



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 160 OF 2012

(An appeal from the Judgment of S.OKATO senior Principal Magistrate,

Nyeri in CM SEXUAL OFFENCE Case No. 41 of 2011 dated 12/9/2012)

PAUL MURIITHI GATHERU..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

The appellant was convicted by Nyeri senior Principal Magistrate of the offence of attempted defilement contrary section 9 (1) (2)) of the sexual offences Act no.3 of 2006 and he was sentenced to life imprisonment.

The appellant being dissatisfied with the conviction and sentence lodged this appeal setting down the following grounds;

1. That in arriving at the conviction the trial magistrate relied on a law that does not exist as the section quoted in the charge sheet was section 9(1) (2)
2. That the magistrate relied on fabricated evidence of pw2, pw3, and pw4 which was riddled with contradictions and inconsistencies.
3. That the trial magistrate erred in rejecting his defence which was not displaced by the prosecution.

In respect to the first ground the appellant submitted that section 9(1) (2) does not exist; that the charge is therefore defective and cannot be cured by section 382 Of the criminal procedure code. He stated that the defect embarrassed the conduct of his defence and that he was prejudiced. He also submitted that section 9(2) provide for a minimum sentence of 10 years and questioned why the trial magistrate sentenced him to life imprisonment.

On the second ground the appellant stated that pw2 and pw3 contradicted pw4 by stating that the appellant was taken to police station by people who came and pw3's husband while pw4 said he was arrested from his house where he was locked by members of public. He further submitted that there is doubt as to whether the complainant was found in his house because pw2 said her mother asked her to go and collect the complainant. He said there was contradiction in his mode of arrest.

On the 3rd ground the appellant submitted the trial court failed to analyze his evidence. He stated that he stated defence of alibi which was not considered.

In response Ms. Mwaniki who represented the respondent made oral submissions. She submitted that the state is supporting the conviction and sentence. She submitted that the state availed 4 witness and that pw1 who was a minor aged 4 years gave unsworn evidence after voir dire examination. She said that complainant testified how she went to the appellants house whom she identified as baba Caro in company of her brother pw2 and her sister and how the appellant sent away the complainant's siblings to the shop and remained with her in the house; after which he locked the house put her on bed then removed her clothes and his then lay on her. She said the complainant's evidence was corroborated by pw2's who peeped through an opening at the door when they went back to appellant's house. she submitted that pw2 corroborated the complainant's evidence. She said that attempt is defined in section 388 of the penal code; that the appellant put the appellant on his bed ,removed her clothes, his and lay on her; that the overt act show that he had positive intention of defiling the minor. She submitted that identification was not questionable as the appellant was known to the minor whom she referred to as baba Caro. She submitted that the appellants adduced unsworn evidence which was not subjected to test but was convicted due to overwhelming evidence. She submitted that the sentence of life imprisonment is legal as section 9(2) of the sexual offences Act provide for a minimum sentence of 10 years. She finally submitted that the defect in the charge sheet is curable by section 382 of the criminal procedure code unless it will occasion injustice which is not the position in this case as the appellant actively participated in the proceedings which shows he was well aware of the charges he was facing; That no injustice was occasioned to him and that the charges were not ambiguous. She urged court to uphold conviction and sentence.

This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis .This I do while bearing in mind the fact that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The trial court record show that Pw1 a girl aged 3 years was taken through voire dire examination. The trial magistrate found her to be of sufficient intelligence but she did not understand what it means to swear. She adduced unsworn evidence. She testified that her elder brother Stephen and muthoni went to baba charo's house because it was rainy. She said while there baba charo removed his trouser then removed her clothes and lay on her. She said baba charo did bad manners on her by putting his penis on her genital organ (she pointed at her genital organ).pw1 said S saw baba charo defiling her. She said she closed the door after being asked to do so by baba charo.pw1 said she screamed and S went out. She said the appellant sent S and c to the shop to buy cake. She said the appellant closed the door after the two children left and did bad manners to her again after which she was given the cake brought by the two children then she was left to go. She told her mother what happened. She was taken to police. In cross examination pw1 said muthoni is older than her. She said other children were playing and they did not see what the appellant did to her. She said her mother told her what to say in court and that that the appellant did not put her on bed. In reexamination pw1 said that her mother had told her in the morning what to say. On further reexamination pw1 said baba charo did bad manners to her and what she said was true and not what her mother told her.

Pw2 S N a boy aged 5 years who is complainant's brother was examined and found to be possessed of sufficient intelligence and understand the meaning of oath. He adduced sworn evidence. He confirmed

that he, the sister and charo went to baba charo's home to shelter from rain. He said baba charo sent him and c to the shop for 2 cakes and 2 sweets but asked the complainant to remain. At the shop pw2 met his mother who asked him where the complainant was. He told her where she was. His mother asked pw2 to go and call the complainant.pw2 said that on reaching the appellants house, he found the door locked. He said that he knocked the door and appellant asked to wait.pw2 said that he peeped through an opening on the door frame and saw the appellant on bed having removed his trouser and was lying on the complainant.pw2 went to inform his mother. They went to appellant's house with his mother and found the appellant on bed.pw2 said his mother called his father; that his father came and wanted to stab the appellant but was stopped by members of public. The appellant was later arrested.

Pw3 the complainant's mother said she met the complainant crying and she learnt what had happened to her from pw2. She confirmed that the complainant was taken to Endarasha health clinic for examination. She produced clinic card showing her date of birth as 11/8/2006.She said the appellant is her neighbor and their children visit each other. In cross examination pw3 denied having asked any money from the appellant. She admitted that her husband went to see the appellant several times at the police station.

Pw4 a police officer said he was informed that there was a man locked inside his house with a girl aged 4 years .He said he went there and found the man and the girl inside the house. He said they interrogated the girl who said the man just touched her private parts. He said the girl had no injury on her private parts. He said p3 was not filled because she had no injuries.In cross examination pw4 said he found the appellant seated on his bed while the girl was stood near the door and there were many people outside who disappeared as the police were arresting the appellant. He said he did not get any adult witness. He said the father's child was not present when they arrested the appellant.

In his sworn statement the appellant said that on 20/10/2011 at 5.40pm he arrived from his farm and found children playing outside his house. He said he placed his panga and hoe down and ordered the children to go to their homes. He said he was with 12 year old son whom he sent to a nearby shop for cigarettes as took bathe then he left to Endarasha town. At 7.30pm he went to Endarasha police station because pw3 had reported that he assaulted her daughter. He said at the police station he found pw3 and her daughter. He was placed in cells. On 22/10/2011 pw3's husband and pw4 went to the cell. He said Pw3's husband told pw4 that he was not interested in the case because his daughter had not been assaulted. He said he was charged on 24/10/2011.

I wish to consider whether the charge was proved beyond reasonable doubt. Besides the complainant who is aged 3 years the other witness who adduced direct evidence is pw2 a brother to the complainant aged 5 years, the other child who was said to have been present when the incident occurred is alleged to have taken place, is the appellant's son c aged 12 years who never adduced evidence. The trial magistrate concluded that the complainant was intelligent and understood the importance of saying the truth but when she was cross examined she said her mother told her what to say in court and that the appellant did not put her on bed. In reexamination she repeated that her mother told her what to say and on further reexamination she said the appellant did bad manners to her and that she is the one who climbed the bed. She went further to say "what I have said is the truth but not what my mother told me."Pw2 on the other hand said the complainant's father was called by the mother (pw3) and when he arrived at the scene, he attempted to stab the appellant but members of public prevented him. On the other hand pw4 who went to arrest the appellant said both the appellant and the child were locked inside the house and that the complainant's father was not present. The question is who among them is saying the truth, the other issue is if the child had left the appellant's house as indicated by pw2 and pw3 what was the logic of locking the child and appellant inside the house again. This do not add up. Besides doubt arising from the complainant's evidence, pw2s evidences evidence do not help in clearing the doubt. Pw4 a police officer confirmed that the complainant never sustained any injuries and p3 was therefore never filled. From the foregoing I find that it was unsafe to rely on evidence on record. I therefore proceed to quash the conviction herein and set aside the sentence imposed. Appellant to be released unless lawfully held.

Dated and signed at Nairobi this.....day of....2017.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 19TH day of JULY 2017.

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JUDGE