



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 41 OF 2018

NASIR KHAMIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 252 of 2016 by

the Senior Resident Magistrate – Hon. J.M. Wekesa delivered

on 7th February 2018 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of attempted defilement contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 2nd day of October, 2016 in Turkana West District within Turkana County, intentionally attempted to cause his penis to penetrate the vagina of **NK** a child aged five (5) years. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

2. He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment from the date of arrest. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:-

a) He was convicted on the sole evidence of two witnesses who were related.

b) Defilement was not proved to the required standard.

c) The defence was rejected without cogent reasons.

d) The sentence was too harsh.

SUBMISSION

3. When the appeal came up for hearing before me the Appellant who was unrepresented filed handwritten submissions which he relied upon while Mr. Mongare for the State opposed the appeal and supported the conviction and sentence. On behalf of the Appellant it was submitted that he was properly identified as the evidence of the complainant was that she was being chased by an unidentified Somali man. It was submitted that vital prosecution witnesses including the sister of the Appellant one **Rama** were not called as witnesses. It was contended that there was contradictions in the testimony of the prosecution witnesses and in particular **PW1** and **PW2**. It was submitted further that the age of the complainant was not proved and therefore the prosecution case was not proved to the required standard.

4. On behalf of the prosecution it was submitted that the complainant and her mother were not exempted from testifying against the Appellant and that the prosecution case was that of an attempted defilement therefore there was no need to prove penetration. It was contended that the Appellant's defence was considered and rejected. The sentence given to the Appellant, it was stated to be the minimum provided for in law and was therefore not excessive.

5. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving an allowance that it did not have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO v REPUBLIC [1972] EA 32** thus:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R

[1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. 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 witnesses, see Peters v Sunday Post [1958] EA 424."

PROCEEDINGS

6. **PW1** the mother of the complainant testified that she had sent her to call her elder siblings to come and drink *uji* and that she took long. She decided to look for her in the house of the Appellant who told her that she was not there and at 11.30 a.m. saw the complainant who told her that she was from the Appellant's house who had beaten her up and inflicted injuries on her body. She said that the Appellant was living with Rama his sister. The complainant reported that the Appellant had taken her to his room in Zone 1 Block 7 where he tied her hands and mouth and removed her pants and lied on top of her while armed with a knife. The complainant corroborated this evidence.

7. **PW3 DOCTOR TONY OYOO** examined the complainant who had bruises on the nasal region, face and scratches on the face. He stated that there was no lacerations or tears around the vagina and concluded that there was no evidence of penetration. **PW4 JENNIFER KAMAU** testified on behalf of **SGT. JANE** who had arrested the Appellant and produced the original birth certificate of the victim.

8. When put on his defence the Appellant testified on 2nd October 2016. He was at the stage when an old man of the Burundi origin requested him to take him to the police station where he was arrested and later on charged with the present offence. He denied knowing the complainant and that at the time of his interrogation by a police woman there was no one to interpret to him.

9. In this matter I have identified the following issues for determination:-

1) *Whether the Appellant was properly identified.*

2) *Whether the prosecution case against the same was proved to the required degree.*

3) *What order should the court make herein.*

10. On the issue of identification of the Appellant, the evidence on record is that the same was identified by the complainant's mother on the basis of what she had allegedly been told by the same that she was attacked by a Somali old man. In her testimony the complainant identified the Appellant as Nasir but did not explain whether she knew him before the said date. It was the complainant's evidence that the Appellant poured water on her and told her to leave his house after he was done with her but **PW1** her mother did not confirm whether the same was wet at the time she met her. I have further noted that the prosecution case is silent on how the Appellant was arrested as no arresting officer was called to testify on behalf of the prosecution.

11. The Appellant in his submission has stated that vital prosecution witnesses including his sister one **Rama** and his mother who were the first persons to had been in contact with the complainant were never called to testify and has urged the court to make an adverse inference against the prosecution case. I have further noted from the proceedings that the Appellant's mitigation were not recorded by the court and in view of the doubt raised in the prosecution case I have come to the conclusion that his conviction was not safe and free from error.

12. Whereas this was a case where justice demanded for a retrial, I have noted the age of the complainant and her conduct at the initial trial and have come to a conclusion that it will not be in the interest of justice to subject her to further trauma of undergoing a fresh trial.

13. I will therefore grant the Appellant the benefit of doubt raised herein and allow the appeal by quashing the conviction and setting aside the sentence herein. The Appellant shall be set free forthwith unless otherwise lawfully held.

Dated, delivered and signed at Lodwar this 6th day of June, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ for the Respondent

_____ for the Appellant

Accused - _____

_____ - Court assistant