



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.61 OF 2014

L A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in SO Criminal Case Number 90 of 2013 in the Chief Magistrate's Court at Kakamega delivered by Hon. C. Kendagor (Ag. SRM) on 6th June 2014)

JUDGMENT

The Trial

1. The Appellant herein L A has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 28th March, 2013 at [Particulars withheld] village, iguhu location within Kakamega County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of R.A.M a aged 17 years

2. Appellant was also charged with an alternative count of indecent act with the minor.

Prosecution case

3. The prosecution called a total of five (5) witnesses in support of its case. Complainant stated that she was 7 years old and in class 1. She recalled that she was going home from school with other children when they met the appellant whom she referred to as G.G and he dragged her to a bush and defiled her. That the incident was reported to her grandmother by one J and her grandmother took her to hospital. PW2, J A L, aged 10 years stated that on 7.3.13, complainant informed her that G.G had defiled her. PW3, T I, complainant's grandmother stated that on 7.2.13 and at a later date, she noticed that complainant looked sickly. That when she questioned her, complainant informed her that G.G had defiled her. That she escorted complainant to hospital and later reported the matter to police. PW4 Berfla Atieno, a clinical officer examined complainant on 7.3.13 and found her with an inflamed vulva and broken hymen. She produced complainant's immunization card and P3 form as PEXH. 1 and 3 respectively. PW5, PC David Wanjohi received complainant's report on 7.3.13 and after investigations caused the appellant to be charged.

4. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence.

5. In a judgment delivered on 6th June, 2014, appellant was convicted and sentenced to life imprisonment.

The appeal

6. Aggrieved by this decision, the appellant lodged the instant appeal on 28th November, 2016 and set out 6 grounds which I have summarized into 3 grounds to wit:-

1. That he was remanded at Kakamega G.K Prison on 28.3.13 when the offence was allegedly committed

2. That evidence did not support the charge

3. That he was a minor but was tried as an adult

7. When the appeal came up for hearing on 5.9.18, Ms. Siminyu, appearing on behalf of the appellant counsel chose to wholly rely on the

grounds of appeal and also on his submission filed on 5.7.18. Mr, Juma, Learned Counsel for the state opposed the appeal and stated that he was relying on the evidence on record.

8. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of OKENO VS. REPUBLIC [1972] E. A. 32, where it held that:-

“It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

9. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

Analysis and determination

10. I have carefully considered the evidence on record together with the grounds of appeal and submission filed on behalf of the appellant and I have deduced the following issues for determination.

i. Was complainant was defiled

ii. When was the offence committed

iii. Who committed the offence

11. In deciding this appeal, I will address each of the issues as hereunder.

Was complainant was defiled?

12. Complainant’s evidence is corroborated by that of PW4, the clinical officer who upon examining the complainant on 7.3.13 found her with an inflamed vulva and broken hymen. The P3 form indeed confirms that complainant was defiled.

When was the offence committed?

13. As is usual with most sexual offence cases, complainant was the only witness to the offence. She could not recall when the offence was committed and that is excusable considering her tender age. PW2, also a minor of tender years stated that on 7.3.13, complainant informed her that G.G had defiled her. PW3, the complainant’s grandmother stated that on 7.2.13 and at a later date she did not state, she noticed that complainant looked sickly and upon questioning the complainant she informed her that G.G had defiled her.

14. The appellant was arrested, charged, convicted and sentenced for an offence that was allegedly committed on 28th March. 2013. Clearly, the evidence on record is at variance with the charge.

15. At the close of the prosecution case, the inconsistency regarding the date when the offence was allegedly committed was not resolved and it is therefore not comprehensible when the offence was committed.

Who committed the offence?

16. The court record clearly shows that the appellant was in custody as at 28.3.13. Since he could not have committed the offence while he was in custody, he ought to have been given the benefit of doubt.(See **Philip Muiruri Ndaruga v Republic [2016] eKLR**).

Decision

17. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of clarifying the date when the offence was committed. Similarly, the trial court did not attempt to resolve the discrepancy thereby arriving at a erroneous decision considering that the evidence tendered against the appellant cannot be said to have been overwhelming.

21. I thus find and hold that the conviction and sentence were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that appellant shall be set at liberty forthwith.

DATED AND SIGNED IN KAKAMEGA THIS 7th DAY OF September 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Erick and George

Appellant - Ms Masakwa

For the State - Mr. Juma