



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

HCCR. APPEAL 67 OF 2016

SAMUEL MBURU NGETHE.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court

at Kandara Cr. Case No. 730 of 2012 delivered by Hon. P. Nditika (SPM) on 21st April, 2015).

J U D G M E N T

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement of a girl with mental disability Contrary to Section 7 of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the 25th day of October, 2012 at [Particulars Withheld] village within Murang'a County intentionally and unlawfully caused his penis to penetrate the vagina of E.W. a girl aged 15 with mental disability in violation of Section 7 of the Sexual Offences Act No. 3 of 2006.
2. In the alternative he was charged with indecent act contrary to Section 11(1) of Sexual Offences Act No.3 of 2006 in that he unlawfully and intentionally touched the vagina, breasts and buttocks of E.W. a girl aged 15 years in violation of Section 11(1) of the Sexual Offence Act No. 3 of 2006.
3. On conclusion of the trial, the trial Court found the Appellant guilty of the alternative charge and convicted him accordingly. He was sentenced to serve 10 years imprisonment.
4. The Appellant was dissatisfied with both his conviction and sentence against which he preferred the present Appeal. His Petition of Appeal in hand written form was filed on 26th June, 2018. It raises nine (9) grounds of Appeal which I summarize as follows.
5. The Appellant took issue with the fact that no cogent evidence in proof of the offence he was convicted for was tendered. He faulted the manner in which the identification parade in an attempt to identify him was conducted. He states that he was the only balded man in the parade and that a female police officer touched him before the complainant (PW1) could. Further, that he was not given a chance to call a solicitor or a friend during the parade. He also faulted the evidence of PW2 which he claims did not tally with what was recorded in the investigation diary. He took issue with the fact that none of the persons who assisted in his arrest were called as prosecution witness, more so on the Court failing to recognize that one of them had a grudge with him. Finally, on his identification, he complained that although PW1 claimed to have positively identified him, PW6 testified that PW1 did not give a description of him and how she made the report. He finally complained that the sentence of 10

years imprisonment was harsh and excessive.

SUBMISSIONS

6. The Appeal was canvassed before me on 3rd September, 2020. The Appellant who was in person relied on brief undated hand-written submissions. The Respondent was represented by learned State Counsel, Miss Gichuru who tendered oral submissions.

7. According to the Appellant, he was convicted for an offence that was not disclosed by the evidence tendered. He submitted that the complainant testified that she was not touched any part of her body. That although she said that the clothes she was wearing on the material date were stained with blood, the said clothes were neither subjected to any examination nor availed in Court.

8. The Appellant also submitted that the charge was a fabrication. He took issue with the complainant's testimony that the blood from her vagina also had other discharge, yet the doctor's evidence did not reveal such findings. That any case, PW2 stated that she had not noted anything unusual with PW1. That the witness (PW2) had also alluded that the (Appellant) was a good person.

9. On his identification, the Appellant submitted that no one testified to have seen him with the complainant on the material date. Further, during the identification parade, one of the Police officers present touched him before the complainant did with a view to directing the complainant whom to identify.

10. As regards the age of PW1, the Appellant submitted that the same was not proved. He cited contradictions in the witnesses evidence. He stated that the charge sheet showed PW's age as 15 years while PW2 testified that she was aged 16 years. In further contrast on the same, the P3 Form showed her age as 13.

11. Finally, he urged the Court to release him because he had learnt several life support skills which would assist him earn a living out of prison.

12. Miss Gichuru for the Respondent opposed the Appeal. She submitted that the issue of the age of the complainant was not contested. It was her case that the victim was a girl who had a mental disability whom the trial Court ruled that, although she could testify, she did not understand the essence of taking an oath.

13. Counsel submitted that, although the trial Court found no evidence to support the offence of defilement, it was clear that she and the Appellant met on the material date and the Appellant touched her private parts. PW1's evidence, Counsel asserted, was corroborated by that of PW3, her mother. Further an identification parade was conducted later on the same day and PW1 positively identified the Appellant as the culprit. She added that there was no bad blood between the parties that would occasion PW1 to implicate the Appellant. Furthermore, investigations revealed that the Appellant was not at his place of work on the material date.

14. It was Miss Gichuru's view therefore, that the prosecution had proved its case beyond a reasonable doubt. She urged the Court to uphold both the conviction and sentence and accordingly dismiss the Appeal.

15. In rejoinder, the Appellant urged the Court to consider that while in prison he had trained in many artisan skills which would assist him and in return assist others if the Court released him.

SUMMARY OF EVIDENCE

16. This being the first Appellate Court its duty is to reevaluate and reanalyze the evidence and come up with its independence findings. In doing so, the Court must bear in mind that it has neither seen or heard the witnesses and give due regard for that. **See Okeno vs Republic (1972) EA, 32.** Bearing this in mind, I summarized the prosecution case as follows.

17. In total the prosecution called a total of six witnesses. PW1 was the complainant, then attending [Particulars Withheld] Community Training Center for mentally challenged children. Although she could not recall her age her teacher **Beatrice Wanyambura Nganga** who testified as **PW2** stated that she was 16 years old. She had joined the center in the year 2005. On the 25th October, 2012 at about 7.00 am she was walking to school when she met the Appellant on the road. She had there before severally seen the Appellant within the area although she did not know his name. The Appellant pulled her by her hand and dragged to a nearby bush where he defiled her. He then left her on the road and she proceeded to school. On arrival at school at parade PW 2 noticed that she was not happy. She provoked her to speak out after which she revealed that she had been defiled. PW2 then reported the matter to priest within the Center who advised that PW1 be taken to hospital. Subsequently, PW1's mother, **MW (PW3)** was informed. She joined PW1 and 2 at Kandara Health Center where PW1 was treated.

18. A Post Rape Care (PRC) form was filled on 25th October, 2012 which indicated that PW1's genitalia was normal and had no lacerations, there was absence of hymen, no bleeding or abnormal discharge. **PW5, Dr Chacha Mwita** of Thika Level 5 Hospital filed PW1's P3 Form on 1st November, 2012. Apart from physically examining PW1 he was guided by the PRC Form in filling the P3 Form. The findings were of normal external genitalia, lack of hymen, lack of lacerations or abnormal discharge. The P3 Form and PRC Form were produced in evidence as exhibits 3 and 4 respectively.

19. After the incident, PW3 decided to be escorting PW1 to school. She adopted a trick whereby PW1 would walk a few meters ahead of her. On 19th November, 2012 as they were walking to school she saw PW1 suddenly retreat backwards towards her. PW1 then informed her that she had seen her assailant. She advised her to run to school leaving her (PW3) behind. PW3 then stalked the Appellant up to a point where he found some people who could assist in arresting him. This was near Ngarariga Shopping Centre where he mobilized three men who arrested the Appellant. PW3 informed **PW4, James Rongo** the village elder about the arrest. PW4 in turn informed the chief who advised that the matter be reported to the police. Subsequently, the Appellant was taken to Ngarariga Police Post and later to Kandara Police Station. Thereafter investigations commenced.

20. An identification parade was conducted on the date of arrest, 19th November, 2012 by Inspector Kanyeki of Kandara Police Station in which PW1 positively identified the Appellant. The Appellant was then charged accordingly. The identification parade form was produced in evidence by PW6 who testified as the investigating officer.

21. After the close of the prosecution case, the learned trial magistrate ruled that the prosecution evidence had failed to establish the main charge of defilement and according acquitted the Appellant on that count. Conversely, the Court ruled that a prima facie case had been established on the alternative charge of indecent act and accordingly called upon the Appellant to tender a defence. The Appellant opted to give an unsworn statement of defence in which he denied committing the offence.

22. In his brief statement, he stated that he was occupied as a bore hole digger. That on the 19th November, 2012 as he was looking for a job he was accosted by many men who started assaulting him and broke his two teeth. They alleged that he had raped a woman. An old man who was passing by intervened urging the men who were beating him to take him to the police station. He was accordingly, escorted to the police station. He confirmed that on the same date an identification parade was conducted where a female police officer touched him before the complainant did. He was thereafter placed in cells and charged with defilement. He claimed he had never seen the complainant before.

23. In the Judgment of the learned trial magistrate, the Court made a finding that the complainant gave a truthful account that, apart from defilement the Appellant had touched her breasts and buttocks. He also had no doubt in his mind that both Appellant and Complainant had met. Consequently, he found him guilty of the alternative charge of indecent act.

DETERMINATION

24. In my view, I entirely concur with the decision of the learned trial magistrate that the prosecution evidence failed to establish the offence of defilement. This is particular so because although the complainant testified that she was defiled as a consequence of which the Appellant ejaculated on her and she bled from her private parts, a medical examination on the same date disclosed no such findings. Further, although PRC and P3 forms indicated that there was absence of hymen, amidst other negative findings it was incumbent to disclose how old the broken hymen was so that a possible penetration could be associated with the date of the alleged incident. Furthermore, PW5 the doctor who examined PW1 was candid that the hymen could have been broken through other means other than sexual intercourse.

25. The onus of this Court therefore, is to determine whether the Appellant intentionally indecently touched the buttocks, vagina and the breasts of the complainant. Of paramount determination is the positive identification of the Appellant.

26. PW1 who was a minor was candid that on the material date she met the Appellant as she was going to school. Although she did not know him by name she testified that it was a man she used to meet within the area and particularly in the morning when she was going to school. She further described this man as a balded gentleman. On the basis of this description the investigator decided that an identification parade be conducted which yielded positive results. It suffices to state that the officer who conducted the parade, Inspector Kanyeki did not testify. The Identification Parade Form was adduced by Sergeant (woman) Jane Gichiku without the objection on the part of the defence which was represented by learned Counsel, Mr. Mbiu.

27. I note that the Appellant has taken issue with the assertion that a female police officer first touched him before the complainant did during the parade so as to direct the latter who the assailant was. A scrutiny of PW1's evidence in chief attests that she indicated that her assailant was balded. She further stated that she was reminded to state as much. Her evidence reveals that the identification parade may not have been conducted in accordance with the Police Standing Orders. She testified that the Appellant was placed somewhere in the middle of the parade members. That all the parade members wore white coats despite that they were not all balded or of the same height. Later she confirmed that in deed it was only the Appellant who was balded and taller than other parade members. The fact that she was reminded to pick out a man who was balded is a testament that she did not independently identify the Appellant. This implies that she could have identified a man who was known to another person and not herself.

28. The manner in which the parade was conducted definitely was contrary to laid down procedure of conducting parades under the National Police Standing Orders. Rule 7 under Chapter 42 of the Orders deals with how parades should be conducted. Rule 7 (5) (e) states as follows:

“where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not specially apparent.”

29. In the present case, the only balded member of the parade was the Appellant which made it easy for the witness to identify him. Again, the conduct of the parade went against **Rule 7(2)** which prohibits a police officer from directly leading a witness to the suspect. The same reads:

“The police shall not take a witness direct to an accused or suspected person for the purpose of identification except when they are sure that the accused or suspect is well known to him or her.”

30. Another intriguing twist is that investigations did not lay the basis for conducting the identification parade. The purpose of conducting an identification parade is simply to confirm that the victim would be able to identify a person s/he had clearly seen in difficult circumstances; thereby ruling out a case of mistaken identity. This rationale is echoed under Rule 7 (1) which states that:

“7. (1) The police shall organize an identification parade to ensure a fair and correct identification when the whereabouts of the accused or suspected person is known to the police, but there is some doubt as to whether he or she is the person so accused. ”

31. In the instant case and as testified by PW1 and PW6 there was no first report made as regards the description of the assailant. It begged then the basis on which police formed an opinion that an identification parade would be conducted.

32. Furthermore, in her evidence in chief the PW1 stated that she was reminded by her mother and the police on what to say; specifically about the parade and about a man who was balded. She further said she was told to tell the Court the it was the first time she has had sexual intercourse. This drives to a simple conclusion, that her identification of the Appellant was premised on couched evidence, more so from her mother. It was clearly an identification that was tainted with unfairness to the Appellant. I am in doubt therefore, that the identification of the Appellant was fully independent of coercion from third parties.

33. I have also perused the original records of the trial Court proceedings as well as the record of Appeal prepared for the purposes of this Appeal. Nowhere does the parade form feature, whether deliberately misplaced or not. I am unable therefore to make a conclusion that the identification parade was conducted in accordance to the laid down procedure. In the circumstances and notwithstanding that PW1 complained of both defilement and indecent assault, the identification to the Appellant is doubtful.

34. The law is very clear that the prosecution must discharge its burden to the required standard, which is beyond all reasonable doubt. Where a Court entertains a doubt no matter how small it is the benefit of the doubt must be accorded to the accused person. I have no other task than to do the needful.

35. I also note that the prosecution of the matter was done in a casual manner. This is in view of the fact that under both Sections 8 and 11 of the Sexual Offences Act No. 3 of 2006 proof of the age of the victim is a necessary element. As regards Section 8 sentences are governed by the age of the victim. With regards to Section 11(1) it refers to indecent act with a child and therefore the prosecution was obligated to establish that the complainant in this case was a child. This is more so where the age of a victim is on the border line.

36. In this regard the prosecution failed to discharge this onus even when clearly the evidence was on their eyes. I say so because PW3, the mother to the victim in an attempt to demonstrate the age of her daughter informed the Court she had a hospital Clinic Card. The prosecutor in Court did not lead the witness to identify that Clinic Card which would have disclosed the age of the victim. Surprisingly she had told the Court that the complainant was aged 15 years thereby supporting the charge sheet. However, her teacher, PW2 informed the Court that the victim was 15 years old. The P3 form on the hand indicated the age of the victim as 13 years.

37. The question arising is; on what basis would the Court have sentenced the Appellant were it to find that penetration was established? Further, how would the Court have arrived at a conclusion that the victim was a child for purposes of Section 11(1) of the Sexual Offences Act? I will not further delve in this issue upon my finding that the Appellant was not positively identified. I only emphasize that when the prosecution attempts to introduce documentary evidence which it does not move the Court into its admissibility the result is to fall far short of discharging the burden of proof of the case beyond all reasonable doubt.

38. In sum, I find that the prosecution did not proof its case to the required standard. The conviction of the Appellant was not save. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH DAY OF SEPTEMBER, 2020.

G.W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Miss Gichuru for the Respondent.