



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 55 OF 2018

MICHAEL THOYA KAVURE KATANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an Appeal against the conviction and sentence in the Judgement of Hon C.O. Nyawiri, SRM

delivered on 6th June, 2018 in Malindi CM Court Criminal Case No. 361 of 2013,

Republic v Michael Thoya Kivure Katana]

JUDGEMENT

1. The Appellant, Michael Thoya Kavure Katana, is currently serving 15 years imprisonment having been convicted by the Chief Magistrate's Court at Malindi for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006 (SOA). The particulars of the charge disclosed that on 18th May, 2013 in Malindi District within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of RK, a child aged 15 years.

2. Although the Appellant was faced with an alternative charge of committing indecent act with a child contrary to Section 11(1) of the SOA, it is not necessary to reproduce the particulars of the alternative charge since the charge is not relevant in this appeal.

3. The Appellant being aggrieved by both the conviction and sentence seeks to overturn the findings on eleven grounds which in summary disclose that the Appellant is aggrieved because the trial magistrate allegedly convicted him on insufficient evidence and failed to consider his defence.

4. This is a first appeal and the duty of a first appellate court has repeatedly been highlighted in various decisions. In **Gunga Baya & another v Republic [2015] eKLR** the Court of Appeal restated the principles as follows:

“[6] This being a first appeal, we are alive to the fact that our obligation in determining the appeal as has been repeated numerous times is to reconsider and re-evaluate the evidence that was adduced in the trial court with a view to drawing our own conclusions, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanour of the witnesses. (*Pandya vs R, 1957 EA 336; Peters vs Sunday Post, 1958 E A 424*). Secondly, as was held in *Chemagong vs Republic [1984] KLR 611*, this Court will normally not interfere with the finding of fact made by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles.”

5. This appeal will therefore proceed on the basis of the said principles. The prosecution case as presented to the trial court is that the complainant, RK, was on 18th May, 2013 sent to the house of the complainant by her mother PW3 AC to go and collect some charcoal to be used in their food cafe. The complainant went to the house of the Appellant and collected the key for the store. As the complainant was returning the key to the Appellant in his bedroom, the Appellant pounced on her, threw her on the bed, removed her clothes and had carnal knowledge of her.

6. After the ordeal, the complainant went home and reported the matter to her mother who went and confronted the Appellant before proceeding to report the incident to the police. The complainant was examined by PW2 Ibrahim Abdillahi, a senior clinical officer who formed the opinion that she was penetrated.

7. The Appellant denied committing the offence. He, however, admitted meeting the complainant in his house on the material day but stated

that he did so in the presence of two other persons.

8. Through submissions dated 24th December, 2018, Gunga Mwinga for the Appellant contended that the evidence on record taken in its totality did not satisfy the ingredients of the offence of defilement. It is the position of the Appellant that contradictory evidence was adduced. In support of the assertion that the Appellant was convicted on contradictory evidence, reference is made to the complainant's testimony that:-

“I found Michael at the cafe. I asked for the keys. He gave it to me then I went and collected the charcoal then returned the key to him. Michael was in his room. He asked me to enter and pick the key. He asked me to return the key when I was done.”

9. Counsel for the Appellant submitted that the said evidence shows that the complainant found the Appellant in his cafe who told her to pick the key and return it. According to the Appellant's counsel it is not clear when the Appellant left the cafe and headed to the room where the complainant claimed she was defiled.

10. Further, that both the complainant and her mother did not clarify the nexus between the cafe and the room. Counsel for the Appellant termed the complainant's evidence as wanting, stating that from the evidence it is not clear how many times the key was picked. He pointed out that at one point the record shows that she was given the key by the Appellant at the cafe and at another point she says she was asked to enter the Appellant's room and pick the key. Counsel for the Appellant urged this court to find that the complainant was economical with the truth and her evidence therefore left serious gaps in the prosecution case.

11. Counsel for the Appellant accused the trial magistrate of fabricating evidence and pointed to a statement in the judgment that the Appellant **“also removed his trouser then had sex with her”** as supporting this assertion. According to counsel for the Appellant, the complainant never stated in her evidence that the Appellant removed his trouser.

12. Still on the issue of the unreliability of the complainant's testimony, counsel for the Appellant urged the court to note that she never raised alarm and that it was curious that after a purported act of defilement she still found time and necessity to take the charcoal and go home.

13. Turning to the testimony of PW3, the complainant's mother, counsel for the Appellant submitted that she was not an eye witness and her testimony revolved around bloodstained panties. Counsel wondered why PW3 who promptly visited the scene did not see blood on the Appellant's bed or the floor of his house.

14. Counsel cited the decision in **Kitale Criminal Appeal No. 22 of 2015, Benson Barasa v Republic** and urged the court to find that the evidence was so contradictory or inconsistent and the trial court ought to have acquitted the Appellant.

15. In support of the submission that penetration was not proved, counsel for the Appellant urged the court to find that the mere fact that the complainant's hymen was not intact, as indicated in the P3 form, is not conclusive proof that there was penetration by a genital organ.

16. He urged the court to note that the clinician (PW2) did not see tears or lacerations on the vagina and the witness' testimony was that he could not tell when the hymen was broken.

17. Further, that the treatment notes did not demonstrate that there was bleeding despite the doctor seeing bloodstained panties. Counsel also submitted that the doctor who examined the complainant did not state that the object that broke the hymen was a male genital organ. It is therefore the position of the Appellant's counsel that penetration was not proved.

18. Finally, counsel for the Appellant submitted that the trial court simply dismissed the Appellant's defence without analyzing it vis-à-vis the prosecution case. Counsel therefore urged the court to allow the appeal.

19. Opposing the appeal, counsel for the State urged the court to find that the prosecution proved its case to the standards required in criminal cases. The decision of **Dominic Kibet Mwareng v Republic [2013] eKLR** was cited as delineating the ingredients of the offence of defilement as the age of the complainant, proof of penetration and positive identification of the assailant and the court was urged to find that the prosecution discharged its onus.

20. Relying on the decision by the Tanzanian Court of Appeal in **Dickson Elia Nsamba Shapwata & another v The Republic, Cr. App. No. 92 of 2007**, counsel for the Respondent urged the court to consider the evidence adduced as a whole and not to isolate one line from the others. Counsel submitted that when looked at as a whole, the evidence will show that the Appellant penetrated the complainant who was a child at the time of the alleged offence.

21. Counsel for the State further submitted that the conviction of the Appellant was sound as the trial court believed the testimony of the complainant and proceeded as allowed by proviso to Section 124 of the Evidence Act, Cap. 80.

22. In conclusion counsel urged the court to find that the trial magistrate considered the Appellant's case and formed an opinion that the same was unbelievable.

23. The Appellant's position is that he did not defile the complainant. However, the complainant's narration supported by the evidence of the other prosecution witnesses paints a compelling narrative that could only lead to the conclusion arrived at by the trial court.

24. The manner in which the evidence in a case should be considered is as was stated by the Court of Appeal of Tanzania in the case of **Dickson Elia Nsamba Shapwata** (supra) that:-

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

25. Not every inconsistency, contradiction or omission should lead to an acquittal. Indeed the court should be worried where there is consistency to the dot. Human beings are bound to make one or two mistakes and they can also paint slightly different pictures of the same event.

26. The summary of the complainant’s testimony, which was not shaken even under intense cross-examination by the Appellant, was that after removing the charcoal from the store and in the process of returning the key to the Appellant as instructed, she found the Appellant on his bed without a shirt. As she tried to hand over the key to him, the Appellant who was alone got hold of her and forced her to the bed. He slept on her, lifted her skirt and removed her panties. He had sex with her and ejaculated inside her. Her evidence was that she saw a whitish discharge and blood from her vagina. She later showed her bloodstained panties to her mother. She identified the panties in court and Corporal Fatuma Ali produced the same as exhibit. The complainant stated that she reported the incident to her mother and they proceeded back to the scene where upon confrontation the Appellant stated that he had only caressed her.

27. PW3 confirmed the evidence of the complainant. She stated that when she confronted the Appellant and threatened to call the village elder, the Appellant pushed her and ran away. She confirmed seeing blood on the panties the complainant was wearing.

28. According to the treatment notes produced as evidence, the medical officer who examined the complainant on the date of the assault noted bloodstains on her panties. PW4 produced the treatment notes as exhibit.

29. The Appellant’s claim that the medical evidence did not confirm that he is the one who penetrated the complainant is without merit. Where a person is charged with a sexual offence, the medical evidence is corroborative in nature. There could be other evidence to support the evidence of the victim. In this case there was the bloodstained innerwear and PW3’s testimony that the Appellant took off when confronted with the allegation of defiling the complainant.

30. Although the Appellant did not question the age of the complainant, the complainant testified that her birth certificate was destroyed when their house got burned. She also testified that a medical officer assessed her age and found that she was 15 years. That the complainant was a child was therefore established by the prosecution.

31. The evidence of the prosecution witnesses clearly established the events of that day. It shows that the Appellant forced himself on the complainant. The Appellant actually confirmed in his defence that he met the complainant in his house. There may be some inconsistencies in the prosecution case but those inconsistencies do not change the core evidence of how the Appellant attacked and defiled the complainant in his house.

32. In the case of **Philip Chaka Watu v Republic [2016] eKLR; Criminal Appeal No. 29 of 2015 (Mombasa)**, the Court of Appeal held that:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

33. The overwhelming evidence adduced by the prosecution rendered the Appellant’s testimony that he was in the company of others when the complainant went for the key unbelievable.

34. In the circumstances of this case, I am inclined, just like the trial court did, to find that the prosecution proved its case against the Appellant beyond reasonable doubt. His appeal on conviction is therefore without merit and it is dismissed.

35. The sentence imposed is the minimum sentence provided for the offence for which the Appellant was convicted. His appeal on sentence also fails. The end result is that the Appellant’s appeal fails in its entirety and the same is dismissed.

Dated and Signed at Nairobi this 17th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th day of June 2019

R. Nyakundi,

Judge of the High Court