



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 26 OF 2019

FURAHA CHARO KAZUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal from original conviction and sentence in Malindi Criminal Case No. 705 of 2015 as presided over by Hon. S. R. Wewa (Senior Principal Magistrate) at Malindi Law Courts dated on 29th March 2019)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

Furaha Charo Kazungu, hereinafter referred as the appellant was tried and convicted for the offence of Sexual Assault contrary to Section 5 (1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006. That upon conviction he was sentenced to serve 10 years imprisonment within this context of the Judgment of the trial court appellant appealed based on the following grounds:

- 1. The trial Magistrate erred in admitting the evidence of the victim and she was of doubtfully integrity.***
- 2. That the trial Magistrate erred in failing to see that the age of the complainant was proved.***
- 3. That the trial Magistrate erred by not considering that the element of penetration was not proved.***
- 4. That the trial Magistrate erred in law and fact in failing to consider that some crucial witnesses were not part of the prosecution case hence breach of Section 150 and 144 (1) of the Criminal Procedure Code.***
- 5. That the trial Magistrate did not consider the accused defence.***

Procedural History

HS, the complainant that on material day of the incident he had gone to the farm to collect some vegetables. The appellant came out to the location where he was and committed a sexual act against the order of nature. According to the complainant as a result of the penetration he sustained injury to the anal and when the appellant finished he paid him Kshs.20/= as a token of appreciation instead of 100/=. From the scene the complainant testified that he went to the hospital at Malindi where he was examined by **PW6 – Ibrahim Abdullah**. Concerning the examination PW6 gave evidence that the complainant came in with a history of having been sexually assaulted through the anus.

On physical examination PW6 confirmed the complainant suffered scratch marks on both arms and the elbow. He had also blood stained clothes. In his opinion PW6 stated that the injury could be proximate cause of sodomy.

PW2 – KK, the mother to the complainant testified that she noticed that he was walking with a limp. On inquiry, that is when the complainant informed her that the previous day he was sexually assaulted by the appellant.

PW3 – Elizabeth Nzai told the court that on 10.10.2015 on or about 11.00 am the complainant had gone to the farm to collect vegetables. It is about 3.00 p.m. when he came into contact with the complainant only to notice that he was walking by use of a stick and in pain. PW3 and other family members including PW2 decided to have the incident of sexual assault by the appellant reported to the village elder and

subsequently to the police.

According to **PW5, CPL Famina Andrew** on receipt of the report he referred the complainant to the hospital by issuing a P3 Form.

The appellant on being placed on his defence denied the offence and allegations as made by the complainant. He attributed the charge to a dispute over land between his late father and the family of the complainant way back in 2005. The gist of the dispute was that the family of the complainant was only allowed to cultivate but disobeyed by rebuilding occupation. This grudge on land precipitated the present charge. It is against this backdrop the appellants appeal would be weighed to establish whether the impugned Judgment is sustainable on both conviction and sentence.

Analysis and determination

It is trite that this being a first appeal am bound by the principles in **Okeno v R [1972] E.A. 32** in terms of the provisions of Section 107 (1) of the Evidence Act and the dicta in the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372**. The prosecution case is vested in their province to prove it beyond reasonable doubt against the appellant. Fortunately, for the appellant under Article 50 2(a) of the constitution he is presumed innocent until the contrary is proved beyond reasonable doubt by the prosecution as mandated under Article 50 2(a) of the constitution.

On appeal the test would be to find out whether the prosecution satisfied all the elements of the offence as proved beyond iota of doubt.

From the provisions of Section 5 of the Sexual Offences Act the prosecution is under a duty to prove the following elements as stipulated in the case of **Miller v Minister of Pensions (supra)** and Section 107(1) of the Evidence Act:

1. The act of penetration of a genital organ of another person with any part of the body of another or that person.

Section 2 of the Act defines genital organs to include the whole or part of male or female genital organs and for purposes of this Act, includes the anus.

On the first ingredient of penetration Section 2 defines penetration to mean partial or complete insertion of the genital organ of a person to another person's genital organs.

In the case before me the complainant testimony graphically demonstrated to the trial court the commencement and complaint of the sexual act by the appellant. From the clinical officer **Ibrahim Abdullah (who testified as PW6)** on examination of the complainant after the sexual act, the anal orifice revealed presence of friction a possibility of sodomy set to have been committed. This aspect of penetration as defined in Section 2 of the Sexual Offences Act is deemed to be complete even with partial evidence of penetration.

PW2 KK, PW3 – Elizabeth Nzai and PW4 – Salim Hussein all testified with a common denominator in their evidence that when they met the complainant she was in pain and walking using a stick. He was in a distressed condition which on inquiry he blamed the appellant for penetrating his private parts with his penis.

The clinical officer **PW6** alluded to the complainant seen as an outpatient with blood stained clothes. According to **PW6** the complainant gave an history on the background information which caused the physical injury to the anal orifice and the bleeding as observed by **PW6**.

The trial court record further indicates that the appellant made sexual seduction to the complainant while coming from the farm in broad day light. The descriptions by the complainant points positively to the appellant as the person who had carnal knowledge on the material day. It is even stated that the appellant in a step to compromise any information or report being made to the police or the parents gave out Kshs.20/= to entice the complainant from raising the matter with any other person.

Holding unto the circumstances of this case as reflected in the evidence and Judgment of the trial court, the sexual act was intentional and unlawful as defined in Section 43 of the Sexual Offences Act. On this peril the appellant had forced carnal knowledge of the complainant against his consent.

The other significant ground of this appeal is on identification of the appellant. In the case of **Francis Kariuki Njiru & 7 others v Republic [2001] eKLR** the court stated that:

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Arising the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.” (See also **Abdullah Bin Wendo v R [1953] 20 EACA 106, Roria v R [1967] EA 583**)

In the instant case, the appellant was positively identified by the complainant who apparently as a neighbor within the locality and residence of **PW2** and **PW4**. It is trite that the law on identification of a single witness must be evaluated and scrutinized with greatest care and attention to details before a court can place reliance on it to convict. The court is also called upon to warn itself of the likely dangers and risks of acting on such evidence only to the extent that its satisfied that it meets the legal threshold.

As regard this appeal the complainant was very categorical of who sexually assaulted him on the fateful day. This was an assailant the complainant was familiar with and well known to him before the incident took place. The complainant prima facie evidence shows that he

had gone to the farm to pick vegetables at about 11.00 a.m. The sexual assault took place at 3.00 p.m. The daylight and prior knowledge provided sufficient grounds enough for the positive recognition of the appellant. Needless to say, that immediately after the carnal knowledge, the complainant gave the description of the appellant to PW2, PW3 and PW4 respectively. Therefore, as properly established by the Learned trial Magistrate, the appellant was positively recognized as the sexual predator and directly placed at the scene.

I did not find any evidence on mistaken identity from the evidence leveled by the appellant why he forced himself in court. The critical part of it did not displace both the direct and circumstantial evidence by the prosecution.

The appellant contends that his father had a land dispute with the family of the complainant. In his testimony this was a way of revenging by fabricating a charge of carnal knowledge. My examination of the evidence shows that the complainant has had no previous conflict with the appellant. It is conceivable that the complainant would have transferred the will or hatred of dispute which he was a party just to fix the appellant. It was also apparent that the appellant provided no credible or tangible evidence to show existence of a land dispute between his family and the complainants to form the basis of the indictment.

I therefore find that the prosecution proved all essentials of the offence of sexual assault before the trial court beyond reasonable doubt. The appeal on conviction has no merit and is hereby dismissed.

Sentence

I am guided by the provisions under Section 11(1) of the Sexual Offences Act in imposing sentence. The trial court considered the penalty as prescribed by parliament under Section 5(1) of the Act to be imprisoned for a term not less than 10 years imprisonment.

In the case of **Kiwalabye Benard v Uganda** by the Supreme Court in **Criminal Appeal No. 143 of 2001** the court held as follows on the jurisdiction of an appellate court on sentence:

“The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence. Unless the exercise of the discretion is such that its results in the sentence imposed to be manifestly excessive or solemn to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong.”

On the issue of sentence it is my view that the Learned trial Magistrate imposed a lawful and legal minimum sentence proportionate to the offence. The appellant was indicted with at the trial court.

The appeal on conviction and sentence is dismissed in its entirety. **DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.**

R. NYAKUNDI

JUDGE