



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO. 91 OF 2015

BETWEEN

CHARLES ASEKA ASHIMALI.....APPELLANT

AND

STATE.....RESPONDENT

(Being an appeal arising from the decision of M.I. Shimenga RM,

on 7.8.2015 In Butere SPM Criminal Case No. 434 of 2013)

J U D G M E N T

Introduction

1. The appeal herein arises from the conviction and sentence of Hon. M. I Shimenga in which Charles Aseka Ashimali the appellant who was found guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No.3 of 2006 and sentenced to 20 years imprisonment by the Principal Magistrate's Court at Butere in Criminal Case No. 434 of 2013

The Appeal

2. Being aggrieved and dissatisfied by both the conviction and sentence the appellant filed the appeal premised on the following homemade grounds;-

1. THAT I did not plead guilty to the above appended charge.
2. THAT the sentence meted was very harsh and excessive in the circumstances
3. THAT the learned trial Magistrate erred in law and facts in convicting me on the evidence which did not prove the charges.
4. THAT the trial court did not consider that I was medically tested to confirm if indeed it was me who committed the alleged offence.
5. THAT the trial court did not consider any mitigation.
6. THAT the learned trial Magistrate ignored my defence

7. THAT more grounds will be adduced at the hearing hereof.

3. The appellant prays that the appeal be allowed and a full trial ordered. He also filed supplementary homemade grounds for appeal as follows:-

1. That the learned trial Magistrate grossly erred in law and facts in holding the prosecution's evidence against me as water tight and conclusive without the evidence of a properly conducted DNA report as required under Section 36 of the Sexual Offences Act.

2. That the learned trial Magistrate grossly erred in law and facts in recording a conviction without observing that my fundamental rights to liberty were denied as enshrined under Section 49(1)(f) of the [Constitution]

3. That the learned trial Magistrate grossly erred in law and fact when she denied me the right to interpretation [as granted] under Section 50(2)(m) of the [Constitution]

4. That the learned trial Magistrate grossly erred in law and facts and basing her conviction on the unsworn and doubtful evidence of PW1 which who largely contradicted by theist of the rest of the witnesses.

5. That the learned trial Magistrate misconducted herself in law in denying me ample time after ruling to adequately prepare my defence as required under the constitution.

4. He prays that these supplementary grounds be considered alongside those of his main petition of appeal and that the appeal be allowed, conviction quashed and sentence of 20 years set aside.

Submissions

5. The appellant filed his written submissions on the appeal. The court has carefully read through the same. The appellant puts emphasis on the petition and supplementary grounds. Briefly the appellant submitted that the evidence relied on by the prosecution was inadequate to sustain the conviction. He also claims that his fundamental rights as enshrined under article 49(1)(f) and 50 (2)(m) of the constitution were violated. He contends that he was arrested on the 17.11. 2013 and taken to court on the 19.11.2013. In his view, the delay in taking him to court rendered the trial and proceedings thereof an illegality. He submits that he was not given a fair hearing and that the evidence of PW1, 2, 4 and 5 was not subjected to interpretation as required by law. He explains that PW1 gave evidence in Luhya language which is not an official language of the court and no interpretation was made. Further that it was not known what language PW4 used in giving his evidence.

6. The appellant submits that he was prejudiced and was unable to cross examine PW4. He claims that the prosecution case against him was premised on the unsworn evidence of PW1 which evidence was inconsistent untruthful and marred with doubt. He submits that since PW1 was retarded her evidence should not have been believed.

7. He submits further that the learned trial Magistrate failed to evaluate the whole evidence on record with a view of making an honest finding. He also claims that his desire to cross examine PW1 was hampered and this was unfair to him. He adds that several key and crucial witnesses and exhibits mentioned by various witnesses were not produced, thereby the more weakening the prosecution case against him.

8. He maintains that the failure to conduct a DNA on the specimen collected at Khwisero Hospital was a fatal defect to the trial. Mr. Oroni, prosecution counsel relied on the evidence on record in urging this court to find that the appellant was properly convicted and sentenced.

Duty of this Court

9. This being a first appeal this court's duty is to re-evaluate and re-analyze the evidence on record and to

come up with its own conclusions and decision bearing in mind that it never saw the witnesses testify. This court has also to remember that issues that touch on demeanor of witnesses are best left to what the trial court observed. The duty of the first appellate court was well put by the Court of Appeal for Eastern Africa in the case of **Pandya – vs- Republic [1957]E.A at page 337.**

The Prosecution Case.

10. The prosecution called a total of five 5 witnesses. PW1 M.O.A. a minor in class 3 was taken through a *voire dire* examination. The trial court observed that she was unable to understand the meaning of giving a testimony on oath. She therefore gave an unsworn testimony in *luyha* language. In her evidence she told the court that the accused (now appellant) wronged her at some point. She explained that the appellant called her from home and took her to a tea plantation where he removed her under wear, covered her mouth then laid on top of her. She testified that the appellant removed his penis and inserted it on her “thing” and she felt much pain. Her father then picked her from the tea plantation and took her to Emalindi police post. She added that he father knew that she was at the tea plantation as he was informed by a man who was slashing by the river which was not far from the tea plantation. She testified that the man who was slashing had seen them heading to the tea plantation and he called her father on phone.

11. In her testimony she stated that the man found the accused on top of her and the accused on seeing him took off leaving her at the tea plantation. She also stood up and went to the house carrying her under wear. When the father was called he rushed to the scene where he saw the appellant and told him to follow them to Emalinda AP Camp. She was referred to Khwisero Police station and later to Butere. Before going to Butere she was taken to Khwisero at the Hospital. She identified the treatment notes PEX1” and the P3 form “PX3”.

12. The trial court noted that since the victim had given an unsworn statement, the accused did not have the right to cross examine her. Though at some point, this court has held a similar view, this is no longer good criminal practice. Every witness except an accused person should undergo cross examination.

13. PW2 Belinda Munani a clinical Officer at Khwisero Sub-County Hospital testified that the complainant visited their facility for treatment on the 17.11.2013 under outpatient No. 10511/2013 with a history of being defiled at around 4 PM. On examination she observed that the complainant looked confused and shocked. Her clothes were stained with mud and her skirt was torn though she had no physical injuries.

14. She also examined her genitalia and noted a vaginal discharge with tenderness, there were no lacerations seen. A speculum examination showed the hymen was missing, cervix and vaginal wall were intact. She concluded that there was penetration since the hymen was absent. Other tests were carried out including pregnancy and HIV which turned out to be negative. High vagina swab revealed epithelial cells along the vagina wall which increase when there was friction and which meant there was intercourse.

15. She made a diagnosis of defilement and gave the complainant pills to prevent pregnancy and HIV infections. She produced the treatment notes for the complainant “PEX1” and the P3 form for the complainant marked as “PEX2”

16. PW2 also examined the appellant on the same day. She noted that he had been assaulted by a mob, his clothes were blood stained and he had cut wounds on the fingers.

17. She did a syphilis test and urine analysis. Syphilis and HIV tests were negative but his urine had an infection (Bacterial) which was marked as STI. She opined that the soft tissue injuries suffered by the appellant were secondary to assault and that the infection found on him could not have been found on the complainant because infection takes at least two (2) days to be seen. She produced appellant’s treatment notes as “PEX4” and his P3 form as “PEX5”

18. PW3 BA the father of the complainant testified that on 17.11.2013 at 4.30PM he was called by L and

asked if his daughter was at home, whereupon he decided to look for the complainant. He asked the complainant's younger sister where the complainant was and young girl who was in class 5 at the time told him that an old man had come by and called the complainant to the road while they were playing football. L then called back and told him to go near the river in the tea plantation on N O's parcel of land where her daughter was being defiled.

19. He rushed there and found L who was standing 30 meters into the tea plantation from the road. He then called out the complainant and she responded faintly. He entered 10 metres further into the tea plantation and saw accused lying on top of his daughter.

20. He told the trial court that as the appellant tried to run he fell down because his trousers were lowered to his knees. He apprehended him with the assistance of L who was shouting. "Mwizi wa mtoto" Mwizi wa mtoto"

21. This attracted a crowd of people who attacked the appellant. They then took the appellant to the AP camp on the advice of one Ochieng Simon. They were together with one Alex Andere, Simon Ochieng and L. AP officers took the appellant to Emalindi AP Camp. PW3 claimed that he saw blood stains on his daughter when she was naked at the scene.

22. The appellant was arrested and taken to Khwisero police station while the complainant was taken to hospital on 17.11.2013 and P3 form filled on 18.11.2013. He identified the exhibits being in "PEX1 and PEX2". He claimed that he did not know the appellant before. On cross examination by the appellant he explained that he knew the appellant's three names but did not know his home that well. He also explained how he arrested him at the tea plantation and that it was his first time to see him. He explained that Leonida was picking firewood in the forest and reiterated that he found the appellant defiling his daughter.

23. PW4 Alex Andere who was at his home on the 17.11.2013 heard PW3 asking someone about what he had done to his daughter. He went to the scene and found PW3 had arrested the appellant. He also found the complainant and a few neighbours who had gathered at the scene PW4 testified that when he arrived at the scene, he saw the appellant zipping his trouser while the complainant was carrying her under wear in her right hand. They escorted the appellant to Emalindi AP Camp who later transferred him to Khwisero Police Station. They later took both the complainant and the accused to hospital for examination. He added that the complainant was affected by measles when she was young and so she was kind of retarded

24. PW5 No. 96461 PC W Immaculate Ogutu attached to Khwisero police station investigated the case. She took the complainant who alleged she had been defiled by the appellant to hospital. She also recorded her statement accompanied by her father and PW4 and an Ap Officer from Emalindi Ap Camp. She also rearrested the Appellant who had been assaulted by a mob on allegations of defiling the complainant.

25. She produced the treatment notes for the complainant "PEX1" her P3 form PEX2, Appellant's treatment notes "PEX4" and his P3 form "PEX5". She also obtained the birth notification for the complainant which shows that she was born on 16.12.1999 which she produced and which was marked as "PEX3". After her investigations, she preferred the charges herein against the appellant.

Defence Case

26. The trial court found that the prosecution had established a prima facie case against the appellant who was put on his defence. He opted to give an unsworn statement and did not call any witness. He testified that on the 17.11.2013 he left his home and went to Emalindi for a burial of his friend who lived in Nairobi. At about 2.00pm it started drizzling and he took cover. On his way home a mob of people attacked him claiming that he had defiled a young girl whom he did not know. He was taken to AP Camp at Emalindi and later to Khwisero police station where he was charged with the offence of defilement.

Analysis of Evidence.

27. From the evidence both by the prosecution and the defence the appellant was a stranger in the village. He was not well known both by the complainant and the prosecution witnesses. He alleged in his testimony that he had attended a burial of his friend at Emalindi and that his home was at Bunyore. This therefore confirms that he was around Emalindi area on the 17.11.2013. The complainant claimed that the appellant called her from her home at Emalindi which he does not deny in his testimony. He was seen by Leonida who informed PW3 who went to the scene and found him lying on top of the complainant, defiling her.

28. According to the evidence of PW2 the Clinical Officer there was not only penetration but there was intercourse, meaning that the accused took his time to defile the girl. PW2 stated that a high vagina swab revealed epithelial cells along the vagina wall which increases when there was friction and which meant there was intercourse”

29. The incident happened during the day at about 4.00pm and therefore identification of the victim was positive. The appellant was caught in the act as explained by PW3. Investigations of the case were done on the same day and the appellant arrested on the same day and tests done on him. The appellant in his testimony confirmed PW2’s testimony that he was assaulted by a crowd. This was because Leonida raised an alarm when they found him with PW3 which attracted a crowd who went ahead and attacked him. From the analysis of the evidence, I find that the appellant was found in the act and was properly identified. The evidence by the clinical Officer confirms that the appellant defiled the complainant whose age was also confirmed by the notification of birth which was produced “Pexhibit 3”.

Determination

30. From the petition of appeal and the supplementary grounds of appeal the following pertinent issues fall for determination;-

- a) Whether the evidence was sufficient to sustain the conviction and whether the sentence meted out to appellant was proper.
- b) Whether the appellants fundamental rights as enshrined under article 49(1)(f) and 50(2) (m) of the constitution were violated?
- c) Whether the evidence of the prosecution was subjected to interpretation.

31. On the first issue herein I find that the evidence as analysed herein above was sufficient to sustain the conviction. The sentence of 20 years was also proper as this is what is provided for under the sentencing Section of the Sexual Offences Act No. 3 of 2016. The complainant herein was born on the 16.12.1999 as shown by the notification PEX3. Her age at the time of the incident was fourteen (14) years. Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the penalty. Section 8(1) defines what defilement is and section 8(3) gives the punishment to be meted upon the person who commits the offence of defilement with a child between the age of twelve and fifteen years which is imprisonment for a term not less than twenty(20) years. The appellant raised the issue of DNA examination. On this I find that there was no need for the same as the appellant was found in the act by the father of the complainant. I hasten to add that the trial court was right in replying wholly on the evidence of the complainant which needed no corroboration. As provided by Section 124 of the Evidence Act the second part.

32. Regarding the appellant’s complaint that the prosecution failed to call certain crucial witnesses. I must say that the prosecution had the right to call the number of witnesses it did even though some people who were mentioned did not testify. Where important prosecution witnesses are not called to testify, the court is in law entitled to draw an inference that the evidence of those important witnesses would have been adverse to the prosecution case. See the case of **Bukenya & Others –vrs – Uganda [1972] E.A 549**. In this case however, I see no reason for making such inference since the appellant was caught in

the act.

33. The second issue is whether the appellant fundamental rights as enshrined under Articles 49(1)(f) and 50(2)(m) of the constitution were violated. The appellant claims to have been arrested on the 17.11.2013 and arraigned in court on 19.11.2013. This is reflected on the charge sheet Article 49(1)(f) provides as follows. “An arrested person has the right (f) to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested.”

34. It seems that the appellant herein was brought before the court two (2) days after being arrested. A look at the calendar shows that appellant was arrested on Sunday the 17.11.2013 and arraigned in court on 19.11.2013 in the morning. Time therefore started to run on the 18.11.2013. I do find that this ground of appeal fails as the appellant was produced before court within 24 hours after being arrested. A glimpse of the same Article 49(i)(f) (ii) states that if the

“Twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day,”

35. In this case, the end of the next day was the 18.11.2013 and the appellant was brought before court on the morning of 19.11.2013 which was within the 24 hours stipulated by the Constitution.

36. The last issue is on interpretation of the evidence.. Article 50(2)(m) provides that “Every accused person has the right to a fair trial which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

37. PW2 testified in Luhya. A look at the record of 29.08.2014 does not show that there was any interpretation of the proceedings and if so, in what language/s. In fact all the proceedings conducted by the learned trial Magistrate do not have any indication of language. This clearly means that the appellant may indeed not have followed the proceedings during the trial. Article 50(2) (m) provides that every accused person has “to have the assistance of an interpreter without..... if the accused person cannot understand the language used at the trial.” It is not indicated in the record whether the appellant herein understood Luhya language in which the complainant testified.

38. The complainant was a critical witness whose evidence the appellant needed to understand. Part of the lower court record reveals that the trial court did not indicate the language in which PW4 testified. In my considered view this omission on the part of the trial court prejudiced the appellant who was unrepresented.

39. In light of the above, this court finds that the appeal must succeed on the ground that the evidence adduced before the trial court was not properly interpreted to the appellant, the appeal is allowed, conviction quashed and sentence of twenty (20) years set aside.

40. What follows after this? In my considered view this is a proper case for retrial because the interests of justice demand so. The complainant was defiled, and the evidence is such that if it were not for the issue of language, this court would have found no reason to overturn the Judgment of the learned trial Court. Further, the case against the appellant is not very old and the witnesses should be readily available to testify further. The error leading to the appeal being allowed by this court was an error committed by the trial court.

41. In the circumstances, I order that this case shall be remitted to the Principal Magistrate’s court at Butere for retrial. The fresh hearing shall be conducted by a magistrate other than Hon. M. I Shimenga who conducted the trial in the first place.

42. To expedite the process, the appellant shall be produced before the Magistrate in charge, Butere Principal Magistrate’s Court on Monday, 27.02.2017 for directions as to fresh hearing of the case. Meantime the appellant shall remain in custody.

Orders accordingly.

Judgment delivered, read and signed in open court at Kakamega this 21st day of February 2017

RUTH N.SITATI

JUDGE

In the presence of ;-

Present in person.....for Appellant

Miss Tarus (present).....for State

Polycap.....Court Clerk