mother VWK confirmed that the complainant left home on 9th July 2013 to go to school but did not return until the following day at 8.00 a.m. by which time her father had reported to the police that she was missing. All she knew she gathered from the girl's aunt one PK. That the complainant had been suspended from school the previous day, how she had gone to her father's place of work but instead of getting in, had decided to take a walk at the back of the hotel. That is when a man greeted her in Kalenjin. He offered to escort her because it was late. He told her he lived in Kiamunyi with another man and he was a watchman. She walked with the man to his house where he introduced himself as Gideon. That he had sexual intercourse with her under threat of stabbing her with a knife. On cross-examination she conceded that her daughter had left her school uniform and bag with a friend. She denied that her daughter was spoiled.

8. According to PW4 No. 863392 PC Nyatere Nyakundi, on 10th July 2013 the complainant led him and other officers to the house of the appellant. It was a small wooden house in Kiamunyi Estate. He said the accused lit a 'koroboi' lamp so it must have been at night. The complainant identified him and they arrested him.

9. According to him, the complainant's story was that upon being given a letter to call her parents to school, she removed her school uniform and her bag, gave to a friend. She went to the hotel where her father worked but out of fear, she left, without seeing or talking to him. On her way, she met the accused a total stranger who greeted her. It began to rain. They took shelter. "Time flew. It got dark". The accused told her he could host her where he stays with her family and children. She accepted, went with him to Kiamunyi. When they got there, she found that he had lied. He lived alone in this wooden house where he made her sit on a wooden box, asked her to have sex with him she refused, he threatened to throw her out. She was afraid and gave in. He defiled her. The following day she went home and told her parents. On cross-examination he said they went to the appellant's house at night. That the appellant's house was at Kiamunyi near the Railway line, on the left of [particulars withheld]. That it was the only wooden house in the vicinity. That it could have been about 50 metres from the road but he was not sure because they took many corners. That there was a point where they stopped the car and crossed the rail, and the accused's house was about 20m from the rail. That she had walked from that house on 10th. That they had walked from town to Kiamunyi on foot and arrived when it was dark. As at 28th January 2014 he was not sure the house was still there. He denied that accused was arrested at Soilo. He said the complainant had given him one name – Gideon, and they had gone with her so that she could identify the accused for arrest.

On re-examination, he said she told him she walked from the house to the Nakuru Eldama Ravine road but did not ask her how she got home.

10. On 28th January, 2019 the prosecution closed its case and a date was proposed for submissions.

11. On 25th February, 2014 the matter was for submissions. The defence, while pointing out that the appellant had been in remand for long, however applied for the complainant to be recalled. The counsel argued that another magistrate had started the case and it was important for this magistrate to see her. The Prosecution objected to the application on the ground that the defence had sufficient time to cross-examine her. The trial magistrate ordered for the proceedings to be typed to enable her make a decision on the issue. The complainant was recalled, cross-examined, and re-examined by prosecution.

12. The matter was fixed for mention on 21st March 2014. The record does not show whether the trial magistrate made a ruling on the issue of recalling the complainant. There was a new prosecutor who simply stated that the complainant was a school going child. A date was fixed for hearing on 2nd May 2014.

13. The record shows "PW1 RECALLED CHRISTIAN FEMALE ADULT DULY SWORN STATES IN KISWAHILI". The magistrate proceeded to carry out what appears to be a voire dire examination.

'My name is VI. I am 14 years old. I am in form 2. I understand the bible is the word of God if I lie I will be judged by court for lying. I understand the purpose of the oath if I lie God will punish me. I am aware in court I must say the truth. There are repercussions if I do not do so'

14. She was cross-examined some more. She said she had walked for about 10 minutes from her father's place of work before she met accused at about 6:10 pm at Waterbuck hotel near Valley Hospital. It started drizzling. They did not shelter anywhere. That she went with the man because he said he was a soldier and she thought he was a police officer. She said she marked the place where accused lived and took the police there. That there was a signpost with the name 'Kiamunyi'. She said she did not bleed though that was her first sexual encounter. On re-examination she said that she was scared to tell her father she had been suspended. That they walked in the drizzle all the way. She said the accused told her to climb a wall and find her way out. She said his wooden house was within the compound of a main house and she believed that he worked there because he told her the owners were away. That on her way she marked the way- marked a kiosk, a bar and a

kiosk written 'Kiamunyi'.

15. In his defence, the appellant Gideon Kipkogei Koskei gave a sworn statement. He said he was at Mercy Njeri area on the material date. He denied any knowledge of the complainant. He denied having been arrested at Kiamunyi but at Soilo. He testified that he was arrested from his house when the complainant went there with three men. As part of his defence, he asked the court to visit the scene where he was allegedly arrested. On cross examination he said there were no shops, bars, hotels near his house which was after the Njoro junction. On 27th January, 2015 the court visited the scene to search for the wooden house where the defilement allegedly took place. No such house was found and neither was there any sign that it had existed. However, the record suggests that the appellant confirmed that is the place he referred to as Soilo.

Submissions

16. In his written submissions, the appellant argued that:-

There was no proper **identification**. According to the evidence, the complainant had left the hotel where father worked about 6.30 p.m. and had walked with the defiler for over six (6) kilometers to Kiamunyi, where they entered a house with no lights and where the only light was from a Koroboi (tin lamp). Those conditions were not conducive for identification

She also testified that during the defilement she bit the defiler on the chin. No injuries of a human bite were found on him.

He argued that the complainant's testimony was that she had not known him before and that it was the police who assisted her in identifying his name because upon arrival, they asked his name and he told them.

For the prosecution it was argued that the two (2) had walked together and spent the night together. That the complainant had left the following morning so she had **enough time to identify** the attacker.

The appellant also argued that the **medical evidence** before court was **inconclusive**. The doctor himself testified that the examination and reports only pointed out to a likelihood of defilement. The prosecution however argued that the **evidence was enough**.

Looking at the totality of the evidence the appellant argued that the case for the prosecution was riddled with contradictions and inconsistencies.

He urged the court to find that the complainant was not a credible witness, if by any chance she had known his one name as alleged by the police she would have said so at the police station. He thus relied on **Terekalli & Others v. Republic (1952) vol. 19 at page 259 where the court said**

"Evidence of first report by the complaint to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be ganged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others..."

That the complainant's testimony could not be relied on because she had contradicted herself and other witnesses. For instance she testified she did not read the letter addressed to her parents, yet in the same breath said she was afraid of going home because of the suspension. The investigating officer said she told him it had rained and she and the accused sheltered from the rain, time flew and it got dark, yet in her own evidence she said she never sheltered anywhere from the rain. That it only drizzled. Her mother testified that she told her aunt PK she went with the accused who told her he lived with another man, yet the investigating officer said the accused told her that he would shelter her because he lived with his wife and children. Her mother said she told her the man told her he was a watchman. She said he told her he was a police officer. Her mother also testified that it was not usual for the complainant to wear home clothes under her school uniform but that day she did and she removed her school uniform and retained the pair of shorts and a t-shirt. This aunt was not called as a witness. The Appellant argued that the fact of abandoning her school uniform, and the mission to deliver the school note to her father painted her unworthy of belief and devoid of merit. Further that her testimony about the alleged walk from Water Buck Hotel to Kiamunyi was not a true account. Saying that there were no motor vehicles on the road, that they never stopped to cross any road was far from the reality on the ground, because the Water Buck Hotel is right inside town and to walk from there to Kiamunyi there is traffic, you must cross roads etc. In addition that when the scene was visited there was nothing there to support either her description or that of the investigating officer.

17. He argued that there was a test for the truthfulness of a witness set out under **Section 163 (1) (c) of the Evidence Act Cap 80 Laws of Kenya which states**

163. Evidence to impeach the credit of a witness

(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—

(a)

(b)

(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be

contradicted;

(d)...

18. On this point he also cited from **HCCRA No. 405 and 406 of 2009 JON CARDON WAGNER v REPUBLIC & 2 others [2011] eKLR where the court held**

The law is that if a witness had formerly said or written the contrary of that which he testifies, unless a satisfactory reason is given for having done so, his evidence should not have much weight except to show that he or she is not a credible witness.

19. The prosecution's response to all this was that the complainant upon being recalled did not contradict herself and her evidence was not shaken at all. That there was no reason why the complainant would pick on the appellant. That the appellant had insisted that there was no access to his home except through Nakuru Eldoret Highway, but the court has proved otherwise.

20. About the sentence, the appellant argued that it was harsh; that the minimum sentence was twenty (20) years and the trial magistrate had no reason to enhance the same taking into consideration that he was a first offender and the fact that he ought to have benefitted from the least severe sentence prescribed by law. He decried the trend by courts in this country of giving long terms of imprisonment. He pointed out that that by itself had not served as a deterrent.

21. The prosecution was of the view that the twenty-five (25) years sentence was meted after taking into consideration the elements of defilement, the impact of the offence on the complainant and all the evidence on record.

22. Finally referring to the provisions of **Section 124 of the Evidence Act**, the appellant argued that that over reliance on it led to the lowering of the standards of investigation. He argued that all over the country sexual offences were the bane of shoddy police investigations. That there is never conclusive medical evidence and the only evidence available is usually that of the complainant. He argued that as a result the prisons are filled with many innocent men like himself.

23. He argued further that the circumstances of the offence are important and ought to be taken into consideration together with any proof that the complainant was actually defiled.

Analysis

This being a first appeal the appellant is entitled to a re-assessment of the evidence on record and for this court to arrive at its conclusion always bearing in mind I never heard or saw the witnesses testify **Okeno vs R (1972) EA 372**

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

24. That is the challenge with appeals. The court determines issues of facts where the court never saw or heard the witnesses speak, but relies on what was recorded by the trial court. Hence, it is also important to note that an overturned decision does not necessarily mean that the victim was a liar, but that her testimony did not meet the evidential threshold, and that the evidence in its totality could not safely support a conviction.

25. In this case, circumstances of the case were presented by the complainant's testimony. She was there, the medical evidence, which was obtained the day after the incident, the report to the I.O, again made the same day, and the arrest of the appellant. The aunt, to whom she narrated her ordeal, did not testify and hence what her mother told the court with regard to the circumstances is what the aunt told her and that is hearsay. The prosecution did not call this aunt who was a crucial witness and there was no explanation for this. I say this, alive to the fact that the prosecution has the legal discretion the witness they choose to support their case, (**s. 143 Evidence Act**). **However**, where the testimony of the witness is as crucial as that of the complainant's aunt in this case, the court is at liberty to draw the inference that may be her testimony would not support the case for prosecution, see **Bukenya v Uganda**.

26. I do agree with the appellant that indeed, the evidence regarding the circumstances surrounding the offence present the scenarios by the complainant, the scenario by the aunt through the mother, the I.Os scenario. The provisions of s. 163 of the evidence Act and the **Jon Wagner** case easily apply to these scenarios.

27. However, in this seeming chaos in the evidence, there is a certain consistency that runs through. The complainant told the nurse who examined her to fill out the PRC form on 10th July 2013 at around 12:15 pm that 'she was sent away home from school **'met the perpetrator who offered her a place to spend the night'** . On the part where it seeks information on the assailant, it reads, **'can be identified as well as his house'**. The PRC also records that she had **'tenderness and pain on the laps, (vagina) profuse white discharge'**. The lab results revealed **'moderate epithelial cells'**. The P3 completed on 11th July, the brief details of the offence **'...date and time ..9th July 2013 at night...she alleges to have been defiled by a known person to her ...'** and the general medical history **'...patient was defiled on 9/7/2013 by someone she can physically identify'**. He concluded that the evidence was **highly suggestive of defilement**.

28. It is noteworthy that she said she bit the appellant while fighting him off. It is not evident whether the I.O had this information and if he did what he did with it. What is evident is that the I.O did not carry out investigations save to accompany the complainant to the appellant's house. He did not even know how the complainant got home from the appellant's house, did not follow up with the boda boda riders at show

ground, or record Aunt Patricia's statement. No investigation except the bare minimal.

29. This consistent thread must be put together with the fact that she took the police officers to the appellant's house. The appellant conceded in his defence that the complainant went to his house with three men at night. She had all along said that she could identify the assailant plus his house and she did exactly that. What is the chance in a million that the complainant just took officers to a random house in Kiamunyi or Soilo as the appellant called it? The scene visit more than 6 months after the event was another bet. So much could have changed in that period.

30. It appears to me that the likely thing, which the complainant was trying to cover up, is that the accused was not a total stranger. Her father was not a monster, neither was her mother. She had no morbid fear sufficient enough to take cover, because she went back right home after the incident. Her father reported that she was missing. She went with the appellant to his house because he was not a complete stranger. Look at the evidence. She was found to have broken a school rule and was given a letter to take to her parent. On her way out of school, she discarded her school uniform and was left with a pair of shorts and top, and according to her, her intention was to go ask her father to accompany her to school, that same evening, in the pretext that she had arrived home and changed from her school clothes. This ploy was to dupe both her father and the school administration. Instead, a few meters from her father's place of work, she decided to walk around "kupiga maraundi" and met a stranger opposite Valley Hospital. Valley Hospital and Waterbuck Hotel, are adjacent to each other with a road separating them. According to the complainant, it is between Valley Hospital and Waterbuck Hotel that they spoke many things to the point where she agreed to go with the man she had just met to his home. It was nearer for her to go meet her father or go home than go with a total stranger to his home but she did, it was dark, they walked in the darkness, Kiamunyi is far from Waterbuck, 2.7 kilometres according to Google maps and it would take about forty (40) minutes to walk there. From Waterbuck Hotel to Mwariki where her home was would be 2.2 kilometres, about 27 minutes' walk. It is difficult to envisage walking with a total stranger the whole of that distance without her for one minute questioning herself where she was going with a complete stranger.

31. The appellant cannot be heard to say she did not know his name. They could not have spent so much time together and she would not know. In my view the omission to tell it did not create a sense that she was lying, because she actually took the police to the appellant's house. He was arrested from his house, the house pointed out by the complainant the day after the incident.

32. There was a certificate of birth, which shows she was born on 6th May 1999, which made her to be between 14 and 15 since the offence was committed just after her 14th birthday.

33. Hence, though as I agree with the appellant that the complainant's evidence is jumbled up, and could easily be read to mean she was not a trustworthy witness, I find that that is not the position. When we ignore all the hearsay evidence, and take into consideration of the shoddy investigations there is still clear evidence that an offence was committed. Her testimony is corroborated by the medical evidence and the arrest of the appellant from his house. Penetration, the identity of the perpetrator and her age have all been established beyond a reasonable doubt.

34. I find no reason to disturb the conviction.

35. Regarding the sentence, the magistrate who delivered the judgment on behalf of the one who wrote it meted out the 25-year sentence against a possible 20 to 15 years sentence, Why? No reason was given for exceeding the indicated 'minimum'.

36. In **Dismas Wafula Kilwake v R** the Court of Appeal imported the holding in **Francis Karioko Muruatetu** on the unconstitutionality of the mandatory nature of any sentence that takes away the discretion of the court in sentencing under the **Sexual Offences Act** in the following words.

*Here at home in a judgment rendered on 14th December 2017 in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While we appreciate that the decision had nothing to do with the Sexual Offences Act, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. The Court expressed itself thus:*

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right." (Emphasis added)

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing."

37. In **Dismas Wasike Kilwake** case, there were aggravating circumstances. The appellant was armed with a panga and threatened his 14-year-old victim with the same. The court reduced the sentence from 20 to 15 years' imprisonment.

38. In this case, according to the complainant, when she threatened to leave, the appellant told her if she left at that time of the night she would be eaten by dogs. He had told he would call another watchman but she did not say what for. After defiling her he did nothing else. She sat on the stool till morning. He slept and at 6:00am showed her the way to the stage.

39. The appellant has been in custody since 12th July 2013 and was sentenced to 25 years imprisonment on 5th June 2015. The prosecution said he was a first offender. There were no other aggravating factors. He sought a lenient sentence because he was sick, a fact borne by the record when the trial magistrate had to make orders for his treatment.

40. **Section 333(2) of the Criminal Procedure Code** requires that the period spent in custody prior to the sentence to be taken into consideration.

41. The appeal succeeds on sentence. The sentence of 25 years is substituted with 10 years' imprisonment to run from 5th June 2015.

42. Before I conclude, I have in this judgment pointed out the omissions in the record, not for anything else but because if the record is not complete then at the appeal which relies on the record there could be issues. If an issue is set aside for ruling let the record, reflect that, either the ruling was delivered or the issue was settled in another manner. If a different magistrate delivers, the judgment let the record bear the name and signature of the magistrate.

43. The conviction is sustained. The appellant to serve ten (10) years imprisonment to run from 5th June 2015.

Dated and signed at Nakuru this 9th day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of: Via Zoom

Appellant present

Ms Mburu for state

Edna Court Assistant