



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 4 OF 2018

NICHOLAS TAMBULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case No. 1622 of 2015 in the Senior Resident Magistrate Court at Kilgoris delivered by Hon. N. Matutu (SRM) on 17th day of October 2017)

JUDGMENT

1. The Appellant herein, Nicholas Tambula convicted for the offence of Defilement of a girl contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve life imprisonment. He had also been charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The particulars of the main charge were that:-

“On the 5th day of December, 2015 within Narok County intentionally caused his penis to penetrate the vagina of DNM a girl aged 9 years.”

ALTERNATIVE CHARGE

“On the 5th day of December, 2015 within Narok County intentionally caused his penis to penetrate the vagina of one DNM a girl aged 9.”

3. Being dissatisfied with the judgment, on 24th January 2018, the Appellant filed a Petition of Appeal and the grounds of appeal can be summarised as follows that :

1. The trial magistrate erred in law and fact as the conviction was based on flawed evidence marred with irregularities;

2. The trial magistrate erred in law and fact as the conviction was based on the evidence of the complainant’s parents though the complainant had confessed of not being defiled;

3. The trial magistrate erred in law and fact as the appellant’s defence was not considered; and

4. The trial magistrate erred in law and fact as the appellants rights under articles 50 (2) (g) & (h) as well as Article 25 (a) & (c) were grossly violated.

4. On 10th August 2018, the Appellant filed amended grounds of appeal and written submissions. The said amended grounds of Appeal were that the evidence by PW1, PW2, PW3 and PW4 was doubtful and that the appellants defence was overlooked. The appellant further contended that the trial court overlooked provisions of Article 28, 48 and 50 (1) & (2) of the Constitution.

5. This being a first appeal, the court is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and reassess it and reach its own independent conclusion (see Okeno v R 1972 E. A).

6. This was the prosecution case. The trial court after conducting *voire dire* examination found that DN Pw1 could give her testimony under oath. She stated that she picked maize from the Appellant’s ‘shamba’ and when caught by the Appellant, the appellant beat her up. As she ran away the fence tore her clothes. She met a woman who after inquiring what had happened and advised PW1 to say that the Appellant

raped her. She reported to the police that the Appellant raped/defiled her. The prosecution asked for the witness to be declared hostile and the court allowed the witness to be cross-examined by the Prosecution. Pw2 Sarah Musere stated that she was the mother of PW1 but could not remember her age. She stated that on 05/12/2015 PW1 came back home carrying two maize cobs and crying that she had been raped. PW1 was taken to the hospital by her father and the boy (the appellant) was arrested. She stated that they were approached by the family members of the Appellant and who were seeking forgiveness. Pw3 Michael Saningo stated that on after coming back from a journey he was informed by PW1 that the appellant had raped her. PW3 took PW1 to the village elders. The Appellant was arrested and PW1 was taken to the hospital by PW2. Upon cross-examination by the Appellant he stated that PW1 reported that she was defiled. He stated that PW1 did not state that she had been assaulted. Pw4 Festus Kurgat a clinical officer testified that PW1 was brought to hospital on 06/12/2015 and alleged that she was defiled by someone known to her. PW1's labia were hyperaemic, bruised with injuries, and there was a reddish and whitish discharge. He stated that the age assessment was done by Dr. Mutisia who concluded that PW1 was 9-10 years. Pw5 Joan Wamalwa stated that they were assigned a case to investigate the offense of defilement involving PW1. Upon interrogation PW1 revealed that the appellant grabbed her carried her to his home and defiled her. During the act the appellant threatened the victim (PW1) not to raise any alarm. The Appellant gave PW1 a brownish kitenge blouse and a blue inner-wear as PW1's clothes had been torn. PW5 stated that she was not aware of any attempts of out of court settlement.

7. The appellant Nicholas Tambula gave unsworn evidence. He stated that he was arrested because of a family dispute. He stated that evidence by PW1 was that she was not defiled but coached to say so by some woman. He stated that he did not defile the girl (PW1).

8. The appellant submitted that the evidence by PW2, PW3, PW4 and PW5 were considerably inconsistent and the only evidence that could be relied upon was that of PW1. However, the evidence by PW1 was irrelevant and could not sustain a conviction. He argued that the entire evidence by the prosecution was doctored to fix the appellant. It was his submission that it is not clear to ascertain the age PW1 as no birth certificate was produced and that PW2 had stated that she did not know the age of PW1 and this was contrary to provisions of Section 198 (1), (2) & (3) of the Criminal Procedure Code. He further submitted that it is not clear who took PW1 to hospital as PW2 stated that it was PW3 who took the complainant to the hospital. On the other hand PW3 stated that it was PW2 who took the complainant to hospital.

9. Mr. Otieno for the state submitted that they concede to the Appeal as the Complainant was declared as hostile witness and that nothing she said was useful. He concluded that conviction of the appellant was therefore unsafe.

10. The Appellant submitted that his right to fair trial was violated as provided for by Article 50(1) & (2) of the Constitution. The Appellant in his appeal stated that more particularly his rights under Section 50(2) (g) & (h) were infringed. The said provisions *provide that*:

(2).Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

11. The Supreme Court's whilst interpreting Article 50(2)(h) in Republic v. Karisa Chengo & 2 Others[2017] eKLR expressed itself as follows:

"...the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

I have gone through the proceedings and note that the Appellant in this case did not make an application to have legal aid at the trial magistrate court and find that his right to fair trial was not infringed.

12. The second issue is whether the prosecution case was proved beyond reasonable doubt with the evidence relied upon by the prosecution. The trial magistrate in her judgement relied on the evidence by PW3, PW4, and PW5 to reach a determination. To prove an offence of defilement under Section 8(1) of the Sexual Offences Act, the prosecution needs to prove penetration, the age of the victim and the perpetrator of the offence. The Appellant has argued that a birth certificate was not availed during trial to ascertain the age of the complainant and the PW2 also testified that the age of the complainant was not known to her. Failing to prove the age of the Complainant in defilement cases amounts to failure in proving the offence of defilement. In this case the trial magistrate conducted a *voire dire* examination before taking the evidence of PW1 in which the Complainant stated that she was aged 9 years. At the end of the *voire dire* examination, the court found the witness to be knowledgeable and made an order for PW1 give her testimony on oath. The P3 form produced by PW4 as exhibit also showed that the Complainant was 9 years. PEXB6 produced by PW4 on the age assessment by Dr. Mutisia also indicate that PW1 was between 9-10 years old. In **Francis Omuroni –vs- Uganda Criminal Appeal No.2 of 2000**, the court observed that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....."

I therefore find that there was sufficient proof on the age of the complainant, even though the complainant's birth certificate was not produced as an exhibit, Dr. Mutisia assessed the age of the complainant to be between 9-10 years.

13. The next issue whether the prosecution proved the case beyond reasonable doubt in doing so this court must determine the weight of the evidence by PW1 who was declared a hostile witness. The trial magistrate was correct not to rely on the evidence of the complainant. I however find that the trial magistrate misdirected himself in relying on the evidence of PW3 to corroborate the evidence of PW1. This is

because evidence given by PW3 was informed by earlier statements made by PW1 which the court pronounced to be unreliable. It is also unclear why the magistrate treated evidence by PW2 as untruthful as she was not declared a hostile witness. I however find that PW2's evidence amounted to hearsay and could not corroborate the evidence of PW1 as statements by PW1 before and during trial has little value. The evidence of a hostile witness is of little value as stated in **Batala v Uganda [1974] EA.402** that;

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight.

14. It is paramount to establish whether this court can therefore rely on the evidence of PW4, and more so on the P3 form. In my view the doctor's evidence cannot corroborate the evidence of complainant who was declared hostile. With the above findings I find that the conviction was unsafe and I allow the appeal, quash the conviction and set aside the sentence. The appellant is free to go unless lawfully held.

Dated signed and delivered at **Kisii** this **15th** day of **November** 2018.

R. E. OUGO

JUDGE

In the presence of;

Appellant in person

Mr. Otieno For the State

Ms. Rael Court/clerk