



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 28 OF 2017

IBRAHIM MAINA KARUIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence from the judgment of the Hon.D.M.Ireri Resident Magistrate, Othaya delivered on 22nd May, 2017 in CM.Criminal Case No.1 of 2017)

JUDGMENT

1. The Appellant **Ibrahim Maina Karuiru** was charged with the offence of defilement of a girl contrary to **Section 8 (1)(3)** of the **Sexual Offences Act**; the particulars of the charge are that on the night of 30th day of December, 2016 within Nyeri County, the Appellant intentionally caused his member to penetrate the genital organ of **JKW** a female child aged fifteen (15) years.

2. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that on the same date and at the same place hereinabove mentioned the appellant intentionally touched the private parts of **JKW** with his member.

3. The prosecution called six (6) witnesses to prove its case and after the trial, the Appellant was found guilty, and was convicted on the main charge and sentenced to twenty (20) years imprisonment;

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and the grounds of appeal and amended grounds of appeal are summarized *inter alia*;

(i) The entire prosecution evidence was hearsay, derivative and contradictory; that the complainant's evidence exonerated the appellant of the offence;

(ii) That his identity was not proved; the medical evidence cast doubts in the prosecution's case; that penetration was not proved to the required standard;

(iii) The trial court rejected his credible sworn defence without considering that the same was not displaced by the prosecution evidence;

5. At the hearing hereof the appellant was unrepresented and relied on his written submissions whereas the prosecuting counsel for the state was Ms. Gicheha who made oral presentations; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

6. The appellants first contention is that the prosecution did not prove penetration to the desired threshold as defined by Section 2 of the Sexual Offences Act; that **PW6** testified that he did not take samples of blood, nor the lessor nor the biker to the Government Chemist for laboratory analysis as required by law so as to prove the penetration in question; no clinical notes were produced; therefore there was no evidence to prove whether the blood found resulted from penetration or was from her menstruation; therefore without a Lab Request Form there was no evidence to support the charge; the appellant ought to have been given the benefit of the doubt; case-law relied on **Richard Nyaga Kariuki HCRA.No.103 of 2013 Nyeri** where it was held "*....the purpose of the analysis according to the Government Chemist was to determine the presence and the source of the semen or spermatozoa...*".

7. That there was a delay in filling the P3Form; the dates of the filing of the P3Form differ from the date the complainant was sent to hospital; the discrepancy on the dates casts doubt to the prosecution case;

8. The trial court failed to discharge its duty as required of it on the main ingredient of identification or recognition of the appellant by **PW2**;

the evidence of Beatrice (**PW3**) who was her teacher and that of **PW4** and also of **PW6** was that **PW2** did not disclose to any of them the identity of the person who had defiled her; that this shows that **PW2** did not know the person who defiled her on the material date; case-law relied on **Republic vs Kabogo s/oWagunyu eKLR (2013)** where it was held that “...*the omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers identity*”

9. The appellant urged the court to grant him the benefit of doubt;

10. The appellant elected to give sworn evidence and called two witnesses to testify; that he never defiled **PW2** and that he had an established alibi on his whereabouts; he stated that he used to be a farm worker; on that material date at about 1.00pm he was at Gitandara in the company of George (**DW2**) and his employers wife one Lucy Wanjiru (**DW3**) cutting nappier grass; that they got back at 4.00pm and he started milking the cows and were thru with their tasks by 8.00pm when they went and bathed and never left the house which was 10metres from his employers house;

11. That she resided about a kilometer away from his employers’ house and he used to see her on the road but didn’t know her name; he knew her father who also used to work for his employer when the Appellant was away; that maybe **PW2** and **PW5** had planned to fix and frame him;

12. The trial court did not properly consider his credible and believable defence and failed to give sound reasons for rejecting it; he urged this court to critically re-assess and re-evaluate the whole evidence adduced by the prosecution and to arrive at a different conclusion;

RESPONDENT’S SUBMISSIONS

13. In response the state submitted that the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3); the alternative charge was indecent act with a child; the child was aged 15 years; he was convicted and sentenced to serve 20 years imprisonment;

14. **PW2’s** narrative of what transpired on that material date 30/12/2016 was that at about 6.00pm she had gone to the shops to buy paraffin; when going back at 6.30pm as it was getting dark she decided to use a short-cut; when she got to the gate of the Appellant’s employer she found the Appellant there and he engaged her in conversation enquiring where she was coming from; to which she responded and continued walking and the Appellant followed her; she started running and the Appellant followed suit and caught up with her and held her hand; she screamed but no one came to her aid; he took her to his house and left to go out to look around to confirm that no one was around;

15. In her testimony she gave a description of the inside of the Appellants’ house; that it was divided by card-board into two rooms; there was a bench that he had made her sit on; she told him that she was on her menses but he declined to hear and pushed her to his bed; he removed her lessso, biker and sanitary pad and spread her legs apart and proceeded to defile her on his bed; she tried to scream but he ordered her to keep quiet; the ordeal lasted for 20 minutes;

16. The time was now about 7.00pm; the appellant walked out and she wiped herself with the lessso and dressed up and left; the Appellant attempted to escort her but she declined; she couldn’t tell her father about the incident but the following day she told her teacher who then called her Aunty K who then notified her father;

17. She was taken to Othaya Hospital where she was treated with antibiotics and was referred to Othaya Police Station; the results of the examination were tendered into court by **PW1** who confirmed that there was blood on the external genitalia with lacerations and also a freshly broken hymen; the vaginal swab showed the presence of bacteria which was an indication of an infection; these were signs and confirmation of defilement;

18. The other witnesses were **PW3** who was the complainant’s teacher, **PW4** who was the aunty and **PW5** who was her father; all these witnesses corroborated **PW2’s** evidence; and the prosecution proved its case beyond reasonable doubt that the complainant had been defiled; penetration was proved by **PW1** and the age of the minor was also proved that in fact she was a minor;

19. On whether it was the appellant who committed the offence; there was no doubt as **PW2** revealed that it was the Appellant who had assaulted her; when he was arrested she identified him as the one who had defiled her; **PW6** the Investigating Officer visited the scene of crime and he saw the bench and the bed and that the house was indeed isolated and he confirmed that the settings were as described by the complainant; his evidence corroborated that of the complainant;

20. Counsel submitted that there were no contradictions in the evidence of the prosecution witnesses; the complainant was consistent in her evidence in chief and during cross-examination in that there was no other person who committed the offence other than the appellant; the complainant had no relations with the Appellant and the 15year old could not frame him; that the evidence in the medical report was conclusive;

21. As for the alibi defence the appellant called two witnesses to prove that he was away in the field cutting nappier grass; but this defence was rejected as it was found to be a collusion by the three to lie to the court so as to deny the complainant justice; the defence did not water down the prosecution’s case;

22. The trial court’s decision was safe and counsel prayed that the appeal be dismissed for lack of merit; and that the conviction and sentence be upheld;

ISSUES FOR DETERMINATION:

23. After taking into consideration the submissions of both the Appellant and Prosecuting Counsel this court finds the following issues for determination;

- (i) Whether the prosecution proved its case to the desired threshold;
- (ii) Whether the trial court disregarded the Appellants defence without giving sound reasons.

ANALYSIS

24. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the prosecution proved its case to the desired threshold;

25. The key ingredients for the offence of defilement are identification, penetration and age; the appellant never addressed the issue of the age of the complainant at all in his appeal; he was more concerned with proof of identification and penetration; it is not a disputed fact that the age of the complainant was proved by the evidence on record and the production of **PW2's** Birth Certificate by **PW6**;

26. This court is satisfied that the prosecution provided sufficient documentary evidence that proved the age of **PW2** as at the date when the offence was committed; and that this ingredient was proved to the desired threshold;

27. **On identification**; it was the Appellants' contention that **PW2** did not know the identity of the person who defiled her on the material date; this contention arose from the evidence of **PW3**, **PW4** and **PW5** in that the complainant did not disclose to them the identity of the '**culprit**' who had defiled her; but the trial court's observations in its judgment were that the complainant's father had stated during cross-examination that;

"...the complainant would not tell him her personal issues due to shyness and that she had informed him that she would disclose the suspect to the police or to the court. Although she did not immediately disclose to her aunt, father and teacher who had defiled her, she nevertheless disclosed to the investigating police officer (PW6) that it was the accused who defiled her."

28. Indeed, **PW6** corroborated the evidence of **PW5**; his evidence was that he had taken **PW2** to the crime office in the company of PC Ngina where **PW2** disclosed to them that the Appellant was the person who had defiled her on that material date;

29. The trial court noted in its judgment that it was not a case of mistaken identity as the Appellant had taken **PW2** to his house and that the ordeal had lasted for about 20minutes; it was the trial court's finding that the Appellant was a person well known by the complainant and that he was the one who defiled her; the record states as follows;

"The complainant was known to the accused person who used to work for one Kibui. The accused person confirmed that he used to see the complainant but did not know her name which means that they were known to each other."

....In my view and considering the totality of the complainant's evidence, there is no mistaken identity of the accused by the minor as submitted by the defence."

30. On re-evaluating the evidence on identification it is noted that the incident occurred at around 6.30pm and the Appellant stated that it was getting dark and therefore she opted to take a short cut; it was not dark so there was no need for the trial court to enquire into the sufficiency of light; the complainant was able to see the Appellant with whatever daylight that was left; apart from seeing the Appellant she had engaged in a conversation with him; he had followed her and taken her by the hand and led the inside of his house; the ordeal she said had lasted 20 minutes; this court is satisfied that the 20 minutes was sufficient time for the complainant to be able to observe the Appellant at length and it goes without saying that there was proximity; on non-revelation of the Appellants identity **PW5** her father attributed it to shyness; this court opines that it was not a case of not knowing the assailant as contended by the Appellant but could be attributable to shame or trauma; she eventually opened up to **PW6** who confirmed that she had revealed the identity of her assailant to him;

31. After carefully re-evaluating the prosecution evidence on identification this court is satisfied that the conditions for identifying the Appellant were ideal; the trial court is found to have properly analyzed the evidence on identification and this court finds no justifiable reason to interfere with the trial court's finding that the Appellant was a person known to the complainant and the person who had defiled her;

32. This court is satisfied that the Appellant was positively identified by way of recognition; and that the prosecution proved the ingredient of identification to the desired threshold;

33. **As for penetration** the Appellant raised the issue that **PW6** did not take any samples of blood, or the lessor or the biker to the Government Chemist for laboratory analysis and testing to establish whether the blood found on the lessor resulted from penetration or was from her menstruation; his contention was that without a Laboratory Request Form and an analysis there was no evidence to support the charge; and that he ought to have been given the benefit of the doubt;

34. **The re-assessment of the evidence on penetration is as follows**; **PW1** gave a narrative on what transpired on that day; that when coming from the shops she met the Appellant at his employer's gate; the appellant attempted to engage her in conversation but she continued

walking on; when the Appellant followed her she told the court that she started running and that he caught up with her and held her hand and led her into his house; that he placed her on a bench and went out to confirm that there was no one around; he came back and pulled her onto his bed and would not hear anything about her being on her periods; that he removed her lessso, bikers and sanitary pads and proceeded to defile her; when the Appellant was through he stepped out to fetch water for her; that she wiped herself with the lessso and left for home; the next day she narrated her ordeal to her teacher **PW3** and then **PW4, PW5 and PW6**; that she was taken to hospital for a medical examination;

35. The evidence of **PW1** a clinical officer from Othaya Sub-County Hospital where **PW1** was examined stated that she had lacerations on her external genitalia; upon doing a high vaginal swab it showed the presence of bacteria and he confirmed that her hymen was freshly broken and he made a finding of defilement; the P3 Form was tendered as evidence and was marked "**PExb.1**"; the witness confirmed that the incident occurred on the 30/12/16 and was categorical that he examined her on the 31/12/16 and not on the 3/12/16; the record reflects that the trial court found him no reason to doubt the credibility of this expert witness;

36. Section 2 of the Sexual Offences Act defines penetration as follows;

"...as the partial or complete insertion of the genital organs of a person into the genital organs of another person"

37. After carefully re-evaluating the medical evidence on record this court is satisfied that in this instance there were no gaps in the prosecution's case that would have necessitated the inclusion of the specimens, clothing and the laboratory and scientific tests; thus this court is satisfied that the omission was not fatal to the prosecution's case;

38. The trial court's response to the Appellant's contention on the laboratory analysis was;

"As to whether the complainant took all the clothes to the police to be used as exhibits, that cannot be blamed on the minor and that there was an investigating officer in this case."

39. This court finds that there is sufficient medical evidence that corroborates the evidence of the minor on the key ingredient of penetration; and is satisfied that the prosecution proved the ingredient of penetration to the required threshold;

40. The ground of appeal that the prosecution failed to prove its case to the required standard is found lacking in merit and is hereby disallowed.

Whether the trial court disregarded the appellants defence without giving sound reasons.

41. Under this ground of appeal the appellant states that he raised an alibi in his sworn statement of defence; that on the material date and time he was not with the complainant but was away; he submitted that he was in the company of **DW2** a co-worker and **DW3** his employer at Gitandara cutting nappier grass;

42. It is noted that the trial court addressed the Appellants alibi defence at length and gave its reasons for rejecting it; the reason given was that;

"...the accused person did not raise the defence at the earliest stage in the case and did not put any such suggestions to any of the six witnesses nor did he put any questions in this regards to any of those witnesses."

43. The trial court was guided by the Court of Appeal decision in the case of **Karanja vs Republic (1983) KLR 501** were the court agreed with the observations made in **R vs Ahmed Bin Abdul Hafid (1934) 1 EACE 76** that;

"...that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at any early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."

44. The trial court observed that the Appellant had raised this defence after the court had placed him on his defence; that he ought to have put it up for testing during cross-examination of the prosecution witnesses; the trial court found that it did challenge or water down the totality of the prosecution evidence on record; that it was a collusion between **DW1, DW2 and DW3** to lie to the court so as to deny the complainant justice; and it went on to reject the defence as it was found to be a mere denial and an afterthought;

45. The Appellant also raised the issue of having been framed by **PW2** and her father **PW5** whom he said wanted to take away his job; again the trial court found this to be an afterthought as the Appellant

46. Had failed to '**put such suggestions, by way of cross-examination, to the said witness (PW5) or the complainant for them to confirm or deny.**' is trite law that when an accused person raises an alibi defence he does not assume any burden of proving it; however it must be borne in mind that such evidence ought to have been tested and therefore when invited to cross-examine **PW2** and **PW5** the Appellant ought to have tested his alibi defence and explored the possible reasons that led them to frame him;

47. This court is satisfied that the trial court that the trial court considered the Appellants defence of alibi and gave good and sound reasons for rejecting it;

This ground of appeal is found lacking in merit and is hereby disallowed;

48. In the light of the forgoing this court makes the following findings;

(i) The prosecution is found to have proved its case to the desired threshold; the conviction is found to be safe;

(ii) The trial court gave good reasons for disregarding and rejecting the Appellants defence of alibi;

DETERMINATION

49. The appeal is found to be lacking in merit and is hereby disallowed.

50. The conviction and sentence are both hereby upheld;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 11th day February, 2019.

HON.A.MSHILA

JUDGE