



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 90 OF 2017

PETER AKUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. S. Telewa (RM) delivered on 25th August, 2017 in Eldoret Chief Magistrates' Court Criminal Case No. 6841 of 2017)

JUDGEMENT

1. The appellant was convicted with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2016 and sentenced to serve 20 years imprisonment. He appeals against the same on grounds that:

- a) That the trial magistrate had failed to observe the provision of law that the appellant's right to fair, efficient and undelayed justice was infringed and violated.*
- b) That the trial court failed in law to conduct voir dire examination on PW1 to justify reception of her evidence before giving such evidence.*
- c) That the trial magistrate erred in both law and fact by failing to observe that the prosecution evidence adduced before it were hearsay, contradictory and incredible to form a basis for conviction.*
- d) That the trial magistrate failed to consider his defence of grudge and alibi.*

2. This is a first appeal and this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh so as to arrive at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor.

3. PA (PW1) testimony was that it was not the first time she was having sex with the appellant. That on the material dates to this case namely 12th and 13th December, 2015 she lived with the appellant and had sex for the two days. That the appellant was her boyfriend and they had sex all the time. That she was taken to hospital and a p3 form filled. On cross examination she denied that her father owed the appellant any money. She stated that the appellant went to her place and picked her. That he forced her into the house and locked her in and went to buy milk at the Centre. That she was found at the appellant's house. Francis Mukura (PW2) was on 12th December, 2015 morning informed that PW1 was lost. On 13th December, 2015 someone informed him that he knew PW1's whereabouts. He went to the appellant's house in company of police officers and found PW1 in the appellant's house while the appellant had gone to buy milk. The appellant was found on the way and was arrested. Police Constable Buto Alem (PW3) received a report that PW1 had gone missing for two days. He escorted PW2 to the appellant's house where they found PW1 in the appellant's house which was locked. He arrested the appellant and escorted the two to Ziwa Hospital. Dr. Paul Rono (PW4) produced the p3 form filled by Dr. Yatich in respect of P.A. He stated that P.A. had hymenal tear in two places which was not fresh and opined that she had been defiled.

4. The appellant was put on his defence. He testified as follows in his defence. That PW2 had approached him to buy his bicycle. That they agreed at a consideration of KShs. 5,000/- and gave him KShs. 2,700/-. He allowed the appellant to use the bicycle on that day but went for it three days after. He advised him to wait since his child was unwell and he did not have money. That PW2 kept going to him for money but he still did not have. That one day he found PW2 in a crowd taking beer and he asked him to refund him the money but PW2 said he did not have money and the appellant told PW2 that he will retain the bicycle. He at some point saw PW2's wife and asked her about the money and that she told him that her husband was a drunkard and has no money. That he took the bicycle and PW2 pulled him and slapped him. PW2 beat him up and he was helped by two men. The next day, he saw Administrative Police officer in company of PW2 and he was arrested and charged. He lamented that Peter Ekali and Ruth Ajukim were never called to testify in the matter for reasons he did not understand. The appellant denied that he defiled PW1.

5. I have considered the evidence and the submissions tendered in this appeal. The issues for determination are:

- a) *Whether the trial magistrate failed to observe the provision of law that the appellant's right to fair, efficient and undelayed justice was infringed and violated.*
- b) *Whether the trial court failed in law to conduct voir dire and if so the effect thereof.*
- c) *Whether the appellant was convicted on hearsay evidence.*
- d) *Whether or not the trial magistrate failed to consider his defence of grudge and alibi.*

6. The appellant lamented that his right to fair hearing was infringed since his hearing delayed. I have taken the liberty to peruse the proceedings and find that the same were under circumstances beyond the prosecution's control. The appellant has further not demonstrated how the same prejudiced him. In the end that ground fails.

7. The trial court failed to conduct voir dire examination for PA. The purpose of subjecting a child of tender years to voir dire examination is to protect an accused's right to fair trial guaranteed in the Constitution. This is founded under section 125 (1) of the Evidence Act and section 19 (1) of the Oaths and Statutory Declaration Act which states:

Section 125 (1)

"All persons shall be competent to testify unless they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."

Section 19 (1)

"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

8. The question that begs therefore is who qualifies as a child of tender years? There has been varying findings by the Court of Appeal differently constituted on the same. In **Gamaldene Abdi Abdiraham & Another v. Republic [2013] eKLR**, the court set aside the conviction of the trial court where voir dire examination was not conducted on a complainant who was aged 13 years. In **M.K. v. Republic [2015] eKLR**, the court held that it was unnecessary to conduct voir dire examination on a complainant who was aged 15 years of age. In **JGK v. Republic [2015] eKLR**, the court was of the opinion that so long as the witness was below 18 years voir dire examination was necessary. This is an indication that the definition of a child of tender years under the Children Act has failed to get global importation perhaps due to the consideration that children develop differently depending on their exposure. Having said so, I am fortified in the decision in **Patrick Kathurima v. Republic [2015] eKLR** where it was held that:

"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of Cap 15. We are aware that section 2 of the Children Act defines a child of tender years to be one under age of ten years. the definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."

9. PA's alleged age of 16 was undisputed and even if it were, sufficient evidence was tendered to the fact that she was aged 14 years but 16 years at the time of testifying. Applying the test, I find that she was not a child of tender years therefore it was unnecessary to conduct voir dire examination. That ground fails.

10. On the third issue, it emerged from PW1's evidence that she was at the appellant's house where she had sex with him the entire time. The said evidence was corroborated by the evidence of PW2, PW3 and PW4. It was PW3's evidence that he was informed by PW2 that PW1 had disappeared from home for two days and that he had gotten wind of her whereabouts. That he had been informed that PW1 was at the appellant's house. On visiting, PW3 found the appellant's door locked with PW1 inside. The appellant had locked PW1 in his house as he went for milk. The fact that he locked PW1 in his house alone speaks a lot. PW4's evidence corroborated PW1's evidence that it was not the first time she had sex with the appellant when he stated that PW1 had hymenal tear in two places but was not freshly torn. In the end, that ground fails.

11. Weighing the prosecution evidence and that of the defence, I find that the appellant's evidence has no probative value. The trial court properly considered and found that it did not cast any doubt in the prosecution case. In the end, I find no merit in this appeal. The upshot is that the trial court's conviction and sentence is upheld.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22nd day of **November, 2018.**

HELLEN OMONDI

JUDGE