



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. 14 OF 2017

ZACHAYO NAPAI LORWASIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence dated 31/03/2017 in Criminal Case No 59 of 2015 in the Chief Magistrate's Court, Naivasha, R. Kitagwa, RM)

JUDGMENT

1. The accused was charged and convicted for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2016**. Particulars of the offence were that the accused on the night of 18th August 2015 in Gilgil Sub County within Nakuru County intentionally and unlawfully caused the penetration of his male genital organ (penis) in to the female genital organ (vagina) of FMK a child aged 7 years. The accused was sentenced to life imprisonment.

2. Dissatisfied with the judgment of the lower court the accused appealed against it through a petition of appeal filed on 12th April 2017. However, he amended his grounds of appeal and submitted only on the amended grounds, which are:

1. That the learned trial Magistrate gravely erred in points of law and facts when he harshly convicted the appellant in this case while relying on the evidence as adduced by PW1 on identification without him considering that the same was just a mistaken identity as the circumstances prevailed at the locus-in quo was not positive.

2. That the learned trial Magistrate erred in law and in fact when he convicted the appellant in this case, when he relied on the adduced evidence by all of the testifying prosecution witnesses without him considering that the evidence was just full of contradictions and fell far from the truth of the case, as also the prosecution side failed to avail the vital witnesses to come and testify before the court.

3. That the learned trial Magistrate erred in law and in fact when he convicted the appellant while failing to consider that the prosecution side failed to produce any medical report on his side to prove any of his involvement in the crime in question.

4. That the learned trial magistrate erred in law and in fact when he rejected the appellant's defence without him properly explaining reasons for the rejection and this violated the provisions of law under section 169(1) of CPC.

3. The issues that arise are as follows:

- a. Identification of the accused
- b. Whether penetration was proved
- c. Key witnesses not availed
- d. Failure to consider the appellant's evidence

4. In a nutshell, the background of the incident according to the victim (FMK) is as follows. FMK was eight years old and in class two when her mother sent her to the shop, about one minute away from home, to buy milk on the evening of the material day. At the shop, the lights were on. As she asked for milk, the man in the shop said he knew where she could get good milk. When she agreed to go with him, he closed

the shop. There were no other people around the shop. He then grabbed her and put her in a bag and zipped it.

5. The man took her to a forest where he raped her, violently hitting her head to the ground, and stepping on her stomach with his foot. The entire period, he also gagged her mouth. When morning broke, as she crawled unable to walk, a man found her and assisted her. She was taken to the police station, then to hospital, where she was admitted for about five months, before being taken to a safe house. She identified her assailant as a tall dark man, who she had seen in the light at the shop.

Identification of the accused

6. The appellant does not dispute the occurrence of the incident but submits that he was not privy to it. He argues that though identification was preceded by conduct of a parade, he contests the identification as enough to warrant his conviction. He further submitted that the incident occurred at night and it was impossible for the victim to have recognized a person in the dark. Further, that the description given of the perpetrator by the victim is a tall and dark and person that the victim stated that he was not the only dark person in the village.

7. The complainant's testimony was that although the incident occurred at night, she clearly saw the appellant at the shop since there was sufficient light. She stated that even though she couldn't see the face of the appellant properly in the bushes, she could properly recall him and further that she could properly identify him. The two spent a considerable amount of time together from night to morning. The magistrate noted the disturbed reaction of the complainant in court whenever she referred to the appellant. She reacted with fear and sobbing every time she made reference to the appellant. She also identified the accused in court.

8. In cross examination, she was unshaken when asked about how she identified the accused. She replied to the accused's questions:

"I don't know you. I have never seen you before.... I was able to see you. There was light ..."

9. The complainant had given a description of the appellant as tall and dark. Although there was another tall and dark person in court, she clearly identified and pointed out the appellant and stated that the other dark person was not the one who defiled her. During a *voire dire* examination of the complainant, the magistrate confirmed that the victim had good understanding, and very aware of her testimony. PW2 and PW3 also pointed out the fear and trauma suffered by the complainant at the safe house when she was identifying the appellant. She did not hesitate and quickly pointed out the appellant as the perpetrator.

10. In **Charles Amboko Anemba & Another v Republic [2015] eKLR** the issue of identification was discussed at length with the court placing reliance on the following cases to reach its determination: **R v Turnbull & Others (1976) 3 ALL ER 549**, where the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness, and the court held:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

11. In the case of **Wamunga v Republic (1989) KLR 426** the Court of Appeal stated:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

12. Similarly in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** Court of Appeal said that:

"evidence of identification/recognition at night must be absolutely watertight to justify conviction."

13. Applying these authorities to the present case, I am not persuaded that there is a proper basis for interfering with the lower court's determination on identification. I do find, however, that the trial magistrate was wrong to conclude that an identification parade was held because there is no evidence that a formal parade was conducted. What happened was that after the accused was arrested he was taken to the safe house where the complainant was staying and she identified him there. This is the evidence of PW2, Ann Wambui Kinuthia, who was in-charge of the safe house, and PW3 Margaret Wanjiku Njeri, the complainant's neighbor who took responsibility for the complainant after her mother died.

Whether penetration was proved

14. The appellant asserts that the evidence of the Investigating officer (PW5) was that the appellant used his fingers to penetrate he complainant, and that there was no evidence of penetration

15. The complainant's evidence was that the appellant took her to a forest, laid her down and did bad manners to her:

“He removed my trouser. I wanted to scream but he blocked my mouth with his cap.... he used a thing that I don’t know. And he entered here in the middle (Child points at her private part) he removed his trouser, he was wearing a jeans trouser. He slept on me. I tried to remove him but he hit my head on the ground...”

(emphasis supplied)

16. It is clear to me that the investigating officer’s narration of the event was only a part of the entire story which the victim told her. The victim stated that the accused penetrated her using a thing which she did not know. It could be that the accused used both his penis and also his fingers to penetrate her. In any event, she clearly stated that the accused “entered here” meaning her vagina, and that he slept on me, indicating he was on top of her when he entered.

17. The medical evidence availed including the P3 form and PRC form show that the complainant presented with a freshly torn or broken hymen, inflamed labia, and a second degree perineal tear, which had to be stitched. No vaginal discharge was noted.

18. Although the appellant stated that there was no medical report or evidence linking him to the commission of the offense, there is case law indicating that medical evidence is not mandatory. In the present case there was, of course, medical evidence. In **George Kioji v R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) it was held as follows:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.” (Emphasis supplied).

19. It may be pointed out that under the proviso to **section 124** of the **Evidence Act, Cap 80**, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. The court did not have to invoke that section as there was evidence beyond reasonable doubt that the defilement was perpetrated by accused person.

20. I am satisfied from the overall evidence that it clearly shows that the complainant was penetrated in her vagina, probably with the fingers, but certainly by the accused when he lay on her.

Failure to avail witnesses

21. The appellant also submitted that despite the court having power to summon witnesses, several witnesses were not called including: the shop attendant, and the good Samaritan who helped the complainant in the forest.

22. It is trite law that the prosecution is responsible for availing such witnesses as it considers necessary to prove a case. Not every witness involved in an incident is necessary for proof of a case.

Magistrate’s failure to consider Accused’s testimony

23. The complaint by the appellant under this head was a general lament that the trial magistrate seemed to be so impressed by the prosecution evidence that he received scant recognition.

24. I have carefully perused the lower court’s record and the judgment. The appellant’s evidence was a mere denial. He merely stated that he was a boda boda operator and went to work as usual on 20th September, 2016. A crowd later came and told him to go to the safe house so that a child could identify him. He went and was the only man on parade. That the child said he was not the one but that he resembled the culprit. He was then arrested, taken to the police station and eventually charged.

25. I note that the magistrate first set out the appellant’s evidence at page 5-6 of her judgment. She then analysed his evidence at pages 9 to 11 of her judgment, stating that the Accused merely denied the offence, and did not tell the court where he was on the material day; that he did not dispute the evidence that before the incident he had spent the day drinking chang’aa at the complainant’s house; nor did he dispute the evidence of PW3 that he had disappeared after the incident for about a month before he was spotted.

26. After due consideration of the accused’s testimony, the trial court found that the prosecution had proved its case. I find its finding should not be disturbed

Disposition

27. In conclusion, I find no reason to interfere with the determination of the trial court, and affirm the said decision.

28. Accordingly, the appeal is dismissed

29. Orders accordingly.

Dated and Delivered at Naivasha this 16th Day of July, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Zachayo Napai Lorwasia - Appellant in person
2. Mr. Koima for the Respondent
3. Court Clerk - Quinter Ogutu