



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 111 OF 2010

KIHO NDUNGI NDOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of S. Gacheru (R M)

in Machakos Chief Magistrate's Court, Criminal Case No. 144 of 2008

delivered on 13th July, 2010)

JUDGEMENT

1. The Appellant was charged with the offence of Incest by male contrary to Section 20 (1) of the Sexual Offences Act of 2006. The particulars were that the Appellant on the 3rd day of February, 2008 at [particulars withheld] village in Machakos District within the Eastern Province intentionally and unlawfully penetrated the genital organ of M.K. aged 9 years. He faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act of 2006. The particulars were that the Appellant on 3rd February, 2008 at [particulars withheld] village in Machakos District within the Eastern Province intentionally and unlawfully indecently assaulted M.N. by touching her private parts namely vagina. He was convicted and sentenced to life imprisonment.

2. He filed this appeal on grounds that can be summarized as:

i. That the learned trial magistrate erred in law and facts in convicting him on untruthful evidence.

ii. That the learned trial magistrate erred in law and fact in convicting the appellant yet there was no medical evidence linking him to the offence.

iii. That the learned trial magistrate erred in law and fact in convicting yet he was prosecuted by ungazetted officers contrary to section 85 (1) and 88 (1) of the Criminal Procedure Code.

3. Brief facts are that PMK (PW1) had left M.N., W, N and N all her children with their father, the Appellant. When she came back, M.N. informed her that she had been defiled by the Appellant. She was taken to Machakos Hospital and the matter was reported to Wamunyu Police post. Patrick Sila Kimeu (PW2) was informed of the alleged issue by PW1's brother by the name ME. He accompanied him to Mwala market where the Appellant's home is. They found a group of people. The Appellant had attempted to run away but was arrested. PW1 was said to have checked M.N.'s private parts and confirmed that she had been defiled. Police Constable Stephen Mbui (PW3) received the report and escorted PW1 and N.M. to Machakos General Hospital where she was examined and confirmed that she had been defiled. Dr. Judith Kimuyu (DW4) who examined M.N. confirmed that she was 9 years of age and that her hymen was missing and had vaginal discharge with a foul smell. Her vaginal swap revealed infection but was found not to have HIV and syphilis. No spermatozoa was detected. M. N. (PW5) recounted that she and her siblings had been left with their father on the material day. She had gone to lay her younger brother on the bed where his father was sleeping. He then instructed her to remove her pants and she did. He removed his trouser half way and told her to sleep on the bed. He then inserted his penis into her vagina. She stated that she did not feel pain or bleed. She thereafter proceeded to her grandmother's place and the Appellant went to Wamunyu market. She later informed her mother about the incident.

4. When put to his defence, the appellant (DW1) stated that he on the material day was at the market until 6.00 pm. He later went home together with his wife who proceeded to her mother's place to get the children. That she returned at about 9.30 pm in company of people and claimed that she had defiled N.M. He was arrested and charged.

5. It was the Appellant's submission that there was no likelihood of defilement of N.M. That there was no way she could have been defiled for the first time with no pain felt or blood stains found on her. that PW5 did not confirm that her hymen was freshly ruptured. That the trial magistrate failed to inquire whether N.M. knew the essence of telling the truth contrary to section 163 (1) (c) of the Evidence Act. He further argued that there were essential witnesses who were not summoned to testify among them the area chief. That he was accorded unfair trial having been prosecuted by ungazetted officer.

6. The Respondent on the other hand submitted that the age, penetration and identification of the appellant was proved. on the issue of failure to call witnesses, it was submitted that the same was a discretionary matter. That the prosecution is not obligated to call multiple witnesses to prove similar facts. On the issue of authority of officer, it was submitted that the matter was prosecuted after the amendment of Section 85(1) by Act No. 7 of 2007 thereby the officer was properly gazetted within the meaning of section 85(1) of the Criminal Procedure Code.

7. In the case at hand, the prosecution needed to establish that N.M. was a relative to the appellant and that penetration or indecent act occurred. On the first issue, although no forensic evidence was tendered, it is worth noting that the appellant did not rebut the fact that he was the blood father to N.M. In the circumstances, I find that the aspect of age and Appellant's relationship to the complainant were established.

8. On the issue of failure to call witnesses, the Court of Appeal in **Bukenya v. Uganda [1972] EA 549** held that failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case. However, each case is to be determined on the basis of the circumstances therein. In this case, the witnesses called by the prosecution established the charge beyond reasonable doubt. The failure to bring further witnesses is therefore not fatal. See **Keter v. Republic [2007] 1 EA 135** where the court held thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

9. On competence of N.M. as a witness, it is worth noting that the trial court conducted voir dire evidence within the confines of the law. Inquiring her age and whether or not she understood the meaning of telling the truth. I thereby find no fault in the manner in which it was conducted.

10. On whether or not the Appellant committed that act, N.M. gave flawless narration of the events of the day. The doctor in her examination, confirmed that N.M.'s hymen had been broken and that she had an infection although no spermatozoa was found. The prosecution case was consistent as to how the ordeal occurred. The complainant in her evidence pointed out that it was none other than the Appellant who had committed the offence and that the Appellant was her father. It did not at all transpire that the Appellant and his wife had had problems so as to suggest a frame up. In any event it is highly unlikely that the Appellant's wife could use her own daughter as a victim of incest so as to get at her husband with whom she had no differences in the past. I find the Appellant's evidence did not shake that of the Respondent which was well corroborated and proved against him beyond any reasonable doubt.

11. As regards the issue of lack of capacity by the person who prosecuted the case for the Respondent, it is noted that the prosecution was conducted after the amendment of Section 85(1) of the Criminal Procedure Code by Act No. 7 of 2007 which was as follows:-

“The Attorney General, by a notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.”

The Appellant's case was presented to court on the 7/2/2008 long after the coming into force of Act No. 7 of 2007 and therefore the trial Prosecutor was properly gazetted within the meaning of Section 85(1) of the Criminal Procedure Code. Hence the Appellant's claim that the trial Prosecutor was not qualified lacks merit and thus the proceedings conducted had no irregularity whatsoever. In any case the Appellant suffered no prejudice since he was able to cross-examine all the witnesses and conducted his defence and therefore none of his constitutional rights were violated.

12. In the end, I find no merit in this appeal. The trial court's conviction and sentence is affirmed.

Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2018.

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D.K. KEMEI

JUDGE

the presence of:-

Kiio Ndungi Ndolo - the appellant

Machogu - for the Respondent

Steve - Court Assistant