



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 45 OF 2016

BENSON KIRAGU NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case S.O Number 25 of 2013 in the Chief Magistrate’s Court at Nyeri on 9.6.16 by Hon. K.Onesmus (SRM))

JUDGMENT

The Trial

The Appellant herein **Benson Kiragu Njenga** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 16.7.13 at [particulars withheld] Village in Nyeri County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of C.M.K a girl aged 12 years

In the alternative count; the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that

On 16.7.13 at [particulars withheld] Village in Nyeri County intentionally and unlawfully caused your genital organ namely penis to touch the genital organ namely vagina of C.M.K a girl aged 12 years

The prosecution called a total of four (6) witnesses in support of their case. The complainant **C.M.K** told court that she was born in 2001 and was 12 years when she testified in 2013. She recalled that on 16.7.13, the complainant **C.M.K**, she went into thickets with her friend **J.M** to look for brooms to sweep the house. That while in the thicket, the appellant found them and asked them to sit down and show him their pants but they refused. That the appellant then held both of them by their waists after which he took a sheet that the complainant had, spread it on the ground, removed her panty and skirt, removed his trouser, lay the complainant on it and put his penis into her vagina. That she felt pain and cried. That thereafter, her private parts started to itch and she saw some blood on her skirt and panty. That she went home and did not report the matter to anyone since the appellant had allegedly threatened to injure her with a knife if she reported the matter to anyone. That her mother later got wind of the incident and escorted her to the police where she reported the matter and later to hospital where she was examined by a doctor.

In cross-examination by appellant's counsel Mr. Gori, the complainant told court that the appellant was their Sunday school teacher and that he had been herding cattle when the incident occurred.

PW2 **J.M** who was in company of complainant on the material date told court that she was 12 years when she testified in 2013. She recalled that on 16.7.13 at about 11.00 am, she went to the home of complainant to collect kales. That complainant requested her to help her to sweep their house and they went to the thickets to look for brooms. That while in the thicket, the appellant whom she knew as their Sunday school teacher appeared and asked them to show him their pants but they refused. That the appellant then held the complainant by the waist. That the witnesses moved away and stood at a distance from where she saw the appellant take a sheet that the complainant had, spread it on the ground, lay the complainant on it, removed her clothes and slept on top of her. That complainant cried out aloud. That complainant later joined her and told her that the appellant had threatened to cut her with a knife if she reported the matter to anyone. That when she reached home, the witness informed her friend M about the incident and M in turn informed her mother who in turn reported the matter to complainant's mother.

PW3 K W K, the complainant's mother recalled that on 28.7.13, M informed her that the complainant had been defiled. That she in company of one M W inspected the complainant and **J.M** and noticed that the complainant's hymen was broken. That she reported the matter to the area chief and later escorted complainant to hospital where she was examined and a P3 form was filled. That the appellant who was her neighbor was later arrested and charged.

PW4 M W W recalled that on 28.7.13, her daughter **J.M** refused to go to church and reported that the appellant who was their Sunday school teacher had defiled complainant on 16.7.13. That in company of her daughter, the witness went to the home of complainant's mother and the witness reported the matter to PW2. That she in company of complainant's mother inspected the complainant and **J.M** and noticed that the complainant's hymen was broken.

PW5 Dr. Joyce Kituku testified that the complainant's P3 dated 31.7.13 was filled by Dr. Njuguna who was on leave and could not be availed without delay. She told court that complainant who was 12 years was on examination about 4 weeks after the alleged offence was committed found to have a broken hymen. She produced the P3 form as PEXH. 1.

PW6 PC George Oduor, the investigating officer recalled that on 29.7.13 at about 11.00 am, complainant and her mother went to Mweiga Police Station and complainant reported that she had been defiled on 16.7.13. That he referred complainant to hospital and her P3 form was filled. That he later arrested the appellant and caused him to be charged.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He recalled that he was herding cattle on 16.7.13 but denying seeing the complainant or defiling her.

On 9.6.16 by Hon. K.Onesmus (SRM) delivered a judgment on the basis of proceedings recorded by Hon. Wekesa (SRM), convicted the appellant and sentenced him to serve 21 years imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 20th June 2013, the appellant set out 6 grounds of appeal to wit:-

- 1. The trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.**
- 2. The trial magistrate erred in law and fact in finding that the evidence of the complainant, a minor, was corroborated while the evidence is filled with consistencies**
- 3. The trial magistrate erred in law and fact in making inferences with total disregard for the**

evidence of the medical officer with respect to the probative value of the medical examination carried out on the complainant.

4. The trial magistrate erred in law and fact in failing to take into account the appellant's defence in arriving at his decision

5. The trial magistrate erred in law and fact by failing to take into consideration the mitigation of the appellant

6. The trial magistrate erred in law and fact by failing to find that the prosecution failed to prove their case to the required standard of beyond reasonable doubt

During the hearing of the appeal, Mr. Gori the appellant's counsel informed the court that he was abandoning ground 1 on the petition of appeal. He introduced a new ground that the judgment was delivered by a magistrate other than the one that heard the case and that Section 200 (3) of the Criminal Procedure Code was not complied with. Counsel submitted that the complainant's evidence that she saw blood on her clothes was not corroborated by the medical evidence which did not find the complainant with any injury. He further submitted evidence by PW1, PW2, PW3 and PW4 that complainant was defiled was not supported by medical evidence. Additionally, he submitted that the trial court believed the evidence of PW3 and PW4 and disregarded the evidence of the doctor and the defence of the appellant. Counsel placed reliance on ***Dominic Kibet Mwareng v Republic [2013] eKLR*** in which the appellant was set at liberty due to inconsistencies in the prosecution case.

Mr. Nyamache, Counsel for the state conceded that in response thereto conceded the judgment was delivered by a magistrate other than the one that heard the case and that Section 200 (3) of the Criminal Procedure Code was not complied with. He submitted that the complainant's evidence that she was defiled was corroborated by an eye witness PW2 and also by PW3 and PW4 and the doctor who confirmed that the complainant's hymen was broken. He further submitted that the appellant who was a Sunday school teacher was well known to complainant and PW2 and was positively identified because the incident took place in broad day light. He additionally submitted that the complainant and PW2 told court that the appellant was herding cattle on the material date a fact that appellant conceded in his defence. Counsel as well submitted that the doctor confirmed that the complainant had a broken hymen and that she explained that no other injuries were visible since complainant was examined 4 weeks after the incident. It was further submitted for the state that the defence was analyzed, considered and found to be unbelievable.

Issues for Determination

1. What's the effect of non-compliance with section 200(3) of the Criminal Procedure Code on the appellant's conviction and sentence
2. Was the evidence of the complainant, a minor, corroborated and was it filled with consistencies
3. Did the trial magistrate disregard the evidence of the medical officer
4. Did the trial magistrate take into account the appellant's defence
5. Did the trial magistrate take into consideration the mitigation of the appellant
6. Was the prosecution proved beyond reasonable doubt

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC [1972] E.A.32***, where it held that:-

“It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

i. Section 200(3) of the Criminal Procedure Code

Section 200 (3) of the Criminal Procedure Code provides:-

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

In the case at hand, the trial magistrate commenced the hearing of proceedings and heard both the prosecution and defence case to their conclusion. No part of evidence was recorded by the magistrate that wrote the judgment and Section 200 (3) of the Criminal Procedure Code which provides for summoning and recalling of witnesses is not therefore applicable.

This court is however obliged to consider provisions of Section 200 (4) of the Criminal Procedure Code which provides as follows:-

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial"

There is no evidence that the judgment herein has prejudiced the appellant in any way. There is no evidence that the trial was illegal or defective. I therefore find that appellant has not made out a case in support of setting aside of the conviction or for ordering a retrial under this ground.

ii. Was the evidence of the minor complainant corroborated?

The complainant testified that she and her friend PW2 had gone to pick brooms in a thicket when appellant found them there, held her by the waist after which he took a sheet that she had, spread it on the ground, laid her on it, put his penis into her vagina. As a result of which she felt pain and cried. PW2 J.M who was in company of complainant told court that the appellant found them picking brooms in a thicket, and held the complainant by the waist. The witness said she moved away and stood at a distance from where she saw the appellant take a sheet that the complainant had, spread it on the ground, laid the complainant on it, removed her clothes and defiled her.

I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.

Further; Section 124 of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual 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.

In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury.

In the instant case, two children complainant (PW1) and PW2 were called as witnesses by the prosecution. The court conducted *voire dire* of PW1 as follows:

“I am C.M.K. I am twelve (12) years. I was born in 2001. I go to [particulars withheld] Primary School. I am in Standard 5. I was position 27 out of 37 pupils. I usually attend church. It is called Full Gospel Church. It is in Mwihoko. I know the Ten Commandments. We are told not to lie and if one has, then they die or they become sick. I have come to court to give testimony and promise to tell the truth and nothing but the truth. I do not want God to punish me. I might get sick”

PW2’s *voire dire* reads as follows:

“My name is J.M. I am twelve (12) years. I am a pupil at [particulars withheld] Primary School. I am in Standard 5. I was position 10 out of 30 pupils last year. I usually attend church called Full Gospel Church.I know about the Ten Commandments i.e obey your parents. There is also a commandment that say that one should not lie. If one lies, they they go to the devil. I will choose to tell the truth because I will not want to go to the devil. I wasn’t to go to heaven”

In the *voire dire* of PW1, the trial court concluded that the child was intelligent enough and speaks fluently. The court further found that the child believes in God and knows the consequences of lying in court and ruled that she gives evidence on oath. In the *voire dire* of PW2, the trial court concluded that the child understood the meaning of oath and ruled that she gives evidence on oath. From the requirement of the law, the trial magistrate did establish that the children understood the nature of an oath and duty of telling the truth.

Complainant and PW2 verbally described in detail the events of the material day and went further to state that the appellant was well known to them since he was their Sunday school teacher.

PW5 Dr. Joyce Kituku produced a P3 form which confirmed that complainant had a broken hymen. The appellant’s counsel, Mr. Gori’s submission that the complainant did not have any injury cannot therefore be accurate in view of the fact that the doctor found the complainant with a broken hymen. Further to the foregoing; the complainant in her evidence confirmed that after the incident; she saw blood on her panty and skirt which corroborates the fact that she was injured and her hymen broken as a result of which she bled.

While it is true that the learned trial magistrate stated that PW3 and PW4 who are the complainant and PW2’s mothers’ could tell between an intact and a broken hymen, the magistrate also observed that the evidence by the medical officer corroborated the fact that the complainant had been defiled and her hymen was broken.

In my view, there is sufficient evidence to indicate that the act of penetration by the appellant occurred against the complainant and it was been corroborated by PW2 and medical evidence. Do not find any inconsistencies in the prosecution case and the case of ***Dominic Kibet Mwareng v Republic [2013] eKLR*** cited by the appellant is therefore distinguishable from this case. I agree with the prosecution counsel that evidence of penetration of the minor by the appellant was corroborated. This ground therefore fails.

iii. Did the trial magistrate disregard the evidence of the medical officer?

Contrary to the appellant's counsel's submission that the learned trial magistrate disregarded the evidence of the medical officer; the judgment on record shows that the medical evidence was considered and the learned trial magistrate rendered himself on this fact as follows:

“The medical officer corroborated this fact that the hymen was broken.”

This ground therefore fails.

iv. Did the court take into account the appellant's defence?

An excerpt of appellant's sworn defence states as follows:

“I know the charge I am facing i.e that on 16.7.13 at [particulars withheld] village I caused my private parts to penetrate the private parts of a child namely C.M aged 12 years. This is not true. It is also not true that I committed an offence of indecent assault. The complainant says that I found them when they had gone to pick brooms and that I told them to show me the color of their panties....I did not find them. There is no one I told to show me their inner clothing. I did not defile the complainant. It is also not true that I picked a bed sheet and spread it on the floor then proceeded to defile her. I never saw complainant on that date.”

The learned trial magistrate summarized the appellant's defence as follows:

“The accused denied the allegations in its totality.”

With utmost due respect, the appellant basically denied the charge and all the evidence tendered against him and the learned trial magistrate correctly held that it was a mere denial.

The foregoing notwithstanding; the record illustrates that the appellant was not convicted mainly for denying the charge and the evidence, but on the ground that there was sufficient evidence from PW1 and PW2, which was been corroborated by medical evidence, demonstrating that the act of penetration by the appellant occurred against the complainant.

Consequently, this ground also fails.

v. Was the mitigation of the appellant considered?

After conviction of the appellant, the prosecutor stated that appellant was a first offender. In mitigation; the appellant through his counsel stated:-

“The accused is remorseful and he is an orphan. I pray that the accused be put on non-custodial sentence.”

In sentencing the appellant; the learned trial magistrate rendered himself as follows:

“The Sexual Offences Act provides for minimum sentence. I have put into consideration the fact that he is a first offender and the fact that he is still a young man.” I sentence him to 21 years imprisonment.

The appellant was charged under section 8(1) as read with section 8(3) of the Sexual Offences Act. Section 8 states:

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

Subsection (3) states:-

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

The trial magistrate rightfully observed that the Sexual Offences Act provides for minimum sentences. The learned trial magistrate did not have discretion to depart from the provisions of the law, the appellant's mitigation notwithstanding.

As a result, this ground also fails.

Decision

Having considered this appeal and the submissions by the learned counsels for the appellant and for the state, I am satisfied that the appellant was convicted on sound evidence. Accordingly and for the reasons set out hereinabove, this appeal is dismissed and the conviction and sentence imposed on the appellant is upheld.

DATED AND DELIVERED THIS 9TH DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Kinoti

Appellant - Present in person

Mr. Kingori h/b for Mr. Gori for the appellant

For the State - Mr. Nyamache