



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 80 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. A. LOROT – (PM) delivered on 30th April 2012 in Kapsabet PM CR. Case No.4085 of 2010)

ISAACK JUMA MAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Isaack Juma Mambo was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 17th November 2010 at 6.00 p.m. in Nandi County, the Appellant caused his penis to penetrate the vagina of JJ (the complainant), a child aged three and a half (3^{1/2}) years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully caused his penis to come into contact with the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main charge. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his constitutional right to fair trial was infringed due to the fact that he was detained for a period of four (4) days prior to being presented to court for plea. The Appellant faulted the trial magistrate for relying on insufficient and doubtful evidence of the prosecution witnesses to convict him. He accused the trial court of failing to take into account the fact that there existed a grudge between the Appellant and the complainant's mother that led to the false charges being brought against him. He was finally aggrieved that his alibi defence was treated casually by the trial court and thereby failed to accord him justice. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant made oral submission in support of his appeal. He submitted that he was an innocent man who was wrongly accused of committing an offence that he had no knowledge of. He denied that he had neither assaulted nor defiled the complainant. He faulted the trial magistrate for failing to take into consideration the fact that the medical evidence adduced established that the complainant had a sexually transmitted disease yet he himself did not have such disease. The Appellant urged the court to re-evaluate the evidence and reach the proper decision that he is innocent. He reiterated that he was framed with the charges. He was of the view that someone else had sexually assaulted the complainant. The complainant's family fixed the charges on him to settle an existing grudge. He urged the court to allow his appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced evidence which pointed to the guilt of the Appellant to the required standard of proof. The Appellant was the only one who was within the vicinity of the area when the complainant was sexually assaulted. The Appellant was known to the family of the complainant. Medical examination established that indeed the Appellant had committed the offence. She urged the court to disallow the appeal and uphold the conviction and sentence of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of **defilement**, it was required to prove three essential ingredients: that there was penetration, the age of the victim and finally the identity of the perpetrator. In the present appeal, the complainant testified that on the material day of the incident, the Appellant who was known to her, removed her panties and then sexually assaulted her. Although she felt pain, she could not scream because the Appellant had covered her mouth. After the incident, the complainant informed her grandmother what had transpired. The grandmother informed PW2 JJ, the complainant’s mother. PW2 narrated to court that on the material day, she found the complainant, who had during the day played outside her grandmother’s house as the Appellant was smearing mud on the wall, crying. The child was restless. She did not know what had happened to her until she was told by her mother and later examined the complainant’s private parts, that she discovered that the Appellant had been defiled. Her vaginal area was swollen and a pus-like discharge was coming out of the vagina. She took the complainant on the following day to Chepterwai Sub-District Hospital where she was examined by Mr. Korir, a Clinical Officer based at the hospital. The medical treatment notes and the P3 form were produced into evidence by the prosecution. According to the said medical documents, on examination, the complainant’s labia majora and the labia minora were both swollen and the hymen was broken. There was a clear fluid discharge from the vagina. Motile spermatozoa were seen together with epithelial cells. The complainant was put on treatment. The diagnosis was that indeed the complainant had been defiled. The P3 form and the medical treatment notes were produced on behalf of Mr. Korir by PW3 Josphat Embeko, a clinical officer based at Kapsabet District Hospital.

Upon the re-evaluation of this evidence, it was clear to this court that indeed the prosecution proved to the required standard of proof beyond any reasonable doubt that there was penetration. The presence of spermatozoa in the complainant’s vagina is a clear indication that there was penetration. Her hymen was broken. The Appellant did not challenge the medical evidence that indeed the complainant was penetrated. His assertion was that the penetration was done by someone else.

The age of the complainant was also established to the required standard of proof. The complainant’s clinic card was produced into evidence. It indicated that the complainant was three and a half (3^{1/2}) years at the time of the sexual assault. The prosecution therefore established the age of the complainant as required by the law.

On the identity of the perpetrator, the Appellant denied that he sexually assault the complainant. He insisted that he was framed on the charge due to a difference that he had with the complainant’s family over a debt of Kshs.3,800/-. On the other hand, the prosecution adduced evidence, firstly, which placed the Appellant at the scene of crime and secondly, which established that he was the only one with the complainant at the time the offence was committed. According to the prosecution’s evidence, the Appellant had, at the material time, been hired to plaster the walls of the complainant’s grandmother’s house using mud. The complainant was playing outside the house as the Appellant was working. The complainant asserted that it was the Appellant, who was well known to her at the time, who sexually assaulted. The complainant’s testimony as regard the identity of the Appellant as the perpetrator of the crime was corroborated by her mother PW2 who confirmed seeing the Appellant and the complainant in close proximity at the material time of the incident.

This court, on re-evaluation of the evidence is convinced, to the required standard of proof beyond any reasonable doubt that it was the Appellant, and no one else who had the opportunity and the time to commit the offence. The Appellant’s claim that he was framed with the charge is incredible due to the fact that it is only a diabolical mother who can cause her own daughter to be sexually assaulted to settle a score with someone. The medical evidence irrefutably established, on examination, that the complainant had spermatozoa in her vagina. This court holds that the Appellant’s assertion that he was framed with the charge did not displace the strong culpatory evidence that was adduced against him by the prosecution witnesses. The Appellant’s identity as the perpetrator of the sexual offence was established to the required standard of proof beyond any reasonable doubt.

As regards the Appellant’s assertion that his constitutional rights to fair trial were infringed in that he was detained by the police for a period of four (4) days before he was arraigned in court. This court notes that the 22nd November 2010 was a Monday. The Appellant was in police detention over a weekend. It was not possible for the Appellant to be taken to court during a weekend. The police presented him to court on the first official court day which was a Monday. The Appellant’s assertion that his rights were infringed does not therefore lie. Nothing turns on that ground of appeal.

The upshot of the above reasons is that the Appellant’s appeal against conviction lacks merit and is hereby dismissed. This court cannot fault the verdict that the trial court reached. As regards sentence, the same is legal. It is provided by the law. The Appellant’s appeal against sentence is similarly dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE