



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 12 OF 2017

(From Original Conviction and sentence in Criminal Case No. S.O 8 of 2016 of the Senior Resident Magistrate's Court at Gichugu)

HASSAN MUCIIMI NDARU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted of defilement of a girl aged 16 years on 25/05/2014 and sentenced to 15 years imprisonment contrary to **Section 8(1)** as read with **Section 8 (4) of the Sexual Offences Act No. 3 of 2006**.
2. He lodged an appeal claiming that the learned magistrate erred in law and fact by;
 - a) **Not considering the case was not proved beyond reasonable doubt as required.**
 - b) **Not considering the investigation carried out was shoddy.**
 - c) **Not considering the complainant exonerated him from the act.**
 - d) **Not considering the case was full of contradiction and inconsistencies.**
 - e) **Not observing the prosecution witnesses were not credible.**
 - f) **Observing extraneous matters not supported by evidence adduced in court.**
 - g) **Not considering his alibi defence contrary to Section 169 (1) of the CPC.**
3. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.
4. The state opposed the appeal and filed submissions. It is contended that the offence of defilement was proved beyond any reasonable doubts and the appeal ought to be dismissed.
5. The facts are that the complainant is a child aged sixteen years. On 13/6/16 she was sent by her mother to go to the shop and buy some items. As per the statement she had recorded with the police the complainant stated that she met the accused who pulled her so that she could greet him. She lost consciousness and when she came to she found herself at 4.00 am next to the appellant. On further examination she stated that she had sex with one Dennis but not the appellant. The complainant's mother testified that she waited for the complainant to return home but in vain. The next morning she went looking for her. At 10.00 a.m she was called by the Assistant Chief who informed her that the complainant had been found inside the house of the appellant. She went and met the complainant and the appellant. The complainant was escorted to hospital. PW-2- produced a birth certificate showing that the complainant was born on 1/8/1999. PW3 the complainant's father testified that she reported the matter at the Administration Police Post. PW-4- the arresting Officer mounted a search for the complainant and he met the appellant in his butchery. He ordered the appellant to open his house. Upon opening the complainant was found inside. PW-4- stated that it is the appellant who opened the house for him.
6. Upon being examined by the Clinical Officer, the complainant had the hymen broken and the vagina was inflamed at the opening. The Clinical Officer concluded that the complainant had been defiled due to the presence of excessive trauma at the opening of the vagina. The P3 form was produced as exhibit -1-.

7. In his defence the appellant stated that police went to his shop with the complainant and arrested him without telling him the reason of his arrest. He testified that he suspected that the girl was with somebody else.

8. This being a first appeal this court has a duty to consider the evidence, evaluate it and analyse it and come up with its own independent finding while bearing in mind that it did have an opportunity to see the witnesses and assess their demeanor and leave room for that. This was so held in the case of Okeno –v- R(1972) E. A 32. I have considered the evidence adduced.

Issues arising:

1. Contradictions and inconsistencies

The appellant alleges there is contradiction on where PW 1 was found and who identified her.

PW-2- stated that when PW-1- failed to return home she informed her husband who is PW-3- in this case.

9. PW 3 informed the police that PW 1 was missing and that she was with the appellant. The police went to appellant's place of work and requested to search his house where they found PW 1 sleeping. There is therefore no contradiction. There is well corroborated evidence that the complainant was found in the house of the appellant whose door was locked from outside and it is the appellant who opened the door.

2. Alibi defence

The appellant relies on Section 169(1) of the C.P.C which I find is not relevant.

The appellant claims he had been working on the alleged night and as per the judgment page 6, the trial court duly considered the appellant's defence. The trial Magistrate found that the appellant could not remember the date of arrest. Though he said he was at his place of work. The evidence tendered shows that the complainant did not spend the night at home.

3. Did the prosecution prove its case beyond reasonable doubt?

As per the evidence of PW 1, who was declared hostile witness stated she went with Kicugo and went freely to his home and the police came for her the following morning. That her sister forced her to say it was Hassan the appellant. The trial Magistrate considered her testimony and stated as follows:- Page 36-38 of the record.

“Of importance to note is the fact that the complainant herein the victim, was declared a hostile witness for having recorded a statement at the police station and giving a story in her testimony that was different from what she had earlier recorded.

How should the court treat her testimony? Evidence of such a witness must be treated with a lot of caution and only used where there is sufficient corroboration. A court cannot place weight on evidence that is negligible in law.

In the case of Abel Monati Nyaramba and 4 Others –vs- Republic (1996) eKLR ,the court made the following observation in regard to evidence of a hostile witness:

It is said, “The evidence of a hostile witness is indeed evidence though generally of little value. Obviously no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt(emphasis added).

In the case of Maghenda v/s Republic (1986) KLR 255 the court observed.

“The evidence of a hostile witness must be evaluated in particular if he intends to favour the accused though it may not necessary be acted upon by the court”, it went further to state that;

“A court would normally take a perverse view of the credibility of the hostile or refractory witness in view of shift in position regarding his statement to the police regarding the case against the accused or is reluctant to testify.....”

In Daniel Odhiambo Koyo –v- Republic (2011) eKLR , the Court of Appeal sitting in Kisumu stated that the probative value of such evidence is negligible and may only be relied upon in clear cases to support the prosecution or defence cases.

With the above in mind, should the court believe and put weight in the evidence of the complainant herein? I make an observation that, statement written or recorded by witnesses at a police station are of paramount importance because they provide a test by which the truth is subsequently told: if a witness writes and/or records a statement complaining that another one wronged him or her in this manner, why and how will that person go ahead and deny having implicated that person on a later date? The relationship between a hostile witness and accused person before and after the making of the complaint and recording of statement is very crucial for the court to determine if the hostile witness is truthful or not.

The reason why, the witness (PW1) herein, stated to have at the time of recording her report and statement is that, she was forced and threatened to be killed by her mother, if she did not say the truth. She also said her elder sister told her to implicate the accused. She did not however explain why she was to implicate him. She had denied knowing the accused but towards the end of

her testimony she confirmed she knew him before the date of offence as a butcher man. She cannot therefore deny she was not know to him. All she is seen to be doing by being hostile is attempts to protect and favour the accused by recanting her statement. She was not coerced to record it. She is a child under the Children' Act by virtue of being under the age of 18 years. She is however old enough to differentiate between good and bad. Telling the truth and false, seemingly she was a friend of the accused hence the need to favour him by being hostile. I do believe in what she had told the police is what was recorded by the police in her statement and that was the state of affairs then."

10. The trial Magistrate had the opportunity to see the complainant and found that her intention was to cover the appellant. The complainant is a victim of sexual offence. She was treated as a hostile witness and was cross-examined.

The proviso to **Section 124 of the Evidence Act** states:-

“Provided that where in a Criminal case involving a sexual offence, the only evidence is that if the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”

11. So in this case where the witness was treated as hostile, the evidence of the complainant could not be relied upon to convict. The court had to consider whether the evidence of the complainant was corroborated by other material evidence. The victim had alleged that she was threatened by PW-2- a fact that was denied. Even looking at the way the complainant and appellant were arrested, there was no opportunity for PW-2- to threaten her and PW-2- had no reason to implicate the appellant.

The evidence tendered by PW 2, 3, 4 & 5 corroborates the statement of the complainant which she had recorded at the police station that she had spent the night with the appellant. This is confirmed by the overwhelming evidence that she was found in the house of the appellant which was locked from outside and it is the appellant who had to open the door of his house from where she was rescued. The fact of defilement was corroborated by the medical evidence which found evidence of excessive trauma at the opening of the vagina.

12. The evidence of the complainant though shaky could be relied on to convict the appellant as it is evidence though of little probative value. It was corroborated by evidence which was material to the case and by independent witnesses The evidence had to be evaluated and a finding be made. Where the credibility of the witness is wanting, upon being corroborated with cogent facts, the court will not hesitate to base a conviction. The complainant was found inside the house of the appellant after she had gone missing the whole night. The appellant had locked her inside his house, the doctor found she was engaged in sexual activity. There is overwhelming evidence to corroborate the evidence in her statement to the police that the perpetrator was the appellant. The trial Magistrate did not err in returning a verdict of guilty on the appellant.

13. PW 2 stated that she sent PW 1 to take milk and buy medicine but she did not return that night. The following morning they went looking for her in vain. Later, she was called to the police that PW 1 had been found. PW 1 told her she greeted the appellant and became unconscious.

14. PW 3 stated he called area sub-chief the following morning and was advised to report to AP post. Later a police officer beckoned him to AP post and found PW 1 and the appellant.

15. PW 4 stated how PW 3 went complaining that the appellant had defiled PW 1. They went to search for the appellant and found him in the shopping centre. They told him to open his house and PW 1 was found asleep.

16. PW 5 stated PW 3 reported that PW 1 had gotten lost and he went searching houses in Mbiri market. He was informed that PW 1 was in the home of the appellant. They went to where appellant worked and informed him they wanted to search his house. Upon opening they found PW 1.

17. PW 6 who is attached to Kianyaga police station stated that the appellant was brought together with PW 1 and others on allegation of defiling PW 1.

18. PW 7 the clinical officer on examination of PW 1 found her hymen was broken but not fresh and the vagina was inflamed. High vaginal swab showed no presence of spermatozoa.

19. The appellant in his defence stated that he was working that night upto 10 Pm. The following day, he woke up early to go to work and later police officers came and arrested him. They came with PW 1 and said that he was with her but he did not know her.

20. In a charge of defilement the ingredients which the prosecution has to prove are:-

(a) Identity of the perpetrator.

(b) Penetration.

(c) Age of the complainant.

21. I have said enough above on the identity of the perpetrator. On the issue of penetration, the complainant in her statement to the police had given details on how the appellant penetrated her. The testimony of PW-7- the Clinical Officer who examined the complainant was that

the vagina was inflamed at the opening, the hymen was broken though not fresh. He made a finding that the complainant was penetrated. Penetration was proved.

22. As for the age of the complainant the birth certificate was produced showing that the complainant was born on 1/8/1999. This proves that at the time of the commission of the offence she was 16 years old. The prosecution did discharge the burden to prove all the ingredients of the charge beyond any reasonable doubts.

Section 8 of the Sexual Offences Act No. 3 of 2006 states;

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

23. Looking at evidence adduced, in its entirety I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The police were informed that the appellant was with PW 1 and upon searching his house which he had locked from outside found PW 1 sleeping. The defence was a mere denial and not plausible. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion, that of guilt of the accused.

The appeal is without merits and is dismissed.

Dated at Kerugoya this 7th Day of February 2019.

L. W. GITARI

JUDGE

Read out in open Court.

Mr. Obiri P/C

Accused

C/A- Winnie