



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 80 OF 2016

GERALD NGARAGARI GACHOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Karatina Criminal Case No. 4 of 2015 by Hon. F.W.Macharia, SPM on 3.10.16)

JUDGMENT

The Trial

The Appellant herein **Gerald Ngaragari Gachohi** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that:-

On the night of 16th and 17th March 2015 at [Particulars withheld] village in Mathira East Sub-County within Nyeri County intentionally caused his penis to penetrate the vagina of CWW a child aged 15 years

The prosecution called a total of seven (7) witnesses in support of their case. Complainant **CWW** told court that she was born on 14.8.99 and was in class 8. She recalled that on 13.3.15, appellant arrived at their home after 7.00 pm and she served him with tea as instructed by her mother. That she later went to sleep on her mother's bed as usual and did not hear when her mother went to bed. That she was awoken by pain in her private parts only to find appellant defiling her. That she screamed and appellant stopped but her mother did not assist her. That she went to school and reported the matter to her teacher Mr. M who escorted her to hospital where she was examined.

In cross-examination by the appellant, complainant told court that her mother used to have male visitors and that there was a man on her mother's bed when she woke up the following morning and she was informed that the man was the appellant.

PW2 J W W, the complainant's mother said she was awoken in the middle of the night by complainant's screams and noticed that appellant was defiling the complainant.

PW5 C G, a teacher at [Particulars withheld] primary was the first person to whom the incident was reported on 17.3.15. She said complainant reported that she had been defiled the previous night by her mother's male lover.

PW6 Dr. Kamiti Muchiri presented complainant's P3 form filled by Dr. Wahome as PEXH. 3. The P3

showed presence of spermatozoa, broken hymen, a discharge and inflammation on the genitalia. He concluded that there was evidence of penetration.

PW7 PC Njaki Miriti, the investigating officer produced complainant's certificate of birth which shows that she was born on 14.8.99 as an exhibit.

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 raised an alibi defence and said he spent the night of 16th and 17th March 2015 in his house with his colleague and was arrested on 18.3.15 and charged with an offence that he did not commit.

His witness J M told court that he operated a business with the appellant and that they lived in the same house. He said he was at work with appellant on 16.3.15 and they slept in the same house that night. That the following week, appellant was arrested.

The learned trial magistrate considered the evidence, dismissed the defence and sentenced appellant to serve 20 years imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 10th October 2016, the appellant set out 4 grounds of appeal. In the amended grounds of appeal the appellant set out 4 grounds of appeal to wit:-

- 1. The trial magistrate erred in law and fact by convicting the appellant with the evidence of the complainant without considering that which had doubts on the date and hour that the offence was committed***
- 2. The trial magistrate erred in law and fact in basing the conviction on the evidence of PW2, PW3, PW4, PW6 and PW7 which was riddled with contradictions and inconsistencies***
- 3. The trial magistrate erred in law and fact in believing the evidence of the doctor without putting into consideration Section 33 as read with Section 77 of the Evidence Act***
- 4. The trial magistrate lost direction in rejecting the defence without considering that the same was not displaced by the prosecution***

During the hearing of the appeal, appellant wholly relied on his amended grounds of appeal and written submission both filed on 3.5.17. He additionally, orally amended the dates of 13.4.15, 15.4.15, 16.4.15 and 17.3.15 on his submissions to read 13.3.15, 15.3.15, 16.3.15 and 17.3.15 respectively.

Mr. Nyamache, learned counsel for the state submitted that the complainant's evidence was corroborated by that of her mother PW2 who was an eye witness and by the medical evidence which confirmed that complainant had been defiled. It was also submitted that although the complainant stated that she was defiled on the night of 13.3.15, all other evidence shows that the offence was committed on the night of 16th and 17th March 2015. Mr. Nyamache additionally submitted that the P3 form was produced under section 33 (b) of the Evidence Act since its maker could not be found and further that the defence was considered and dismissed since it did not dislodge the prosecution case.

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**. 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:-

1. Date and time that offence was committed

Complainant stated that she was defiled on the night of 13.3.15 but all other evidence shows that the offence was committed on the night of 16th and 17th March 2015. As stated hereinabove, PW5 a teacher at complainant's school explained that the complainant had a learning disability and this possibly explains the discrepancy of dates in her testimony.

In **Obedi Kilonzo Kevevo v Republic [2015]**, the Court of Appeal stated as follows:-

The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.

Applying this principle, I am satisfied in the instant case that the discrepancy on the part of the complainant did not prejudice the appellant. This defect is curable under Section 214(2) of Criminal Procedure Code which provides that:

"...variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

I am therefore of the considered view that the discrepancy on the dates was resolved and did not occasion a miscarriage of justice.

2. Was section 33 as read with section 77 of the Evidence Act complied with?

The basis of this argument is that the admission of the P3 form in evidence was an error in law, in that the same was filled by Dr. Wahome but was produced by Dr. Kamiti Muchiri.

Section 33 of the Evidence Act provides:

"statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible"

Section 77 of the Evidence Act provides:

"(1) in criminal proceeding any document purporting to be a report under the hand of a government analyst or of any geologist employed in the public service upon any matter or thing submitted to him for examination or analysis may be used in evidence."

To my mind, and in the context of this case, the two sections contemplate a situation where the doctor or clinical officer giving evidence knows the doctor who had filled the P3 form. In effect he should be conversant with his handwriting and signature. Dr. Kamiti had worked with Dr. Wahome for 2 years and hence was acquainted with his handwriting and signature. On the premises, I find that the P3 form was admissible and that Sections 33 as read with 77 of the Evidence Act were complied with.

3. Evidence by PW3, PW4 and PW7 that was doubtful, contradictory, inconsistent and insufficient?

PW3, PW4 and PW7 were not at the scene of crime and simply stated what they did after the offence was

reported to them. Their evidence would therefore not be expected to corroborate the commission of the offence by the appellant. I do not find any doubt, contradiction, inconsistency or insufficient in their evidence.

4. Evidence by complainant, PW2 and PW6

The P3 form produced by PW6 shows that complainant had presence of spermatozoa, broken hymen, discharge and inflammation on the genitalia upon which a conclusion was made that there was evidence of penetration. There is therefore no doubt that complainant was defiled.

Having said that; the question that begs an answer is whether it was the appellant that defiled the complainant. Complainant said she left appellant and her mother in the living room when she went to sleep. Complainant said she slept on her mother's bed as usual and did not hear when her mother went to bed. That she was awoken by pain in her private parts only to find appellant defiling her. That she screamed and appellant stopped but her mother did not assist her. That the following morning when she woke up; she saw a man on her mother's bed and her mother informed that the man was the appellant.

From the evidence on record, there is no doubt that the offence was committed at night. There is no evidence that there was lighting in the room and prosecution did not lead evidence concerning the identification of the appellant in such unfavourable conditions.

Further to the foregoing; the complainant and her mother conceded that different male visitors used to frequent their home. The complainant did not see the man that was on her mother's bed the following morning and could not tell if it was appellant or one of the many male friends that used to visit her mother.

From what is stated hereinabove, there is doubt as to whether it was the appellant that defiled the complainant.

5. Was the defence considered?

On alibi evidence, the Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons”.

The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered by PW1 and PW2 cannot be said to be overwhelming. I have considered the judgment of the trial court and I find that the appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt

Decision

In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED THIS 13th DAY OF July 2017

T. W. CHERERE

JUDGE

DELIVERED ON THIS 19th DAY OF July 2017

BY: - A.MUSHILA

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -