



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 99 OF 2015

Y A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant, Y A was charged with the offence of attempted defilement of a girl contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act, No. 3 of 2006.

The facts being that;

“On the diverse dates between the year 2011 and the year 2012 at Mwandoni area of Kisauni sub-county within Mombasa county, the appellant attempted to cause his penis to penetrate the vagina of M.A, a girl aged 11 years”.

The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act of 3 of 2006.

The particulars were that;

“On the diverse dates between 17th June, 2013 and 19th June,2013 at Mwandani area within Mombasa County, the appellant intentionally touched the vagina of M.A, a girl aged 11 years with his penis”.

The appellant pleaded NOT GUILTY to both counts and was tried, convicted and sentenced to serve ten (10) years imprisonment for the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The appellant was acquitted for the main count of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006.

Upon being aggrieved with the conviction and sentence, the appellant appealed and advanced the following grounds in his petition of appeal by M/s Nyameta Mogaka & Magaya Advocates.

(1) The learned trial magistrate erred in law and fact in finding that the prosecution had proved its case against the appellant whereas the evidence was not sufficient to make out a prima facie

case against the Appellant;

(2) The learned trial magistrate erred in law and fact in convicting and sentencing the Appellant when the crucial ingredients of the offence charged were never established and the prosecution did not discharge its duty to the required standard of proof beyond reasonable doubt;

(3) The learned trial magistrate erred in law and in fact in shifting the burden of proving the Appellant's guilt from the prosecution and implied that the Appellant had a duty to prove his innocence.

(4) The learned trial magistrate erred in law and fact by dismissing off the Appellant's defence which defence raises a possibility that the complainant was motivated by malice;

(5) The learned trial magistrate erred in fact and law by failing to take into account material contradictions and inconsistencies of the testimonies of the key prosecution witnesses, which was on hearsay and did not confirm its source, this rendering unsafe the conviction of the Appellant;

(6) The learned trial magistrate erred in law and fact by misapprehending the facts and applying the wrong principles and therefore, arrived at a wrong judgment and or decision;

(7) That the conviction and sentence of the (10) years imprisonment imposed by the learned trial magistrate is harsh in consideration of all circumstances, more especially that the appellant is of an advanced age;

(8) The learned trial magistrate erred in law and in fact in failing to appreciate and/or ignoring the submissions of the Appellant, and further in not finding that the investigating officer herein did not properly investigate the case, as no criminal intent of the appellant was ever established.

(9) In view of the circumstances set herein above, the learned trial magistrate totally misdirected himself in delivering judgment by failing to consider and appreciate the evidence on record tendered by the Appellant and the circumstances of the whole case.

The appellant therefore prays that the court allows his appeal, sets aside the judgment, conviction and sentence by the trial magistrate and acquit him.

To determine this appeal, the court will briefly set out the evidence that was tendered before the trial court by the prosecution and defence.

Pw1 M.A, told court that she was aged 12 years old and was in standard five (5) at [particulars withheld] Buxton and lives at [particulars withheld]. She stated that they would normally go to their grandmother's at Mwandani where the appellant would call her to his house and make her remove her clothes. She said that she would refuse and the appellant would tell her that she would know who he was. She went on to state that he used to do things to her such as putting his "dudu" into her vagina. And one day she refused to go to his house and he beat her. She said that she never told anyone as she was afraid until a day their teacher asked if there was anyone with a problem and she told her about this. She was then taken to hospital by her father and grandmother.

In cross examination, Pw1 told court that she used to go and visit her grandmother with A N, H R during the weekends and holidays. She said that A was older than her and the rest younger. That she would play with them. She also said that one day her mother was washing clothes when she saw blood on her clothes and asked her about it. She lied that it was Swaleh who had kicked her from behind and she had gotten injured on her private parts. She said that the truth was that it was the accused who had put his "dudu" into her private parts in 2011 and 2012. She also told court that he would torch her private parts and lick her ears at night as they slept in his house.

Pw2, I A testified that M.A, the complainant herein was her 1st born child and that on 19.6.2013, she was called by the teacher and asked if she knew what was happening to her child. She was then informed that there was someone who had defiled her and that it was her grandfather who is her (Pw2) step father. Pw2 said that Pw1 confirmed this and she said that there was a day she saw blood on the said child's clothes but on interrogating her, she told her that it was Swahleh. She took Pw1 to hospital where it was found that there had been no penetration. Pw1 went to reported the matter to Nyali police station and later took Pw1 to Coast Provincial Hospital where it was confirmed that she had been touched but no penetration had happened. She identified the PRC form, P3 form and treatment notes to court (Exhibit P 1,2,3.)

In cross examination, Pw2 confirmed that she had known the appellant for a long time but had never heard of his bad character. She denied having planted the offence against the appellant.

Pw3, DR. LAWRENCE NGONE, is a medical officer who fills P3 forms for the Coast General Provincial General Hospital. He identified to court a P3 form (Exhibit P2) belonging to M A, the complainant who was aged 11 years old in 2013. He testified that she had gone to him on 19.6.2013 with allegations of having been severally defiled by a person known to her between 2011 and 2013. That she had a PRC form No. 2/860. He examined her and found she was a virgin since her hymen was intact but had a laceration at the labia minora. He concluded that there was no clinical evidence of defilement on MA. He then filled and signed the P3 form on 6.3.2013 which he produced as exhibit P2 and the PRC form as exhibit P1.

Pw4, A M A was a teacher at [particulars withheld] Girls primary school in Tononoka. She told court that on 18.6.2013 at about 3.00pm, she was at the said school when one Z A told her that her friend, M.A. who was new in the school had a problem. She then assured M.A. that she could confide in her. That M A then told her that she had gone to the toilet and the appellant had followed and tried to rape her. She also told her that when she tried to scream, the appellant held her mouth. She further told her that the 2nd time the appellant tried to rape her, she screamed and he threatened to kill her if she told anyone. Pw4 said she took MA to the Deputy Head teacher who called her mother. The child was called and she narrated the same story. The child's mother said that it could be true because at one time the child had tried to approach her. They went to the police station and the child still narrated the same story.

When cross examined, Pw4 said that the child's story was consistent and she identified the appellant as the culprit; hence she found her truthful. She also said that the child said that one Swaleh had tried to have sex with her but she had told that to her mother out of fear.

Pw5, NO. 91654 P.C. MARGARET NYAWIRA of Nyali police station who is the investigating officer in this case told court that on 20.6.2013 at 8.00am, she reported to work where she perused the occurrence book and found a case allocated to her for investigations. According to her, it had been reported by the complainant's mother while accompanied by her teacher that she was 11 years . She interrogated the child and was told that she had already been taken to hospital. She then went to Coast Provincial General Hospital (Makadara) and confirmed that the complainant had been there. She found the PRC form which she collected and went back to Nyali police station where she recorded witnesses statements. According to Pw5, the complainant told her that she had gone to her grandfather with other children and the appellant had sent those other children to buy things with Ksh 10/= leaving her with him. That the appellant then removed his pant, held her on the back and defiled her. She also said that the complainant told her that there was a day the appellant removed his penis and asked her to suck it and he would touch and kiss her as this happened. She also said that the complainant told her that she did not tell anyone as the appellant threatened her; but she decided to tell her teacher who then informed her mother. Pw5 decided to send the complainant for age assessment to confirm her age as she did not have a birth certificate. She was confirmed to be 11 years old. Pw5 produced the age assessment report as exhibit P3. She finally stated that the appellant was arrested by chief Inspector Salim and members of community policing on 19.7.2013. She interrogated him and he denied the allegations saying that the child had been defiled by another boy. She charged him with the offence before court.

In cross examination, Pw5 testified that the child had been defiled from 2011 to 2013 on several occasions. She, however, said that there was nothing that shows the appellant defiled the complainant

apart from the complainant and the report by the doctor. She said that she believed the child and it is rare for children to lie. She also said that the P3 form showed that there was no defilement but there were lacerations. She said that the appellant mentioned on another boy but the child did not.

The prosecution closed their case and the trial magistrate placed the appellant on defence whereby he opted to give a sworn testimony and called one witness.

In his defence, the appellant Y A, denied committing the offence and stated that he had never lived with the complainant. He stated that the only time the complainant slept in his house was when their house caught fire and she was with all her family members. He also stated that he used to discipline the complainant and hence her framing him. He then said that the complainant was defiled by a boy named Swaleh in 2008.

In cross examination, the appellant told court that the complainant's mother used to send her to him for discipline because she had once disciplined her by burning her hands. He also said that there was a time he recorded a statement that the complainant was to be married by Swaleh.

Dw2, R A told court that the appellant was her husband and the complainant her granddaughter. She confirmed that the only time the complainant slept in their house was when their house caught fire. She also confirmed that the complainant would normally be taken to the husband for discipline by her mother because she used to fear him.

Both the defence and prosecution counsel submitted orally and cited authorities for the trial court to rely on in its judgment.

After hearing all the evidence and submissions by both the prosecution and defence, the trial magistrate had this to say at paragraph 20 on page 6 of the judgment to paragraph 4 of page 7 of the same-

“Looking at the evidence by the complainant and the P3 form produced, it is clear there was no evidence of defilement as the complainant's hymen was found to be intact. Although there were lacerations found on the labia minora, the same cannot be linked to the accused as the said lacerations were seen on 19th June, 2013 and the incident is alleged to have happened in the year between 2011 and 2012, meaning the lacerations definitely would have healed if they were inflicted in 2011 to 2012. The alleged boy one Swaleh is alleged to have defiled the minor in 2008. For the above reasons, I find that the main charge was not proved to the required standard. The accused is hereby acquitted”

The trial magistrate went onto state at paragraph 5 to 22 of page 7 of the judgment.

“On the second count of indecent act with a child, it was the evidence of the complainant that the accused used to call her to his house and used to insert his penis in her vagina. In cross examination, the complainant stated that the accused used to touch her private parts and used to lick her ears.....I found her to be a credible witness who had no reason to frame the accused. I find the defence of the accused that the complainant might have framed him because he used to discipline the complainant and the defence that the complainant only visited them once when their house caught fire an afterthought and untruthful. The issues were never raised during cross examination.....I find that the prosecution has proved beyond reasonable doubt the alternative charge of indecent act with a child contrary to section 1(1) of the Sexual Offences Act.....”

During the hearing of this appeal, the advocate for the appellant Mr Egunza confirmed having filed and served their written submissions on 26.1.2017 which he indicated he would rely on. He urged the court to allow the appeal.

Learned counsel for the state, M/s Ocholla, held brief for M/s Mutua, also a learned counsel for the state and indicated to court that they were relying on the records in their entirety in opposing the appeal. She

urged the court to support the findings of the trial court.

This being the first appeal, this Honourable court has a duty to look at the evidence which was tendered by the witnesses before the lower court and reach its own conclusion, and in doing this, the court must remember that it does not have the advantage the trial court had in observing the demeanor of the witnesses. (see case of OKENO VRS REPUBLIC)

In considering the appeal, I have carefully analyzed and reevaluated the evidence that was adduced before the trial court, the submissions by both parties, the law and cited authorities with regard to the grounds of appeal upon which the appeal is premised.

From the said grounds of appeal the issues of determination are;

(a) whether the prosecution complied with the law in relying on the evidence of character and previous allegations that were tendered against the appellant

(b) whether the prosecution discharged its burden and established a case against the appellant beyond reasonable doubt.

The appellant was charged with two counts. He was however convicted and sentenced for the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the diverse dates between 17th June 2013 and 19th June, 2013 at Mwandani area within Mombasa county the appellant intentionally touched the vagina of M.A a child aged 11 years with his penis.

It was Pw1's evidence that the appellant used to call her to his house and ask her to remove her clothes. And if She refused, he would tell her she would know who he was. That he used to put his "dudu" in her vagina and do bad things.

It is worth noting that no dates are mentioned in her evidence in chief. That it is only in cross examination that she told court that this happened between 2011 and 2012. Even, the other witnesses did not mention the dates when this incident happened.

This then brings to my mind that although the appellant was acquitted for the offence of attempted defilement in the main count, it has clearly evidence from the dates on which the offence in each count is alleged to have occurred that the alternative offence of indecent act was committed a year or two before the offence of attempted defilement.

In view of this, and with regard to the first issue of whether the prosecution complied with the law, I wish to state that it is trite law that the prosecution ought to take care if it wishes to rely on evidence of character and previous conduct of the accused. And for it to be admissible in such instances, the prosecution must ensure that the evidence tendered meets the minimum standard as provided for by section 34 of the Sexual Offences Act, No 3 of 2006, which state as follows;

"No evidence as to any previous sexual experience or conduct of any person against in connection with whom any offence of sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions".

This is the substantive part of the law which prohibits admissibility of evidence, both of previous conduct and character of an accused person. And for such evidence to be admissible, there is an elaborate procedure to be followed as provided for by the Sexual offences Act No 3 of 2006.

The grant of the application is subject to:-

If satisfied that such evidence or questioning;

- (a) relates to a specific instance of sexual activity relevant to the fact in issue.
- (b) is likely to rebut the evidence previously adduced by the prosecution;
- (c)
- (d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity to privacy
- (e) is fundamental to the accused's defence

All the witnesses who testified gave evidence that the appellant had defiled, or attempted to defile or indecently assaulted the complainant for a period of time.

The complainant also recounted the ordeal without caring about her dignity.

However, this was done without the prosecution making an application to court to be allowed to use evidence of previous history to prove their case against the appellant. This was a fundamental omission which was reflected in the evidence of Pw1, Pw2 and Pw4. The entire evidence, I find, is worthless and inadmissible in terms of section 34 of the Sexual Offences Act No 2 of 2006.

This position of the law is so drafted so as to prevent prejudice to parties during trial and ensure fairness. And fair trial is a constitutionally protected right under Article 25 (c) of the Constitution which provides as follows;

“Despite another provision in this constitution, the following rights and fundamental freedoms shall not be limited.

(a).....

(b).....

(c) the right to a fair trial.

This right is so jealously guarded that Article 50 of the Constitution is dedicated to what constitutes a fair trial.

Article 20 of the Constitution 2010, demands that in dealing with any law or person the Bill of Rights must be read in each and every endeavor by the state or its organ or individual. Failure to comply with section 34 of the Sexual offence Act in the case against the appellant before the trial court was a violation of that tenet and hence caused prejudice to the appellant.

There were other anomalies which were pointed out by the appellant's counsel in his written submissions, and confirmed by the court, which also rendered the case against the appellant incredible.

For instance, according to the formal charge, the appellant is alleged to have attempted to defile the complainant on diverse dates between the year 2011 and 2012, and thereafter proceeded to indecently assault her on diverse dates of 17th day of June, 2013 and 19th June, 2013. This again rendered the charge defective as it offends the provisions of section 135 (1) of the criminal procedure code as they are disconnected.

All in all, with regard to my findings on the first issue, this appeal ought to be allowed on this ground

alone. This being the position, it will be an academic exercise to consider other grounds that were advanced by the appellant.

Accordingly, the conviction is hereby quashed and sentence of fifteen (15) years imprisonment imposed upon the appellant set aside.

The appellant is hereby set at liberty unless he is lawfully held.

Orders accordingly.

Judgement deliver, signed and dated this 5th day of May, 2017

D.O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr. Egunza for the Appellant

Appellant – Present

C/clerk- Kiarie