



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 72 OF 2015

PETERSON KIAMBI BUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of Hon. J.Aringo Resident Magistrate, Nyeri delivered on the 02/09/2015 in Criminal Case No.2 of 2015)

JUDGMENT

1. The Appellant, **Peterson Kiambi Bundi**, was charged with the offence of defilement contrary to **Section 8 (1)(3) of the Sexual Offences Act**; the alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The facts of the case as recorded by the trial court are that on the 6th day of January, 2015 at Ihururu area within Nyeri County, the complainant (**PW1**) came from school and found three (3) cows had strayed into their shamba; as she drove them out she met the appellant mending a fence; he enquired of her name and age and whether she was willing to be his wife; she declined to the latter; at that time he was armed with a panga and threatened to kill her and then proceeded to defile her; the matter was reported to Ihururu Police Post where she was issued with a P3 Form and was thereafter examined at Nyeri PGH; the appellant was later arrested and subsequently charged with the offence of defilement.
3. The Appellant was tried and convicted and sentenced to twenty (20) years imprisonment.
4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Supplementary Grounds of Appeal raising five (5) Grounds of Appeal which grounds are summarized as follows;
 - (i) The key ingredient of penetration and the charges were not proved beyond reasonable doubt;
 - (ii) The appellant was not positively identified;
 - (iii) Crucial witnesses were not called to testify;
 - (iv) The conviction was based on highly contradictory evidence from the prosecution witnesses;
 - (v) The trial court improperly rejected the defence without giving reasons as required in law.
5. The appellant appeared in person and chose to rely on his written submissions; Mrs. Gicheha appeared for the State and made oral presentations; hereunder are the respective parties summarized submissions;

APPELLANTS SUBMISSIONS

(i) **On Penetration** the appellant submitted that penetration was a key ingredient of the offence of defilement which was not proved; the medical evidence left a lot to be desired; the hymen was found not to be recently broken and there was no mention of bleeding or laceration on the genitalia; no efforts were made to ascertain the nature or source of the whitish discharge; the actual words the minor used to describe the ordeal she underwent were missing; the proof of penetration was below the threshold; case referred to was **Charles Kaara Muriya vs Republic Cr.App.No.330 (1987) CA** where it was held that;

‘.....the more serious the charge, the heavier the burden of proof on the prosecution.’

(ii) **On Identification**; this was not positive and free from error; the appellant was a stranger and was not known to **PW1**; she relied on a name given by a mystery “**mzee**” who stumbled upon the incident but he was never summoned to testify; **PW2** relied on hearsay evidence to incriminate the appellant; there was no evidence placing the appellant at the scene of the crime;

(iii) **Crucial witnesses were not called to testify**; the **mzee** who provided the appellants name was never called to testify; the two (2) sisters of **PW1** who received the first information from the complainant were also not summoned to testify; the appellant relied on the renowned case of **Bukenya & Others vs Uganda (1972) EA 549**;

(iv) **Contradictory evidence**; the appellants contention is that the trial court convicted him on the basis of evidence that was highly contradictory; in her evidence **PW1** never mentioned the name of the assailant; the mother **PW2** mentioned the name of the assailant and told the court that she got it from **PW1**; the Investigating Officer **PW5** interviewed the said **mzee** who denied ever being at the scene of crime;

(v) That there were also contradictions as to time the incident occurred; **PW1** stated that it happened at 12.00 whereas **PW2** stated that it occurred at 10.00am; the P3Form indicates that the incident is said to have occurred at 1.00pm;

(vi) **PW1** had also contradicted her mother on the whereabouts of the Birth Certificate which she said was unavailable as evidence as it had gotten burnt when their home burnt down; yet the mother produced it and it was marked as ‘**PExh.2**’; this raised doubts as to its authenticity;

(vii) These contradictions created doubt in the prosecutions’ case.

(viii) **Defence**; that the trial court had improperly rejected his unsworn evidence in which he explained his whereabouts on that date; that the trial court failed to analyze this evidence and weigh it in totality against that of the prosecution; and it did not give reasons why his defence stood displaced; in failing to do so the trial court had shifted the burden of proof to him;

(ix) The appellant prayed that his appeal be allowed and that conviction be quashed; and that the sentence be set aside and he be set at liberty.

6. **RESPONDENTS SUBMISSIONS**- Prosecuting Counsel for the State made the following submissions in response;

(i) **On penetration**- the examining doctor had noted that the hymen was broken and that there was whitish discharge and arrived at the conclusion that the complainant had been sexually assaulted; the doctors evidence corroborated the evidence of **PW1**; penetration was properly proved and confirmed by the P3Form;

(ii) **On identification**- that the incident happened during the day and the complainant saw the appellant clearly; **PW1** didn’t know the appellant but the mother knew that he worked for Mama

Nganga which was at the same place **PW1** found the appellant repairing the fence; at the time of arrest the complainant identified the appellant; that the appellant was positively identified by **PW1** and that this was not a case of mistaken identity as contended by the appellant;

(iii) On crucial witnesses not being called; the prosecution called a total of 5 witnesses and their evidence was not shaken; the mzee was questioned by the Investigating Officer **PW5** but he denied being present at the scene of crime and that he had only overheard details of the incident from others; he could therefore not be compelled to record a statement and be called to testify; the two sisters of the complainant were not at the scene and would not have added any value to the prosecutions' case;

(iv) Contradictions and discrepancies; it was submitted that these did not go to the root of the prosecutions' case; that **PW2** stated that the complainant mentioned the name of the appellant; even though the **mzee** who gave out the name of the appellant had recanted and unwilling to testify this did not negate the fact that the appellant may have been at the scene; that **PW1** had stated that there was no Birth Certificate but **PW2** had produced it; the fact remains that the Birth Certificate was produced to prove the age of the complainant;

(v) On the Defence being rejected; the trial court looked at the evidence and analyzed it and not being satisfied with the defence properly rejected it ;

(vi) Burden of proof; the evidence given by the 5 prosecution witnesses was water tight; the defence did not puncture the prosecutions' case; the prosecution proved its case beyond reasonable doubt and the appellant was correctly convicted and sentenced;

7. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence.

ISSUES FOR DETERMINATION;

8. After taking into consideration the submissions made by both the Appellant and Respondent this court finds the following issues for determination;

(i) Whether the appellant was positively identified

(ii) Whether the prosecution proved the key ingredient of the offence namely, penetration to the desired threshold;

ANALYSIS

9. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the appellant was positively identified;

10. On identification: this is one of the main grounds of appeal raised by the appellant, and his contention was that he was not positively identified;

11. The Complainants evidence as recorded by the trial court was that she told her sisters that she had been caught by somebody and that somebody held her; that a certain **mzee** found them with the appellant in the bush; that she did not know the name of the **mzee**;

12. The evidence of her mother (**PW2**) was that after being called by her daughters and informed of what had befallen **PW1** she rushed home; upon asking **PW1** what had transpired she was told that the old **mzee** who had stumbled on the incident had called the defiler "**Peterson**"; the arresting officer (**PW4**)

upon receiving the report from **PW2** that **PW1** had been defiled by '**Peterson Kiambi**' whom he had been informed by **PW2** resided and was an employee of Mama Nganga; he proceeded thereto and had him arrested; under cross-examination he acknowledged that he did not conduct an identification parade;

13. The trial court analyzed the evidence on identification and noted the gap in the prosecutions' case in failure to produce a key witness, the mysterious **mzee**; this is what is the trial court stated in its judgment;

'The problem is that as per PW5, this person, who is also called mzee by the victim told her that he was never there and he only heard of the incident from the other people later. Hence he did not even record a statement. Did this mzee turn apostate so as to avoid testifying or was he sincere when he told PW5 that he was not present? It was on the basis of the name supplied by PW1 and which she overheard from the mystery mzee that the accused was arrested and ultimately charged.'

".....'Nonetheless, this court is satisfied that the victim is telling the truth and accepts her testimony as per section 124 of the Evidence Act."

14. The trial court believed her testimony and invoked the proviso to Section 124 of the Evidence Act and proceeded to convict the appellant.

15. Upon re-evaluating the evidence on identification it is apparent from the evidence of **PW1** that the assailant was a stranger and a person not known to her; even when testifying she used the word somebody and never referred to the appellant by name; this was aptly captured by the trial court in its judgment; **PW4** acknowledged under cross examination that no identification parade was conducted to enable **PW1** identify the appellant before the trial; this court notes from the record that no evidence was led by the prosecution on whether it was impracticable or unnecessary or on the existence of exceptional circumstances or failing to hold such a parade;

16. The trial court in this instance concerned itself mainly on whether the minor was being truthful and in believing her evidence instead of addressing the quality of the identification evidence;

17. This court makes reference to the case of **Cleophas Otieno Wamunga vs R Cr.Appeal No.20 Of 1989 where it was held that;**

"Where the only evidence against the accused is, as is here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favorable and free from possibility of error before it can safely make it the basis of a conviction.'

18. This court reiterates that the appellant was a stranger and a person not known to **PW1**; upon the arrest of the appellant no identification parade was conducted; the evidence of **PW4** was that **PW1** identified the appellant at the police station; the identification therefore can be deemed to be as having been induced and unreliable;

19. Added to the state of affairs was the fact that there was no identifying witness as the mysterious **mzee** who purportedly provided the name of the appellant was never availed to testify as a witness for the prosecution;

20. The failure by the prosecution to call this mysterious **mzee** who had implicated the appellant leading to his arrest means that the prosecution failed to link the appellant with the offence.

21. This court is satisfied that the appellant was not positively identified.

Whether the prosecution proved the key ingredient of the offence namely, penetration to the desired threshold;

22. The above failure suffices to dispose of the case but this court will comment on the key ingredient raised by the appellant namely penetration; the appellant stated that this was not proved to the desired threshold; the trial court in its judgment posed the following questions;

“.....Does the injury in this context refer to the broken hymen? The victim was defiled in the bush but there is no other injury and the clothes are also clean. Why was no high vaginal swab done to establish the nature the of (sic) whitish discharge referred to.”

23. The trial court made these further observations on the prosecutions' case, that;

“The process of collating evidence in this case was particularly sloppy. The investigation as lazy and half- hearted. This is a serious offence and the penalties are grave. It behoves the investigation process to be equally serious and thorough.”

24. These comments clearly demonstrate that the medical evidence was not thorough and left gaps that created doubts in the prosecutions' case as to whether the injury referred in the P3 Form established that there was penetration; no efforts were made to ascertain the nature or source of the whitish discharge; and it is noted that the actual words the minor used to describe the ordeal she underwent were also missing in her evidence;

25. Despite the afore-going instead of favoring the appellant with the benefit of doubt arising from the shoddy investigations, the trial court went ahead to state that it was satisfied that the offence of defilement was proved and proceeded to convict the appellant on the main count;

26. This court makes reference to the case of **Charles Kaara Muriya vs Republic Cr.App.No.330 (1987) CA** where it was held that;

‘.....the more serious the charge, the heavier the burden of proof on the prosecution.’

27. This court is guided by the above case and is satisfied that the medical evidence was wanting and that the prosecution failed to prove the key ingredient of penetration to the desired threshold.

FINDINGS

28. In the light of the forgoing this court makes the following findings;

- (i) This court finds that the appellant was not positively identified;
- (ii) The ingredient of penetration was also not proved to the desired threshold;
- (iii) And finds that the prosecution failed to prove its case beyond reasonable doubt.

DETERMINATION

29. The appeal is found to be meritorious and is hereby allowed.

30. The conviction is hereby quashed and the sentence set aside; the appellant be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 11th day of May, 2017.

HON.A.MSHILA

JUDGE