



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 69 OF 2014.

[From Original Criminal Case No. 1950 Of 2012 Pm's Court Kimilili]

D W M APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

D W M, the appellant herein was charged in the lower court with the offence of defilement contrary to section 8 (1)(3) of the sexual offences Act, in that on the 30th day of October, 2012 at [particulars withheld in Bungoma North District of Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of S.K a child aged 12 years.

In the alternative, the appellant faced a charge of committing an incident act with a child contrary to section II (1) of the sexual offences act No. 3 of 2006. The particulars hereof are that on the 30th Day of October 2012 at [particulars withheld] in Bungoma North district within Bungoma County, the appellant intentionally touched the vagina of S K a child aged 12 years, with his penis.

The prosecution case is that the complainant in this case is an orphan. By the time the offence was allegedly committed, she was 12 years old. She was living in [particulars withheld] with her grandmother, the PW3 in this case. On 30/10/2012, the complainant slept in the big house belonging to her sister.

After going to sleep, she locked the door. The appellant went and knocked at the door urging her to open the door for him. The complainant knew him as he was employed by her father to look after the cattle.

She opened for him. The appellant was used to visiting the house when M, who was living in the said house with the complainant was away. When the door was opened, he followed the complainant to bed. He removed her pants. He then drew out his penis and inserted it in her vagina. He took about 5 minutes. It was not his first time to do it to her. He promised her money, telling her not to inform her mother.

That morning of 30/10/2012, PW3 woke up and went to the sitting room. She pulled open the window curtain and saw the appellant leaving the house where complainant and M were living. M had already left for school. The appellant was buttoning his short while leaving the house. PW3 suspected him and asked him where he was from. He said he was from toilet. The toilet was far from the said house. PW3 started shouting. The appellant urged her to keep quiet promising he'll not repeat it again and that it was the first time. PW3 examined the complainant. She had some fluids and blood oozing out of her Vagina. She was not in her pants. PW3 took her to Mukuyuni Police patrol Base. PW4 recorded her complaint and issued her with a P3 form.

PW1 examined her on the very same day at Naitiri Sub – district hospital. He noted that she was in a blue pant with white lining. It had some brown spots. Her private parts were reddish/ inflamed. The hymen was missing. She was however not pregnant and had no infection. He concluded that the inflamed private parts were evidence of sexual penetration.

The appellant offered a brief sworn testimony in his defence. He denied the offence saying he was framed by his Inlaw, J W, whom he was working for.

The trial court found him guilty, convicted him and sentenced him to serve 20 years imprisonment.

In his grounds of appeal, he alleges that:

1. He was not issued with witness statements which contravenes Article 50 of the constitution.
2. It was against the law to undergo trial for a period of almost 2 years.
3. The evidence of PW1 was not corroborated
4. He was not examined and a P3 form filled.
5. His defence was rejected without good reasons
6. The burden of proof was shifted to him.

The state opposed the appeal but did admit that they had no evidence that the appellant had witness statements during the trial. They however argued that he was able to do his case and did cross examine all the witnesses and in case he had no statements, that did not occasion a miscarriage of Justice.

On delay the state alleged the appellant also contributed as at the onset he was not ready to proceed. Adjournments granted in the case were merited and there was no inordinate delay.

On evidence, the state aver it was enough to warrant a conviction and the appellant defence was weighed and rejected.

I have reevaluated the entire evidence. The proceedings does not show that the appellant was supplied with witness statements. He says he was not supplied with them. The court cannot hold otherwise than that they were not supplied. The benefit of doubt goes to him.

Article 50 of the constitution which is on fair hearing, give the right to every accused person, 50 (1)(c), to have adequate time and facilities to prepare a defence. 50 (i)(j) make it very explicit that he is to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

Its the duty of the prosecution to meet this constitutional requirement. They cannot simply wish it away. In absence of the proof that it was met, the benefit of doubt is accorded to the accused person or the appellant. It is good practice for the court before commencing a criminal trial to inquire on whether the obligation has been met, and place it on record, for purposes of ensuring the accused is accorded a fair trial, and clearing the doubt on the issue in the matter. I therefore accord the appellant the benefit of doubt on the issue and find that he was not issued with the statements. There was therefore failure to accord him a fair hearing.

Another very important issue of which was not raised by parties but happened in this case is that PW2, the complainant, gave evidence and was not cross examined. The court at the end of her evidence observed:

“Witness is unsworn thus no Cross – examination.”

Its only an accused person who in law if he opts to give unsworn testimony in his defence, can escape or avoid cross examination.

All other witness who offers evidence, sworn or unsworn should be subjected to cross examination to test the veracity of their evidence. ***In Nicholas Mutua Wambui and Another = vs = Republic, Mombasa Criminal appeal NO. 373 of 2006 (UR)***, the court of appeal construed provisions of section 208 and 302 of the criminal procedure code, to allow cross examination of witnesses who give unsworn testimony.

Looking at the evidence of PW2, there are issues which would probably have been made clear during cross examination. The issue of M was not made clear on whether she witnessed the incident. The girl referred to PW3 as her mother while other evidence shows she's her grandmother. She had also referred to the appellant as her uncle, a brother to her father, but later said he's just an employee of her father. PW3 said the girl is an orphan. We are also not aware of any other crucial issue the appellant would have taken up with the witness and the bearing it would have in the case. The judgment of the trial court relied heavily on her evidence of which was not tested. This in my view prejudiced the appellant.

The Judgment shows the evidence was not properly evaluated, issues for determination noted, the law applied on them and a decision arrived at. The trial court summarized well the evidence adduced by each side but immediately thereunder, indicated:

“I have evaluated the evidence adduced before. The prosecution has established a case which they have proved to required standards. The accused has not introduced doubts in evidence of prosecution whether in defence or cross examination. I hereby find accused guilty and proceed to convict under section 215 of the C.P.C.”

It is not shown how prosecution had established and proved the case to the required standard. This failed to comply with provisions of section 169 of the

Criminal procedure code which states a judgment should contain:

1. Point or points for determination.
2. The decision thereon and;
3. The reasons for the decisions

The appellant was facing two counts; the main count and an alternative one. The trial magistrate failed to indicate between the two counts, which one he convicted the accused of. Sec 169(2) of the Criminal Procedure Code reads in Part:

“In the case of a conviction the judgment shall specify the offence of which, and the section of the penal code or other Law under which, the accused person is convicted.....”

The Trial magistrate only stated in his Judgment:

“I hereby find the accused guilty and proceed to convict him under section 215 of the C.P.C. ”

Having considered the foregoing issues I do declare a mistrial in this case. I accordingly quash the conviction and sentence, and order a fresh trial before another magistrate.

Judgment Read and delivered in open Court in the presence of Mrs. Njeru and the Appellant.

Dated this 14th day of **June** 2017 at **Bungoma**.

S. GITHINJI

JUDGE.