REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.156 OF 2014

BETWEEN

PATRICK SHITALO …….APPELLANT

AND

REPUBLIC ……...……RESPONDENT

(Being an appeal from original conviction and sentence of Hon. Ong'ondo, Ag P.M in Kakamega CMC Cr. Case No.34 of 2012 delivered on 17th October 2014)

J U D G M E N T

Introduction

1. The appellant was tried, found guilty and convicted of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was sentenced to three (3) years imprisonment. The appellant had been charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No.3 of 2006. The particulars being that on the 10th of May 2012 between 1900 hrs, to 05.00 hours in Kakamega District within Western province willfully and intentionally caused his penis to penetrate the vagina of M.L.A a child aged 15 years.

2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, particulars being that on the same date and at the same time in the same place he willfully and intentionally touched the vagina of M.L.A a child aged 15 years with his penis.

3. In Count ll, the appellant was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code, the particulars being that on the 10th night of June 2012, between 19.00 hours and 05.00 hours within Kakamega District in Western province, he unlawfully assaulted M.L.A thereby occasioning her actual bodily harm.

4. The appellant denied all the charges when he appeared before the trial Court for plea on 14th June 2012. The prosecution called 4 witnesses being the complainant who testified as PW1, the complainant's uncle J M testified as PW3 while the Assistant Chief of Shirako sub location Alex Mutende Oremo testified as PW4. The Clinical Officer Patrick Mambiri testified as PW2. It was on the basis of the evidence of the above named witnesses, that the trial Court found the appellant guilty of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code, convicted him and sentenced him to three (3) years imprisonment.

The Appeal

5. Being aggrieved by both conviction and sentence, the appellant filed appeal through the firm of Momanyi & Co. Advocates raising the following grounds of appeal.

1) That the appellant was not found guilty beyond reasonable doubt as required in law,

2) That the Court failed to take into account of (sic) the appellants alibi.

3) That the Prosecution's case was full of contradictions which could be considered favourably to the appellant (sic)

4) That the Prosecution failed to call witnesses who could have disapproved the alibi of the appellant (sic)

5) That the judgment didn't take into account that the complainant did not identify the appellant conclusively.

6) That the sentence was excessive in the circumstance.

6. This is a first appeal and on this appeal, this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only making allowance for the fact that I have no opportunity which the trial Court had of seeing and hearing the witnesses. The Court of Appeal in the case of **Ngui –vs- Republic [1984] KLR 729**, in considering the duty of a first appellate Court stated and I fully agree that: "The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions." In the case of **Koech & another –vs- Republic [2004] 2 KLR 322**, the Court of Appeal expressed the same point in the following words." "As this was a first appeal the High Court was mandated to look at the evidence adduced before the trial Court afresh, re-evaluate and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The Court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanor of the witnesses. The Court is further mandated to consider the grounds of appeal put forward by the appellant." I entirely agree, for that is the law.

7. I have carefully reconsidered and evaluated the whole of the evidence afresh. I have also carefully considered the judgment of the learned trial Magistrate, the six grounds of appeal as set out hereinabove and the defence of the appellant which comprises his own testimony and the testimony of his only witness Teresah Atamba who testified as DW2. The appellant denied committing the offence though he admitted that he knew the complainant who was a neighbour. He stated that he was arrested when he answered to a summons by the area chief. DW2 stated that the appellant was her husband and that on the material day, the appellant went to work as usual and returned home at 9.00p.m. On the following morning which was 11th June 2012, the village elder came for the appellant. During cross examination DW2 stated that she did not know what the appellant did before he returned home between 8.00 and 9.00p.m on 10th June 2012.

The Submissions

8. Counsel for the appellant filed very detailed submissions dated 23rd October 2015. Counsel also annexed authorities in support of the submissions. I have carefully read those submissions and I commenced Counsel for his industry in this regard. I shall return to these during my analysis and findings.

9. During his address to the Court at the hearing of the appeal, the learned Prosecution Counsel, Mr. Omwenga conceded the appeal on grounds that the Prosecution evidence was full of inconsistencies and

that for this reason, the appellant should be given the benefit of the doubt by allowing his appeal and setting him free.

Issues for Determination

10. From the rival submissions the following issues are pertinent for determination:

a) Whether the Prosecution proved its case against the appellant beyond any reasonable doubt.

b) Whether the learned trial Magistrate failed to consider the appellants alibi.

c) Whether the learned trial Magistrate failed to appreciate the fact that the complainant did not positively identify the appellant.

d) Whether this appeal should be allowed as submitted by the State.

Analysis and Findings

11. I shall start with the issue of whether or not the complainant positively identified the appellant as the person who assaulted her. According to the complainant she boarded the appellant's motor cycle at about 6.00p.m with the intention of going to the home of her aunt at Elukho. Instead, the appellant took the complainant to a mud house in Shirere within Kakamega town. In the house was another man whom the appellant asked to leave and he left, leaving the appellant and the complainant alone in the house. There was a chimney lantern in the house which was on. The appellant then dragged the complainant to a bed that was in one of the rooms, tore her under pant – PMFI – 2 and her skirt then unzipped his trouser and exposed his erect penis. There was no light in the room where the bed was. The appellant then inserted his penis into her vagina. The complainant screamed because she felt pain but the appellant held her mouth and throat. After defiling her, the appellant whipped the complainant on the left ribs using a black "unyo-unyo" whip. The appellant also threatened the complainant with death if she continued screaming. During the night, the appellant penetrated the complainant a second time. She spent the whole night in that house.

12. Regarding the issue of identification it has been submitted on behalf of the appellant that the complainant did not give evidence as to why she identified the appellant. That she could not even remember the colour of the trouser the appellant wore at the time she boarded his motor cycle. That she did not even say that she identified the appellant up to the time they got to the house at Shirere. Counsel also submitted that the conditions for proper identification of the appellant were not ideal because the complainant states in part of her evidence in chief, "there was light, but whenever I could look at him he could slap me." Counsel also submitted that having admitted that there was no light in the room where the alleged ordeal took place, the complainant could not have identified the appellant. Counsel also faulted the complainant's sense of identification when, even during the following morning she could not remember the registration number of the motor cycle that ferried her from Shirere to Elukho at 11.00a.m.

13. Now, this whole question of identification goes back to the time when the complainant stopped the appellant to ask him if he could take her to Elukho. According to the complainant, the time was 6.00p.m on 10/06/2012. It appears that the complainant walked for a while from Koromatangi to Lurambi before the appellant who was riding a motor cycle came by. During the hearing the complainant pointed to the appellant in Court as the same person who had given her a lift on that fateful evening on 10th June 2012.

14. The complainant also told the Court that when she and the appellant got to the house at Shirere, there was one man in the house, but that man left at the command of the appellant. There was light from a lantern in that house. So that by the time the appellant was defiling and assaulting the complainant it was clear that the person who was doing so was the man who had carried her on the motor cycle from Lurambi. She saw him during daylight before she boarded the motorbike. She did not lose sight of him until they got to the house which was hit with light from the chimney lantern.

15. There is also evidence that the complainant kept looking at the appellant but each time the appellant struck her on the face. In my considered view therefore, the fact that the room where the complainant was defiled and assaulted did not have any light is not fatal to the fact of identification of the appellant. By that time, the complainant already knew who her assailant was and could even see him as he unzipped his trouser before he took her to the room where the bed was.

16. I am therefore satisfied that there was no mistaken identity because the "other man" who was in the house as the appellant and complainant entered the house had been ordered out by the appellant. It is also clear from the record that from the time the complainant boarded the appellant's motor bike, they did not stop anywhere else until they got to the house at Shirere, though the appellant had indicated to the complainant that he would stop to fuel at Kenol Petrol Station within Kakamega town.

17. The second issue for determination is whether the trial Court failed to consider the appellant's defence of alibi in writing the judgment. In this evidence, the appellant stated he was a boda boda rider within Kakamega town and that on 10th June 2012, he worked until 7.00p.m before he went home at 8.00 p.m. He also stated that in the course of this work on the material day, he passed by Lurambi while going home. He denied seeing the complainant; but said she was a neighbour at home. He also said he did not understand why the complainant alleged that he defiled her.

18. In his judgment, the learned trial Magistrate clearly did not make any reference to the appellant's defence. I have however, myself carefully considered the said defence and find that having reached the conclusion that the appellant was positively identified by the complainant, such defence did not poke any holes in the Prosecution's case. I therefore dismiss the defence of alibi as being of no consequence.

19. Finally, the appellant has contended that the Prosecution did not prove its case against him beyond any reasonable doubt. The offence we are dealing with is one of assault causing actual bodily harm. To support this offence, the trial Court relied on the testimony of both the complainant and the Clinical officer Mr. Patrick Mambiri who testified as PW2. PW2 also produced the P3 form which showed that the complainant had painful bruises on the forehead as well as left arm and the thorax and abdomen. The P3 form also showed that there were bruises below the left elbow.

20. The complainant testified that during the night of the ordeal, the appellant kept slapping her on the face whenever she raised her eyes to look at him. She also stated that the appellant whipped her on the left side of her ribs, (the thorax). The Clinical officer's examination of the complainant established painful bruises on the thorax.

21. All in all, I am satisfied that the evidence before Court places the appellant at the scene of crime. He was properly and positively identified by the complainant. The offence of assault was proved through medical evidence produced by the Clinical officer Mr. Mamberi who testified as PW2. Finally the appellant's defence did not in any way cast any doubt on the Prosecution's case against him.

22. As regards sentence of 3 years imprisonment, the appellant complained through the petition of appeal that the same was excessive in the circumstances. The sentence prescribed under the law for the offence of assault causing actual bodily harm is five years with or without corporal punishment. In the instant case, the appellant was sentenced to three years imprisonment. Should this Court interfere with the said sentence?

23. The law is that an appellate Court can only interfere with sentence passed by a trial Court. When it is clear that the trial Court acted on some wrong principle in the exercise of its discretion or that the Court overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case, an Appellate Court had tried the appellant in the first instance, it would have passed a somewhat different sentence. These propositions are set out by the Supreme Court of Uganda in the case of **Kizito –vs- Uganda [2007] 2 EA 424**.

24. From the record in this case, the appellant was to be treated for the appellant stated that the appellant was a young person with a young family with 3 nursery school going children and a wife who had a

formal job. The Court was also told that the appellant was very remorseful.

25. The trail Court noted the mitigation before passing sentence. The trial Court also noted that the violence meted out by the appellant upon the complainant was unwarranted and a breach of trust. The complainant had in him as a motor cycle ride and that the Court was under a duty to speak for the likes of the complainant as a deterence to the recurrence of such episodes in the future.

26. Bearing all the above in mind, this Court cannot say that the trial Court acted on a wrong principle in the exercise of its discretion to sentence the appellant to three (3) years imprisonment. Nor do I find that the sentence was excessive in the circumstances. Ground 6 of the Petition of Appeal therefore lacks merit.

Conclusion

27. From all the foregoing, I find that the appellant's appeal lacks merit. I therefore do not agree with the Prosecution Counsel's submission that the Prosecution case was full of inconsistencies. The complainant remained steadfast during her testimony and further there is no suggestion by the appellant that there was any grudge between him and the complainant which would have been a motivation for false testimony by the complainant against him. The appeal is dismissed in its entirety.

28. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega

this 2nd day of March 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Munyendo h/b for Mr. Mwangi (present) For Appellant

Mr. Omwenga (present) For Respondent

Mr. Lagat - Court Assistant