REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 9 OF 2016

(From original conviction and sentence in Criminal Case No. 1841 of 2014 of the Principal Magistrate Court at Baricho).

PETER KIMANI MBOTE ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant Peter Kimani Mbote was convicted of defilement of a girl aged 16 years on 25/05/2014 and sentenced to 15 years imprisonment under **Section 8(1)** as read with **Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. This was before the P.M's Court Baricho Cr. Case No. 1841/12

The appellant was dissatisfied with both conviction and sentence.

He lodged an appeal claiming that the learned magistrate erred in law and fact by;

a. Failing to consider existing grudge in the family.

b. There was no documentary evidence to prove age of complainant.

c. Relying on defective charge sheet on the name of the appellant.

d. Relying on single witness.

e. Failing to consider that no DNA examination was conducted.

f. Failed to consider that the offence charged was proved beyond reasonable doubt.

g. Failing to consider his defence.

The appellant also filed supplementary grounds of appeal claiming that the learned magistrate erred in law and fact by;

1. Denying him constitution right to interpretation to a language he understands.

2. Admitting evidence of alleged clinical officer who did not prove qualification.

3. Failing to consider crucial witnesses were not called.

4. Relying on shoddy investigation.

5. Convicting him on scanty and contradictory evidence.

6. Failed to appreciate the prosecution did not prove its case beyond reasonable doubt.

7. Failing to take into account his defence

He prays that the appeal be allowed. Conviction be quashed and the sentence imposed be set aside.

The court gave directions that the appeal be disposed off by way of written submissions. The appellant filed submissions in support of his grounds of appeal.

The respondent opposed the appeal and filed submissions urging the court to uphold the conviction and the sentence.

The brief facts of the case are that the complainant B. W. M was born on 18/6/1997 and so on 18/8/2014 she was seventeen (17) years old. On 18/8/2014 she was in the shamba cutting grass when the appellant went to where she was. The appellant had a knife and was eating a pawpaw. The appellant, after asking the complainant where her father was and upon being told that he had gone to work, suddenly held the complainant by the waist. The complainant fell on her back. The appellant then stepped on her right hand and left leg. The appellant then lifted her skirt, unzipped his trouser. The appellant then had sex with the complainant by force by inserting his penis in her vagina. The complainant told him she would report him. The appellant threatened to stab her with a knife. The complainant had not had sexual intercourse before and the experience was painful. She did not disclose to anyone what happened. As a result of the defilement, the complainant got pregnant. Later on 15/9/2014, she reported the matter to her grandmother who inturn informed her Aunty N and her father. The matter was then reported to the police at Kagio Police Station. The complainant was referred to hospital where she was examined by Priscillah Muriuki a Clinical Officer. The Clinical Officer found that the hymen was missing and the complainant was Twenty (20) weeks pregnant on 16/12/14 when the examination was done. The appellant was then arrested and charged with this offence.

The appellant gave a sworn defence and denied the charge. He raised the issue that the matter was reported late, no D. N. A was conducted and that if he had threatened to kill the complainant he would have done so by the time he gave evidence.

I have considered the proceedings before the trial court and the submission. This is a first appeal. This court has a duty to consider the evidence, analyse it and evaluate it then come up with its own independent finding. This was held in the case ***of Okeno –v- Republic 1972 E. A 32.*** The appellant has a legitimate expectation that the evidence will be given a thorough evaluation by the 1st appellant court and a finding be made. The court however leaves room for the fact that it did not see or hear the witnesses when they testified and leave room for that. Court of Appeal has restated this in ***Joseph Njuguna Mwaura & 2 Others –v- R (2013)eKLR*** where it stated:-

> **"It is common place that the first place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses before making a determination of its own."**

There were facts which were not in dispute before the trial court. These are:-

- **The appellant and the complainant were neighbours who knew each other very well.**
- **The appellant was a friend to the complainant's father.**
- **The appellant had no personal grudge with the complainant.**
- **The evidence which was tendered before the trial court was tendered by five witnesses.**

PW-1- Priscillah Muriuki was the Clinical Officer who examined the complainant on 16/12/14 and she reported to have been defiled on 18/8/14 at around 10.00 a.m. she reported that she was defiled by somebody well known to her. She told the court upon examination of the genitalia, there were no laceration, the hymen was absent and she was 20 weeks pregnant. She filled treatment notes and a P3 form, exhibit 1 & 2.

PW-2- A M is the complainants father. He testified that the complainant disclosed to R N that she was pregnant. The complainant then informed him that she was defiled by the appellant on 18/8/2014 while she was in the farm and the appellant threatened to stab him with a knife if she discloses the incident. They reported the matter to the police and took the complainant to hospital. The report confirmed she was pregnant and she later gave birth on 6/5/2015.

PW-3- N M testified that the complainant was her grandchild. She testified that she noticed that the complainant was pregnant and on enquiry she told her the appellant had defiled her. The complainant informed her that she was defiled in the farm in August 2014.

PW-4- the complainant narrated in details how the appellant found her in the shamba and he had a knife and a pawpaw. The appellant grabbed her suddenly and forced her to have sex. She conceived and later delivered a baby who unfortunately passed away. She testified that the appellant was her neighbour.

The last witness was Sgt Caroline Obiri (PW-5-) who was attached at Kagio Police Station. She testified that she received the report from the complainant on 15/12/14 that the appellant who was her neighbour and a friend of her father had defiled her on 18/8/2014. That he threatened her with a knife. She referred her to hospital and a P.3 form was filed. She obtained a birth certificate **exhibit 4** showing that the complainant was born on 18/6/1997. The appellant was arrested by members of Community Policing and was escorted to the Police Station. He then charged him.

The appellant gave a sworn defence and denied he defiled the complainant.

The trial Magistrate found the appellant guilty based on the evidence tendered and sentenced him to fifteen (15) years imprisonment.

The appellant has raised the following issues in his grounds of appeal.

1) Existing grudge:-

The appellant claims that there was a long standing bad blood between PW-2- and himself due to boundary dispute. I find tis an afterthought which cannot possibly be true. The appellant did not cross-examine PW-2- on the said grudge. Indeed the appellant when he was cross-examined stated that the complainant's father was his friend. At Page 14 of the record line 23 the appellant stated that complainant framed him to escape being punished by her father who used to be his friend. At page 15 from line -1- the appellant stated on oath that the complainant and himself had no personal differences. The appellant which the appellant has annexed were not produced before the trial court. In any case the dispute was settled amicably and had involved 3 parties. This was in 2007 and there is nothing to show that the dispute persisted. There was nowhere in the proceedings that the appellant raised the issue of grudge even when he cross-examined PW-2-. I find this a mere allegation which is without basis and has no merits.

2) Erectile disfunction:

The appellant claims that he has been ill for a long time and the medication led to loss of erection ability. It is noted from the record that the appellant did not raise this in his defence. It is at the time of sentencing that he mitigated that he had erectile disfunction. No medical evidence was presented before the trial court.

I find that the allegation is not credible. The complainant who trial Magistrate found to be consistent and firm in her evidence testified that the appellant penetrated her after which she became pregnant. The evidence of penetration was confirmed by medical evidence. The appellant did not disclose the medicine which he has been taking and led to erectile disfunction.

This is a sexual offence and the court relies on the testimony of the complainant to convict even in the absence of corroboration if the court believes the complainant. ***Section 124 of the Evidence Act*** provides:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

We have the evidence of the complainant that the accused penetrated her. The trial Magistrate found no reason to doubt the complainant. I am of the view that the prosecution did prove that the appellant penetrated the complainant and the allegation that he had erectile dysfunction is not true. Indeed if he had the condition, it is expected that it would have been his first line of defence. It was not and the allegation must be rejected.

3) Age of the complainant:

The appellant submits that there was no documentary evidence to prove the age of the complainant. This is far from the truth. The prosecution did produce the birth certificate in court as Exhibit -4- showing that the complainant was born on 18/6/1997. I find that as submitted by the State the age of the complainant was proved beyond any reasonable doubt. The complainant was 17 years and one month old at the time the offence was committed. The ground is without merits.

4)Language:

The appellant submits that the language used was English/Kiswahili which was not well understood. ***Article 50(2)(m) of the Constitution*** provides:

> **"Every accused person has a right to a fair trial which includes the right – to have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."**

From the record, the language used when appellant appeared in court for plea was English/Kiswahili. The court recorded that the charge was read in the language that he understands. There was in court an interpreter by name Marion – Page -2- of the record. At page 14 of the record the court language was indicated as English/Kiswahili/Kikuyu. At line 15 the record shows that the appellant gave his defenec in Kiswahili. There was a mistake by the court in failing to indicate the language used by the court and the witnesses. However the question is whether the right of accused to fair trial was violated. From the record, it is clear that the appellant cross-examined witnesses. He was also able to communicate with the court. This in view is prove that he understood the language used by the court. He never raised the issue with the trial Magistrate. The court was using English/Kiswahili and sometimes Kikuyu language. The appellant was conversant with Kiswahili language which he used to give his defence. It is presumed that he understood the proceeding.

The allegation that he never understood is an afterthought which I find is without merits.

In **Munyasia Mutisya v Republic [2015] eKLR.** The Court in dealing with a similar issue stated;

> **"The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses.**

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however note that the appellant participated fully in the trial by cross examining witnesses. He cross examined PW1. He cross examined PW2. He cross examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not alleged on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."

Failure to call crucial witnesses:

The appellant submits that R N and author of maternity discharge summary were not called to testify.

The proviso to ***Section 124 of the Evidence Act*** (Supra) allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In addition, the above witnesses who were not called were not eye witnesses therefore failure to call them does not have a great impact on the evidence adduced. Furthermore ***Section 143 of the Evidence Act*** provides:

"That no particular number of witnesses is required to prove a fact. The appellant did not object to the production of the discharge summary. The evidence was availed and is sufficient."

In this case, the evidence of the prosecution witnesses together with the medical evidence proved that PW 4 had been defiled and the appellant was identified as the defiler.

Did the prosecution prove its case beyond reasonable doubt?

Looking at the entire evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 4 in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion.

Defective Charge Sheet

The appellant raised the ground but no submission was made on the ground. The appellant was charged with defilement contrary to Section 8(1)(4) of the Sexual Offences Act. The particulars are that on 15/8/14 at [Particulars Withheld] village in Kirinyaga West District within Kirinyaga County, intentionally and unlawfully caused his penis to penetrate the vagina of B W a child aged 17 years.

Section 8 of the Sexual Offences Act No. 3 of 2006 states;

(1) **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

(4) **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

The charge as drawn discloses the charge and gives the particulars which are sufficient to give the appellant information on the nature of the charge. **Section 134 Criminal Procedure Code** provides:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. "

Furthermore **Section 382 of the C.P.C** provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

I find that the charge sheet was properly drawn.

8. D. N. A Examination:

The appellant submits that a D.N.A test should have been conducted to determine paternity. Section 122A of the Penal Code allows the police to order a suspect to undergo medical examination. However, in Sexual Offences, medical examination is ordered under ***Section 36 of the Sexual Offences Act***. The section does not make medical examination mandatory. It is supposed to be ordered where the courts finds it necessary and appropriate depending on the circumstances of the case. It is a discretionary order which the court may make under the section. However it is now well settled in law that sexual assault is proved by evidence of the victim. In the case of ***Fappyton Mutuku Ngui –v- Republic (2014) eKLR*** where the court was considering the issue of medical examination in a defilement case, it was stated:

> **"In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW -2-'s testimony which was trustworthy as to the person who had defiled her."**

What the court is stating is that the fact of defilement is not proved by way of D.N.A test but by way of evidence. In the case of ***Benjamin Mbugua Gitau –v- R*** the court stated that,

> **"there was no necessity of DNA test as penetration which is the main element of the offence was proved."**

The evidence of the complainant was that it is the appellant who defiled. The trial Magistrate found no reason to doubt her after observing her demeanor. I find that there was sufficient evidence to prove the fact that it is the appellant who penetrated the complainant. Failure to conduct the D.N.A test was not fatal to the prosecution case.

> **Looking at the whole evidence adduced, I find the prosecution proved its case beyond all reasonable doubts.** ***The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 4 in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion.***

In Conclusion:-

Having carefully considered the evidence on record, re-evaluated it myself and applying the law I have come to the conclusion that this appeal lacks merits and I hereby dismiss it.

Dated at Kerugoya this 22nd day of November 2018.

L. W. GITARI

JUDGE