



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 27 OF 2017

PATRICK MARANDA ONDIEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 633 of 2016 in the Senior Principal Magistrate's Court at Maseno delivered by Hon. B. K. Kiptoo (RM) on 6th April, 2017)

JUDGMENT

Background

1. The Appellant therein, **PATRICK MARANDA ONDIEKI** has filed this appeal against this conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act.

The particulars of the charge are that ***on 18th May, 2016 at [particulars withheld] area within Vihiga County intentionally caused his penis to penetrate the vagina of S.A.M a girl aged 16 years***

2. Appellant was also charged with indecently assaulting the complainant on 18th May, 2016.

The prosecution's case

3. The prosecution called 7 witnesses in support of the charges. PW1 R M, complainant's mother told court that complainant was born on 22.11.99. She recalled that complainant went to school on 18.5.16 but did not return home. That the following day, she was informed that complainant had been seen with appellant alias Jatingli. That upon his arrest by members of public, appellant led them to his house where complainant was found and she said that appellant had defiled her. PW2, S.A.M, the complainant, stated she met the appellant on 18.5.16 when she was going to school and he took her to his house and defiled her. PW3, J O, complainant's brother and PW5 testified that upon appellant's arrest by them and others on 19.5.16, he led them to his house where they found complainant. PW4. John Shigadi, a clinical officer testified that he examined complainant on 22.5.16 and found the hymen missing and she had bruises on labia majora and labia minor, vaginal bleeding and whitish discharge. He produced treatment notes and P3 Form as PEXH. 1 and PEXH.2 respectively. PW6 PC Irene Chepkonga, the investigating officer testified that after investigations, she caused appellant to be charged. She produced complainant's certificate of birth which shows that she was born on 22.11.99 as PEXH. 3. PW7 Francis Nyota, a mental health consultant examined complainant on 12.9.16 and found that her mental capacity was 30%. He produced his report as PEXH. 4.

4. When put on his defence, the appellant gave an unsworn testimony in which he denied committing the offences. His first witness who was his father did not offer any testimony. His 2nd witness who is his landlord said he did not witness or hear about any incident in appellant's house on the material day.

5. *In a judgment delivered on 6.4.17*, appellant was convicted and sentenced to serve 20 years imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In the amended grounds of appeal filed on 27th February, 2018, appellant raised four (4) grounds as follows:-

1. ***That prosecution did not comply with Article 49(1)(f) of the Constitution***
2. ***That the prosecution case was not proved beyond any reasonable doubt in the absence of some essential witnesses***

3. *That medical evidence exculpated appellant from the offence*
4. *That he was convicted under the wrong section of the law*

7. When the appeal came up for hearing on 6.3.18, appellant relied wholly on the amended grounds of appeal and submissions filed on 27.2.18.

8. Ms. Wafula, learned State Counsel submitted that *voire dire* evidence of complainant was not taken but submitted that evidence that complainant was defiled was corroborated by medical evidence and by the fact that complainant was found in appellant's house on 19.5.16 after she failed to return home from school on 18.5.26. She further submitted that appellant was arrested on a Thursday and was charged on a Monday and that the one day delay was not inordinate.

Analysis

9. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

10. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Article 49(1)(f) of the Constitution

11. Article 49. (1) provides that ***an arrested person has the right***

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

12. There is evidence that appellant was arrested on 19.5.16 which was a Thursday and he was arraigned in court on Monday 23.5.16. No doubt there was one working day delay in arraigning appellant in court. The investigating officer would have been in a better position to explain the one day delay but I notice that this issue did not arise during the trial.

13. This issue has been the subject of several decisions. The correct position in law, on this issue was set out in **Julius Kamau Mbugua v Republic (2010) eKLR**, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. (See **Albanus Mwasia Mutua v Republic [2006] eKLR** and **Evans Wamalwa Simiyu v Republic [2016] eKLR**). On this basis, I do not consider the issue fatal to the prosecution case.

b. Was prosecution case proved beyond any reasonable

14. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.

Further; Section 124 of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual 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.

15. It is on record that complainant's mental capacity was certified to be 30%. It was therefore necessary for the trial court to conduct *voire dire* to determine if complainant was possessed of sufficient intelligent to understand the importance of telling the truth but that was not done.

16. The foregoing notwithstanding, evidence that complainant was found in appellant's house on 19.5.16 after she failed to return home from school on 18.5.26 is well corroborated by PW1 R M, complainant's mother PW3, J O, complainant's brother and PW5.

17. Further to the foregoing, medical evidence contained in treatment notes and P3 Form marked as PEXH. 1 and PEXH.2 respectively attest to the fact that complainant was defiled as she was found with missing hymen and bruises on labia majora and labia minora, vaginal bleeding and whitish discharge.

18. Accused did not deny that he led PW1, PW3, PW5 and others to his house where complainant was found. Complainant having been found in appellant's house and there being clear evidence that she was defiled, is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that it was the appellant that defiled her.

c. Medical evidence

19. Contrary to appellant's assertion and from what is stated hereinabove, medical evidence on record corroborates the prosecution case that complainant was indeed defiled.

d. Was appellant convicted under the wrong section of the law

20. The handwritten proceedings of the court clearly show that appellant was convicted on a charge of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006 under section 215 of the Criminal Procedure Code.

21. There is therefore no doubt in my mind that section 45 of CPC that appears on the typed proceedings is a typing error and is of no consequence to the trial court's finding on conviction.

Determination

22. In view of the foregoing analysis, I reach a conclusion that the case against the appellant was proved beyond any reasonable doubt rendering the conviction and sentence safe. As a result, the conviction is affirmed and the sentence upheld. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 10th DAY OF May 2018.

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present: Mr. Amule Holding Brief for Kyamazima

For the State - Ms. Wafula