



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CRIMINAL APPEAL NO. 18 OF 2016

PETER ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. This is an appeal against the judgment of Hon. N. Kihara, Snr. Resident Magistrate on the 6th day of March 2014 in Keroka Criminal case no.1116/13 against the conviction and sentence.

The appellant, Peter Onyango was charged for defilement contrary to Section 8(1) (2) of the Sexual Offences Act no.3 of 2006.

The particulars thereof were that on the 27th day of October 2013 at [Particulars withheld] village in Borabu District within Nyamira County, intentionally caused his penis to penetrate the vagina of S N a child aged 9 years.

He denied the charge and the trial ensued. He was found guilty and sentenced to serve life imprisonment as provided for under Section 8(2) of the Sexual Offences Act 3 of 2006.

Being dissatisfied and aggrieved he has appealed against both the conviction and sentences.

His grounds of appeal are:-

1. The learned trial Magistrate misapprehended the law and fact by convicting on evidence which was suspect.
2. The learned Trial Magistrate introduced extraneous matters in arriving at the guilty of the Appellant.
3. The learned trial Magistrate erred in and fact in shifting the burden of proof to the Appellant.
4. The learned Trial Magistrate erred in law and fact in convicting the Appellant on evidence for short of the required standard in law.
5. The learned Trial Magistrate erred in law and fact by failing to evaluate on record and particularly failing to reconcile the glaring material contradictions and inconsistencies thus arriving at a wrong decision to the prejudice of the Appellant.

Thus the appellant prays to admit [allow] this appeal and quash the conviction and sentence meted out against the Appellant.

B. The Appellant submitted that:-

1. The Trial Magistrate did not make a finding whether a child –P.W.1-was sufficient intellect to understand the duty of telling the truth.

There are contradictions in her testimony in the proceedings. She says “I informed my grandmother that the accused person had defiled me.” However in cross-examination, she testifies:- “It is not me who told my grandmother, she is the one who asked me what was the problem since I looked sad”.

Therefore these are material contradictions which should be resolved in favour of the Appellant.

2. By the grandmother beating P.W.1 was meant to implicate the appellant. Therefore the evidence implicating the Appellant is not voluntary.

3. The age factor of P.W.1 is not professional as per exhibits 3, thereof by P.W.2.

4. Exhibit 2 does not show or prove penetration, the necessary ingredient for the offence of defilement.

Therefore since no age and penetration was sufficiently proved as by law required, there was a pre-set mind to convict the appellant without sufficient proof.

That further the breaking of the vagina/hymen is not proved either.

C. The Respondent submitted that:-

1. The prosecution produced four witnesses. P.W.1 – the victim – gave detailed testimony of what transpired. She clearly and positively identified the appellant as a person who penetrated her vagina with his penis.

Her testimony was corroborated by evidence of P.W.2- the registered clinical officer – who confirmed the allegations that P.W.1 had injuries on her private parts specifically that the hymen was broken and these were bruises on the labia. He proceeded to give the estimate period of these injuries to be three days which corroborated P.W.1’s testimony, see page 4 – 9 of the typed proceedings.

Therefore the evidence was sufficient and the Trial Magistrate was rightly guided by Section 124 of the Evidence Act.

2. With regard to the issue of contradiction, the Trial Magistrate was alive to the evidence of P.W.3 and rightly took her explanation that the contradictions were as a result of the fact that at the time of the recording the statements, questions directed to her by the police were in Kiswahili language, she was not well versed in that language. Later her testimony was in Ekegusii, a language she well understood.

This led the Trial Magistrate to remark in her judgment, in this regard, that P.W.1 was shy and had to be prodded to speak up which is normal for a child of 9 years. The same could have caused confusion. Her testimony, however, remained unshaken on re-examination see page 2 of the proceeding, first paragraph thereof.

3. With regard to the age of the victim, the age assessment report was conducted by P.W2 was but

sufficient. No objection was raised by the accused at the time of the Trial. The appellant was represented by counsel at his trial.

Further, the appellant in his defence, see page 15, paragraph 2, admitted that the victim was a small girl. It was further in evidence that the victim was class III – a fact which was not challenged by the defence.

4. With regard to the issue of beating by the grandmother, P.W.1, testified at page 7 of the proceedings that she feared to tell the grandmother. She was scared of her.

Therefore P.W.1 and P.W.3's testimony even if contradictory, does not exonerate the appellant from the evidence that he defiled the victim.

Therefore I would urge this court to dismiss this appeal.

D. The first appeal, the court is directed to read the proceedings and reach its own independent conclusion on the basis of textual analysis, bearing in mind however, that the appeal court did not have the benefit of hearing the testimonies of the witnesses *via voce*. See *Okeno –vs- Republic* [1972] E.A 32.

E. The proceedings

The appellant was positively identified by P.W.1 – the victim whom he defiled. This fact of penetration – an apt ingredient in this offence was corroborated by P.W.2 – the doctor, or a registered clinical officer.

Was there penetration by the appellant? P.W.1 affirms it, P.W.2 corroborates.

Was there a broken hymen and bruises on labia?

P.W.1 affirms it, P.W.2 corroborate it.

Was there doubt as to the age of P.W.1. No. P.W.2 affirms it, and P.W.3 corroborates it.

F. FINDINGS & CONCLUSIONS

Findings

The contradictions and inconsistencies by P.W.1 and P.W.3 are not fatal to the credibility of the two witnesses. It would, however, if the contradiction touched the identity of the appellant. The narrative that is alleged to be contradictory relates to the date of the offence and whether P.W.1 told P.W.3 of the defilement or whether P.W.3 found out herself. This in no way exonerates the appellant from the offence. The appellant in his defence attempted to plead an alibi. It was a feeble attempt. The offence occurred at 4 o'clock, not at 2 o'clock.

Thus the court finds that there was penetration of the appellant's penis into the vagina of the victim. The appellant was positively identified by the said victim.

CONCLUSION

In the premises and for the reasons stated herein above, this appeal on both conviction and sentence be and is hereby dismissed.

Orders accordingly.

14 days right of appeal.

Delivered at Nyamira Court this 10th day of February 2017.

C.B. NAGILLAH

JUDGE

In the presence of:-

Moturi Appellant

Ochieng for the respondent

Mobisa for the court.