



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 19 OF 2017

JOSEPH KARIUKI KASIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Ileri B. Nyaga Ag. PM

in the Principal Magistrate's Court at Chuka in Criminal Case No.1527 of 2011

dated 27th October, 2014)

J U D G M E N T

1. **JOSEPH KARIUKI KASIM**, the Respondent herein was charged with the offence of defilement contrary to **Section 8(3)** of Sexual Offences Act No. 3 of 2006.

The particulars of the charge were that on 28th July 2016 at [particulars withheld] village, Chogoria within Tharaka Nithi County, he intentionally caused his genital organ namely penis to penetrate the female genital organ namely vagina of (name withheld), a girl aged 16 years. He also faced an alternative charge of indecent assault contrary to **Section 11(1)** of **Sexual Offences Act**.

2. The trial court upon hearing the evidence tendered found that the prosecution had not established a prima facie case to put the Respondent to answer on either of both counts and acquitted him.

3. The State through the Director of Public Prosecution was aggrieved by ruling of the trial court and filed this appeal raising six grounds in the petition namely:-

(i) That the trial learned magistrate erred in law and in fact by finding that there was no penetration occasion to the victim by the Respondent.

(ii) That the learned trial magistrate erred in law and in fact by finding that the prosecution's evidence was contradictory.

(iii) That the trial learned magistrate erred in law and in fact by finding that the presence of spermatozoa in the victim contradicted her evidence that the Respondent wore a condom.

(iv) That the learned trial magistrate erred by disregarding the medical evidence indicating that

the victim had been defiled.

(v) That the learned trial magistrate erred in acquitting the Respondent on both counts.

(vi) That the trial magistrate erred in law and fact by holding that the prosecution had not established a prima facie case against the Respondent.

4. Before I consider the above grounds, a brief look at the evidence presented before the trial court indicates that the victim of the incident was a girl aged 16 years though she did tell the court that she was 14 years. The birth certificate indicates that she was born on 15th October, 2000 which means on 28th July 2016 (the material date) she was 16 years and 8 months. According to the complainant, she had not gone to school on 28th July 2016 (the material date) as she was feeling tired after a school trip the previous day. It was her evidence that she was sent to her Aunt's place to take some money and as she was coming back, she met the Respondent who convinced her to visit his place and that while there, the Respondent undressed her and had sex intercourse with her after putting on a condom. After the ordeal, she stated that the Respondent cooked a meal and after eating, she went back home and because it was late she feared to be reprimanded and decided to stay outside until the following day when she changed and went to school. It was her further evidence that the Respondent lived 5 metres away across the road. She also testified though that she was a virgin she did not scream because of fear and the fact that she did not know the Respondent well.

5. FK(PW2), the complainant's mother, told the trial court that her daughter (PW1) came back home at 6 am on 29th July 2016 and when she asked her where she had been, the complainant took her clothes and left for school. It was her evidence that the father made a follow up and later she was called to AP Camp where he found the complainant in the company of her father and that later they took her to Chogoria Police Station before taking her to Chuka Hospital where medical examination was done and P3 filled.

6. Hillary Kangichu (PW3) a clinical officer from Chuka General Hospital, told the trial court that he examined the complainant and found the genitalia normal. He further found no laceration or discharge on the external genitalia. However after vaginal swab was done, pus cells and spermatozoa were seen. He also noted that the complainant's hymen was broken though in the P3 (P. Exhibit 1) the issue of broken hymen is not indicated.

7. Henry Chepkwony (PW4), the investigating officer in the case told the trial court that a report was made at Chogoria Police Station on 29th July 2016 by the parents of the complainant regarding defilement and that he sent for medical checkup of the girl and that later the Respondent was arrested and charged for defilement.

8. The trial court was then called upon to make a ruling whether or not the accused had a case to answer and the court found that the evidence was insufficient to sustain the charge. The trial court found that the evidence of the complainant negated the occurrence of offence relating to the 2nd count as well because while the complainant indicated that the Respondent penetrated her using a condom, the evidence of PW3 showed that spermatozoa was seen and the trial court wondered how the presence of sperm could be explained when the culprit wore a condom. The trial court further found that the evidence of the complainant was crucial in sense that offences of sexual nature usually happens in privacy and given that the evidence of the complainant was found shaky because she said that she did not struggle while the evidence tendered by other witnesses indicated the contrary. The trial court also found some inconsistency on the age because while the complainant stated she was 14 years, the birth certificate indicated she was more than 16 years old. Overall the trial court doubted the veracity of the evidence presented before her on that basis found that the evidence was insufficient to sustain a conviction. It is for that reason that the State through the Director of Public Prosecution felt aggrieved by the decision of the trial court and filed this appeal as I have observed above. They contend that they had proven that penetration took place as per the medical evidence that indicated that spermatozoa was seen. In their view, the trial court relied on heavily on the fact that PW1 stated that the Respondent had used a condom. The Appellant avers that the trial court ran into error as it did not consider that the condom may have

broken in the process of defilement or removed without the knowledge of the complainant. The Appellant further contends that there was no other explanation to justify presence of sperm other than defilement

9. That Appellant further avers that the complainant was forced into the act but did not scream because of fear. They urge this court to find that if the 1st count was not proven at least the 2nd count was established.

10. The Respondent has opposed this appeal. He contends that the complainant told lies to this during trial because she screamed if she was forced into the act especially if it is true that she was a virgin at the time. He further contends that the victim's testimony and that of the mother's and arresting officer were contradictory making the trial court to find that the prosecution's case had no substance.

11. The Respondent has pointed out that the medical evidence tendered showed that the genitalia of the victim was found normal and no discharge noted. He also noted that he lives in a residential building with many occupants who could have noted the incident and that he could not have removed all her clothes without resistance.

12. I have considered this appeal and the response made. The Respondent was charged with the offence of defilement contrary to **Section 8(3)** of the Sexual Offences Act. Under the section a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. In regard to the 2nd count, an indecent act is defined under Section 2 as;

“Unlawful intentional act which causes any contact between any part of the body of a person with his genital organs, breasts, or buttocks of another but does not include an act which causes penetration.”

In my view the evidence presented to court did not support to the 2nd count at all. The evidence centred on the 1st count and that is why the Appellant in this appeal asserts that penetration was proved. Before I consider whether the element of penetration was proved and connected to the Respondent, I will first consider the question of the age of the complainant.

13. The trial court faulted the prosecution for inconsistency on the age of the complainant but I am of the view that the age was established beyond doubt by the birth certificate presented. The girl was aged 16 years 8 months as per birth certificate (P. Exhibit 3). The fact that the complainant testified that she was 14 years old was an insignificant anomaly which did not indicate that the inconsistency was deliberate or meant to mislead. It did not prejudice anyone.

14. I however concur with the trial magistrate in finding that the narrative on how the minor ended up at the Respondent's house was shallow and casted doubts to the prosecution's case. She did not scream. She stated that the Respondent's house was 5 metres away but still raised no alarm because she allegedly feared the Respondent because "she did not know him well." This is a contradiction because one would expect that at least if she was not well acquainted with the Respondent, she could not have gone willingly to his house. I also find her evidence that she went back to her home at 8pm and feared to be reprimanded and stayed out till the next day, contradictory because according to her mother (PW2), she only came back home at 6 am the following day after disappearing the previous day. According to the mother, the complainant picked her clothes and went to school. It was her testimony that her father who made a follow up and took action to report. The said father was however inexplicably not called as a witness to fill the gaps in the prosecution's case. At least he would have told the trial court what raised his suspicion that the girl had been defiled. The mother also stated that the girl was afraid that she would beat her and the question was it a recurrent episode?

15. The Post Rape Care form tendered by PW3 was in my view improperly tendered as evidence as the witness did not lay basis for the production of the evidence pursuant to **Section 33** of the **Evidence Act** which requires that before such evidence is tendered the witness must establish that the author of the document cannot be procured with an amount of expense deemed unreasonable and that the author was an expert in that field whose handwriting was familiar to her before tendering evidence on behalf. I find that basis was not well established and the Post Rape Care was improperly tendered and was no probative

value to the prosecution's case.

16. To turn back to the spermatozoa seen, the clinical officer (PW3) did not help matters because she did not state who did the vaginal swab that yielded positive results indicating that penetration had taken place. I also find that he did not indicate on the P3 that the hymen was broken and the omission in my view casted doubts on whether penetration had been established. I also find that trial court had the advantage of observing the witnesses as they testified and if the trial court observed the complainant and found her evidence shaky, it makes it hard to overturn such a finding. A finding on demeanor of a witness cannot be overturned by an Appellate court given that it is the trial court who listens and sees the witness as they testify and unless an appellant can show that the trial court may have been biased, such finding of fact cannot be challenged on appeal.

17. I have considered the basis of the ruling of the trial court and I am in agreement that evidence of PW1 and PW2 was shaky and contradictory it raised more doubts than affirmation that the offence of defilement had occurred and that the Respondent was responsible. The complainant lied to the mother as to where she had been the previous day and if it is true that she had been forced into an act she should not have any hesitation to confide to her mother. Furthermore I find the medical evidence insufficient. Why did not the clinical officer clarify who took the vaginal swab and where was the test conducted? The physical examination conducted as per the P3 did not also sufficiently establish that penetration had occurred. The clinical officer (PW3) did not indicate that the hymen was broken. He only indicated that there was no lacerations on the genitalia. When you consider this evidence with the fact that the complainant stated that she did not feel any pain yet it was supposedly her first time, in my view goes to support the finding by the trial court that the complainant was not credible.

18. It is important to note that a trial court must be satisfied that the evidence tendered must be sufficient to the threshold of *prima facie* case so that if an accused was to choose to remain silent on defence, the evidence must be sufficient to sustain a conviction and the question here is whether the evidence tendered was strong enough to sustain conviction if the Appellant chose to remain silent. In the case of Republic – vs- Wachira (1975) EA 262, the court held as follows:-

“ It has been settled for many years that the sufficiency or otherwise of the evidence at the close of prosecution's case, so as to require an accused to make his defence thereto, is a matter of law. A court is only entitled to acquit at that stage if there is no evidence of material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal properly directing itself could safely convict.....”

In the light of the above I am of the view that the evidence presented by the prosecution presented to the trial court if applied to the above test fails. The trial court was correct in its finding.

19. The standard used in making a finding at the close of prosecution's cases making a finding on whether or not an accused has a case to answer is lower than the standard used when determining at the end of trial whether or not the evidence tendered can sustain a charge and render a conviction. In the former case, all what a trial court requires to do is to satisfy itself on a *prima facie* basis that the evidence tendered is sufficient to place an accused person on his defence to make an answer. The evidence should be such that if the accused fails to make a sufficient answer/defence he would be found guilty or put another way the evidence should be such that if the accused were to choose to remain quiet, the evidence tendered should sustain the charge. In the latter's case the court has to satisfy itself upon evaluating both prosecution's defence case that the evidence tendered is beyond any reasonable doubt that an offence was committed and hence conviction.

20. I have re-evaluated the evidence tendered by the prosecution's and though the trial court used slightly a higher standard, the significance of the elevation is insufficient for me to overturn for the following reasons:-

i. The prosecution's case left so many gaps that it would have been a bit speculative to find that a

prima facie case had been established by the prosecution sufficient enough to call upon the respondent to defend himself. While it is true that the nature of the offence is such that most of the time it is done in private and therefore invariably inferences have to be drawn for the ends of justice to be met, it is important to note that it is trite that where a court is forced to rely on circumstantial evidence to draw inference or conclusion, such inference should lead a court to only one inference. An irresistible conclusion that the accused person is guilty. However where it is possible to make more than two inferences like in this instance, then one cannot avoid having doubts lingering in his or her mind about the guilt of the accused and in such a case, the accused is entitled by law to benefit from any lingering doubt in the mind of a court. In this case, if you consider the evidence of the complainant in regard to what transpired before, during and after the ordeal, one can draw more than one hypothesis because of grey areas in the narrative given by the complainant and the other witnesses. In the first place she said that the house of the accused where the incident occurred is 5 metres away which means it is next door. She told the trial court that she went into the house of Respondent at around 5 pm which was quite early. She did not say she was either lured or forced but all the same stayed in until 8 pm. Again one would wonder why she was afraid to knock at the parents' house if it was actually 8 pm which is late yes but not very late. She also stated that she stayed outside and the question is there a possibility she went back to Respondent's house or spent in another person's house where she had unprotected sex to explain the presence of spermatozoa the following day when she was examined at Chuka County Hospital? She also stated she was hitherto a virgin but according to her she did not feel pain in the act and there was no blood and this leads to more speculations as to whether she was speaking the truth. The inescapable conclusion is that when a young girl has sex for the first time especially forced sex she would very likely experience pain. Why did she lie to her mother (PW2) on where she had been? And if she could lie to her mother is there a possibility that she was also lying on what really happened.?

Secondly the evidence of the medical officer in my view did not clear the air in so far as prove of penetration was concern. He failed to indicate in his report about the broken hymen and though he stated in cross examination that the hymen was broken, the evidence is not supported by the findings recorded on the P 3 (P. Exhibit 1). The only thing indicated on the P3 is presence of spermatozoa and pus cells when vaginal swab was done but again the fact that the witness stated that a condom was used casts some doubts on how the spermatozoa found its way into the vagina and even if the court was to speculate that the condom may have broken as advanced by the Appellant, still doubts will remain lingering as whether the presence of sperms was as a result of the 1st encounter or there was a subsequent encounter. Again one also would need to assume that the vaginal swab was done by a medical expert and that the spermatozoa and pus cells were connected to the respondent. To reach such an assumption in my view is unsafe because as I have observed so many theories can arise from those set of facts.

21. The critical aspect of the trial's court assessment is that she did not find the complainant consistent or truthful. In such circumstance it is not possible for this court to conclude that her evidence was believable and reliable.

In the end I find that this appeal lacks in merit. The same is disallowed and the Respondent's surety is discharged.

Dated, signed and delivered at Chuka this 22nd July, 2019.

R. K. LIMO

JUDGE

22/7/2019

Judgment dated, signed and delivered in the open court in presence of Respondent in person and Maari for Appellant.

R.K. LIMO

JUDGE

22/7/2019