



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 252 OF 2009

SIMON MBATIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.489 of 2006 of

the Chief Magistrate's Court at Nakuru by Hon. H.O Barasa– Resident Magistrate)

JUDGMENT

1. **Simon Mbatia**, the appellant herein, was convicted for the offence of defilement contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on 20th October 2006 at **[Particulars withheld] estate** in **Nakuru** District of the Rift Valley Province unlawfully and intentionally caused his penis to penetrate the vagina of **EWM**, a girl aged 14 years.
3. The appellant was sentenced 20 years imprisonment. He now appeals against both conviction and sentence.
4. The appellant's grounds of appeal can be summarized as follows:
 - a) The learned trial magistrate erred in law and in fact by solely relying on the evidence of the minor.
 - b) The learned trial magistrate erred in law and in fact by ignoring that a grudge existed between him and the complainant's family.
 - c) The learned trial magistrate erred in law and in fact by casually rejecting his defence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the conviction was safe and the sentence lawful.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. In order for the prosecution to discharge its duty in the offence of defilement, it has to prove beyond reasonable doubt that (a) there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were recapitulated in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.
8. **EWM (PW1)** the complainant was too sketchy especially for a person aged 14 years. Since her evidence in chief is very brief I will rehash herein below:

On 21st July 2006 I had gone to the posho mill to have our maize ground. I met the accused. He is called Simon Mbatia. He pushed and I fell down. He covered my mouth and raped me. It was outside. I made noise and my mother came to the scene. Accused fled before my mother came. It was at 7.30 p.m. I was carrying flour.

Accused forcefully removed my pants. He has a wife and children. He unzipped his trouser (sic) and then raped me. The scene was by the path. I was taken to hospital that night. This is the document I was given MFI-1). It is aP3 form. Report was made to Njoro Police Station.

On cross examination this is how she responded:

You sell milk. I had been escorted by my uncle. When we reached near our home he turned back. I then met you near the home. You were not at the Centre. It is you who raped me. I know you very well. Incident was at about 7.30 p.m. You covered my mouth. I was examined by the doctor. I have not carried my clothes. I had seen you during the day. You sell milk. We went to see the scene had maize. You covered my mouth after you finished you took. (Sic). That is when I managed to scream. You had never tried that before. You did not try to befriend me. You have a wife and children.

We cannot assume she knew the meaning of the word rape. She ought to have explained to the court what was done to her that which she called rape. The prosecutor in court failed to elicit material facts to enable the court reach an informed conclusion that indeed she was defiled by the appellant.

9. According to the complainant, the incident took place at about 7.30 p.m. It was important to adduce evidence on whether it was dark or not and if it was not dark the source and the quality of the light that enabled her to see and recognize the person who defiled her. The complainant did not testify that her defiler talked to her. It is not clear how she recognized the person she purported was the appellant.

10. The evidence of Rahab Mumbi Mwangi (PW2) that on 24th October 2006, the appellant went to ask for forgiveness is suspect. She never testified as to what prompted the appellant to go to her home. The evidence of Dickson Kiverenge (PW3) alluded to the same. He said the appellant offered to settle the matter out of court. Section 25A (1) of the Evidence Act provides:

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

The purported confession by these two witnesses is inadmissible.

11. The prosecution case had some material contradictions that ought to have raised reasonable doubts in the mind of the learned trial magistrate. In her testimony, the complainant said when she met with the appellant, he pushed her and she fell down. He then proceeded to defile her. She said the scene was by the path. However, the evidence of Hillary Kimutai (PW4) was that the incident was inside a maize plantation. He found the vegetation therein disturbed.

12. Another material contradiction was the time of the offence. According to the complainant this was at 7.30 p.m., however, Dickson Kiverenge (PW3) the village elder said the matter was reported to him at 2 p.m. Initially I thought there was a typographic error, but on checking the original record the time was given as 2 p.m. on 20th October 2006. This was several hours before the alleged incident.

13. In the celebrated case of **Abdullah Bin Wendo vs. Rex 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

On the other hand, the proviso to section 124 of the Evidence Act provides:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

In this case, the learned trial magistrate had no basis of believing the complainant on the issue of identification.

14. The medical record was produced in court by Tabitha Ngugi (PW5) a clinical officer on behalf of her colleague Dr. Murmuch. The findings were inflamed vaginal wall and vaginal discharge. There were some spermatozoa that were seen upon the examination of high vaginal swab. This proved the element of penetration to the required standards.

15. The appellant faulted the trial magistrate for not making a finding that there was a grudge. Though he produced a sale agreement with the complainant's father, he never informed the court of a grudge. The court could not infer any grudge unless it was testified to.

16. In a nutshell, the prosecution case was too weak for a conviction. I therefore quash the conviction and set aside the sentence. The appellant is set free unless if otherwise lawfully held.

DATED AND SIGNED AT NAKURU THIS 5TH DAY OF DECEMBER, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED AT NAKURU THIS 10TH DAY OF DECEMBER, 2019

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JOEL NGUGI

JUDGE