



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 195 OF 2016

ROBERT KIPKEMOI KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable R. Amwayi Resident Magistrate, delivered on 14th December, 2016 in Molo Chief Magistrate's Court Criminal Case No. 3574 of 2015)

JUDGMENT

1. The Appellant herein is Robert Kipkemoi Kirui. He was arraigned before the Chief Magistrate's Court, Molo, charged with the principal offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act. The particulars were that between September, 2015 and November, 2015 within Kericho County, the Appellant is accused of unlawfully and intentionally causing his male genital organ (penis) to penetrate the female genital organ (vagina) of CK, a child aged 13 years.

2. In the alternative, the Appellant face a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of place and time are the same as those of the principal count save that it is alleged that the Appellant committed an indecent act on CK by touching her genital organs, namely vagina with his genital organs namely, penis.

3. After pleading not guilty to the charge, the case proceeded to trial. The Prosecution called four witnesses while the Appellant gave an unsworn statement on his own behalf.

4. At the conclusion of the case, the Appellant was convicted of the principal offence and was sentenced to fifteen years imprisonment. He is aggrieved by the conviction and sentence and has appealed to this Court. He has raised the following grounds of appeal:

1. The trial magistrate erred in law and fact by appreciating a medical evidence that was not representative of the alleged incidence (medical doctors evidence and the P3)

2. The trial magistrate erred in law and fact by allowing a clinical card from a private hospital in evidence.

3. The trial magistrate erred in law and fact by failing to take into account that the complainant was mentally retarded.

4. That the trial magistrate erred in law by failing to account for the period 1 year 1 month (17/11/15 – 14/12/16) the period I suffered in remand.

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

6. The Appellant filed written submissions and during the hearing of the appeal, informed the Court that he did not wish to add anything orally.

7. Mr. Chigiti, Prosecution Counsel, argued the appeal on behalf of the State.

8. Mr. Chigiti observed that all the three ingredients of the offence of defilement were proved. On Age, he submitted that the Prosecution

produced documentary evidence proving that the child was 16: A Health Card proved that she was 16 years at the time of commissioning of the offence. Additionally, the child told the Court she was 15 years. It was supported by evidence of the Clinical Officer. Mr. Chigiti submitted that the trial court concluded that child was 16 years based on the evidence.

9. On penetration, Mr. Chigiti submitted that the P3 form and a health card were produced and the Clinical Officer testified to establish penetration.

10. On Identification, Mr. Chigiti submitted the Complainant was able to identify the Appellant; he was neighbour and a fellow church member. So, Mr. Chigiti argued that the account given by the child was credible and unshaken on cross-examination.

11. Mr. Chigiti submitted that the evidence tendered before the trial court was sufficient; and that defence was shaky. Hence, he argued, the conviction was proper.

12. At the trial, the following transpired.

13. CK was called to the stand first. Upon conducting voir dire, the Learned Trial Magistrate concluded that she did not know the meaning of oath and would have to give an unsworn statement. However, upon questioning by the Prosecutor, she was uncooperative leading the Prosecution to ask the Learned Trial Magistrate to remand her for eight days. She was remanded at the Nakuru Children's Remand Home for eight days. She was brought back after the eight days when she finally gave evidence.

14. She told the Court that in September, 2015, the Appellant grabbed her and pushed her into his house. He then removed her clothes and panties before unzipping his trousers and defiling her on the ground. CK told the Court that the Appellant threatened to stab her on the throat and kill her if she made any noise or told anyone.

15. CK told the Court that after the ordeal, she immediately went home and told her mother who went and confronted the Appellant. She said that when so confronted, the Appellant confessed what he had done. CK then told the Court that the Appellant had sex with her three times in total. It was unclear from the evidence whether the other two times were before the incident he first told the Court or afterwards.

16. The Prosecution called SC, CK's older sister as the second witness. It is fair to say that other than the evidence she gave about taking CK to hospital, everything else she testified was hearsay. She said that in September, 2015, she was told by her sister-in-law that the Appellant had defiled CK when CK was taking cattle to the river. She vividly described the assault as told to her by her sister-in-law who was, apparently, told by CK.

17. SC also testified that he confronted the Appellant about the incident and that the Appellant confessed that he had defiled CK in front of a Nyumba Kumi elder and the Area Chief. It was after that that the Appellant was apparently arrested and taken to the Police. A P3 Form was issued to CK and SC helped take her to the hospital.

18. The Investigating Officer of the case was PC Alice Wanjiru. She discovered the incident from perusing the Occurrence Book on 16/11/2015. The incident had been reported by SC. She called CK and interrogated her and formed the opinion that a crime had been committed. Upon further investigations, she decided that the Appellant had committed the offence and charged him.

19. PC Wanjiru explained that from the beginning, CK was very reluctant to volunteer any information and she believed that it was because of the threats the Appellant had given her about revealing information.

20. The Prosecution also called John Tengecha as a witness. He is a Clinical Officer at Londiani Sub-county Hospital where both CK and the Appellant were taken for medical examination on 15/11/2015. He testified that he found no injuries and bruises on the genital organs of CK. He also found no infections or pregnancy. However, he found the hymen missing leading to the conclusion that CK had been defiled. Remarkably, the Clinical Officer formed the opinion that CK was mentally retarded. He found no remarkable results from the examination of the Appellant.

21. Put to his defence, the Appellant gave a straight denial: he had known the Complainant for a long time and she was a student in Sunday School. However, he had never defiled her. In the material part of her judgment, the Learned Trial Magistrate analyzed the evidence as follows:

The Accused admitted that he was a Sunday School teacher to the Complainant but state that he never defiled [her] as the perpetrator (sic). The Complainant is a child who is mentally retarded, however during her testimony she was consistent and maintained that she was defiled by the Accused herein. During the Court proceedings herein, the Court noted that the child was afraid and hysterical on sight of the Accused Person which means the Accused had done something to the Complainant which made her to be afraid of him. The offence herein took place in Accused's house where only the Complainant and Accused were present. There was nobody else in Accused's house when offence took place. The Complainant when going into Accused's house, left the cows un-attended to and even her younger brother saw her going into Accused's house. It is therefore not in doubt that the Complainant on material date went into Accused's house whereby Accused defiled her. There was no reason given by the Accused person why the Complainant would have framed him if the Accused had not committed the alleged offence. The Complainant was actually defiled and I don't think she would just [have] gone through the whole Court process just to punish the Accused Person if offence had not taken place. Although the Complainant herein is a child, she was consistent in her testimony despite cross examination by Accused Person. She remained calm in Court and narrated very well how the incident took place. She was coherent and consistent and a truthful witness and her evidence which I believed and which was well corroborated.

22. On my part, after carefully analyzing and re-evaluating the evidence on record, and after adverting my mind to the fact that an appellate Court should only diverge from findings of fact by a lower Court in exceptional circumstances, I find several troubling aspects in this case.

23. First, it is important to recall that CK was a minor who the Learned Trial Magistrate found as a fact was unable to understand the nature of oath. She, therefore, gave unsworn evidence. Unsworn evidence has lower probative value than sworn evidence.

24. Second, the Magistrate observed and the Clinical Officer testified that CK was “mentally retarded”. Perhaps they are referring to developmental challenges by CK – but it would have been important to have this firmly in mind when evaluating the evidence CK gave.

25. Third, it is extremely curious and problematic that four key witnesses were not called to testify during the trial. No explanation was given by the Prosecution why they were not called to testify.

a. One, CK told the Court that immediately after she was defiled she went home and reported to her mother who, reportedly, confronted the Appellant. This would have been a very crucial witness since she was the first to receive the report immediately after the incident occurred. It remains a mystery why she was not called as a witness.

b. Two, CK said that at least one person saw as the Appellant took her to his house. This was a certain Jennifer. Indeed, CK said that Jennifer saw the Appellant push CK into the Appellant’s house. She also said that Jennifer is a “grown up.” Why was this first hand witness not called to testify?

c. Three, according to the testimony of SC, CK’s sister (which as I will say shortly was hearsay and should not have been admitted as evidence), CK’s brother also saw the Appellant taking CK into his house. Again, there is no explanation why this brother was not called to testify.

d. Four, no evidence was adduced about who arrested the Appellant and under what circumstances. The Investigating Officer, PC Wanjiru talks of finding out the defilement from the OB. Who entered it there? Under what circumstances? In the unclear circumstances of this case, the evidence of the arresting officer would have been crucial.

26. Fourth, to these missing pieces of evidence which would have been supplied by these key witnesses, there are two discrepancies which jar on the tightness of the case and its ability to forestall reasonable doubts. One, CK told the Court that the Appellant defiled her at least three times but she gave detailed accounts of one time. It appears unclear whether the other two instances took place after the time detailed in her evidence or after. Two, CK told the Court that after she went home, it was her mother who confronted the Appellant and that she did so immediately after she reported the defilement to her. Yet, SC (PW2) testified that it was her (SC) who confronted the Appellant after she had heard from her sister-in-law about the defilement.

27. Fifth, as alluded to above, a lot of the evidence relied on by the Learned Trial Magistrate to return a guilty verdict, was, unfortunately, inadmissible hearsay evidence. For example, the evidence given by SC about CK’s brother’s knowledge of the defilement and how he saw the Appellant taking CK to his house was inadmissible. The brother needed to be called as a witness to give that evidence. The same goes for the evidence about how the Appellant allegedly “confessed” to the Area Chief who was never called a witness.

28. When all is said and done, this is a sad case. It is sad because it appears readily obvious that CK, a minor with developmental disabilities, was defiled more than once. With proper investigations and prosecution, justice ought to have been done for CK. However, in the circumstances of this case, there is no sufficient admissible evidence to establish a case against the Appellant beyond reasonable doubt. Mere suspicion, however strong, is not enough to convict the Appellant (*See Sawe v Republic (2003) KLR 364*).

29. In the circumstances, I find the appeal herein merited. I hereby quash the conviction and set aside the sentence imposed on the Appellant in Molo Chief Magistrate’s Criminal Case No. 3574 of 2015. The Appellant shall be set at liberty unless otherwise lawfully held in custody.

30. Orders accordingly.

Delivered at Nakuru this 20th day of September, 2018.

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JOEL NGUGI

JUDGE