



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 190B OF 2012

CHARLES KAMAU KARIMI..... APPELLANT

VS

REPUBLIC RESPONDENT

(Appeal from the judgment of the Nyeri Chief Magistrate's Court delivered by S.A.Okato SPM on 1/11/2010 in Criminal Case No.47 of 2011)

JUDGMENT

1. The Appellant, **Charles Kamau Karimi** was charged with the offence of defilement of a girl contrary to **Section 8(1) (2) the Sexual Offences Act**. The particulars of the charge was that on the 21st of November, 2011 at Nyeri County he intentionally and unlawfully inserted his genital organ into the genital organ of **JWM** a child aged 12 years.
2. In the alternative count, the appellant was charged with indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, 2006**.
3. The facts of the case as recorded by the trial magistrate are that the prosecution called a total of six (6) witnesses; the evidence of the complainant (**PW1**) was that on 21/11/2011 at about 11.00am she was at home alone inside the one roomed house and was peeling potatoes; the door of the house was open and she saw the appellant passing by as he headed to the toilet; as he returned from the toilet which was about five (5) metres from the house he entered her house and covered her mouth and eyes with a piece of cloth; he lifted her and threw her onto her mothers' bed and tore her jeans and proceeded to defile her; she screamed whereupon the appellant fled; **PW1** then proceeded to her neighbor Mama John's house where she narrated her ordeal.
4. The matter was reported at Kiganjo Police Station; she was first taken to Kiganjo Hospital for treatment and later escorted to Nyeri PGH for medical examination.
5. The Appellant was arrested and subsequently charged, tried and convicted on the main charge and sentenced to twenty (20) years imprisonment.
6. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on 2nd November, 2012, raising three grounds of appeal; that the evidence adduced by the prosecution witnesses was contradictory in nature; that the prosecution did not prove its case beyond reasonable doubt and that the trial magistrate disregarded his defence.
7. The appeal was heard on the 5/04/2016 with Ms Gicheha appearing for the State and the appellant

being present in person; the appellant relied on his written submissions whereas the State made oral presentations and hereunder is a brief summation of their respective submissions.

APPELLANTS' SUBMISSIONS

8. It was the Appellant's case that he had not been accorded a fair trial and his rights as provided by Article 50 of the Constitution had been violated as he had not been supplied with copies of the witnesses statement and the Occurrence Book despite making requests that were even supported by a court order; that the trial proceeded notwithstanding this fact thus rendering the trial a nullity.

9. That the age of the complainant rendered the charge sheet as defective; that even after it was amended it was still defective.

10. The evidence adduced by the prosecution witnesses was full of discrepancies and had a lot of inconsistencies; particularly on identification and the mode of his arrest; on identification the complainant stated the appellant had a deformed eye which was not the case; on the mode of arrest the appellant states that there were three different versions; the complainant said she took the police to the quarry where she pointed him out leading to his arrest; **PW2** said that he was the one who led the police to the quarry leading to his arrest; whereas **PW3's** version was that the appellant was arrested by members of the public; as they were frog-marching him to the police station they met up with the police who took over and arrested him.

11. The appellant relied on two authorities of *Dinkerai Rimkrishan Pandya vs R (1957) EALR 33 and Muiruri Njoroge vs R COA Cr App. 115 of 1982* where it was held that the court should not rely on evidence that is doubtful and inconsistent.

12. That the prosecution failed to call Mama John who was a crucial witness; being a key witness as she was the one who had escorted the complainant to the hospital; that this essential witness had not been called.

13. That the prosecution did not prove the key ingredient of penetration beyond reasonable doubt; in particular, the medical report did not indicate that **PW2** had injuries consistent with defilement.

14. The Appellant prayed that his appeal be allowed and that he be released.

RESPONDENTS SUBMISSIONS

15. The appeal was opposed by the State that the appellant had been properly convicted and sentenced.

16. On double jeopardy Ms. Gicheha, the Prosecuting Counsel for the State submitted that the appellant had only been arrested twice; that he had been mistakenly released which then led to his re-arrest; that the issue of double jeopardy only arises if he had been tried twice for the same offence.

17. That the appellant contended that he was not accorded a fair trial as he had not been supplied with witness statements; that the appellant requested for the documents on the 23/12/2011 and the court duly granted the order; that on 16/02/2012 the appellant indicated to the court that he was ready to proceed and never raised the issue again; that his constitutional right to a fair trial was complied with.

18. Upon perusal of the court record and proceedings it shows that the appellant never made the request for the production of the Occurrence Book during the trial in the lower court.

19. On identification the appellant tried to implicate **PW2** as the person who committed the offence; but the appellant was a person known by the complainant as he was a neighbor and the complainant stated that he had an eye with a squint; that the appellant was positively identified by the Complainant without any difficulty.

20. That on the initial Charge Sheet the age of the complainant was indicated as eleven (11) years which was then rectified after an age assessment conducted and to read twelve (12) years; that the Section of the offence the appellant had been charged with on the Charge Sheet had not been changed to read Section 8(1) as read with 8(3); that this omission did not make the charge defective.

21. Counsel submitted that the above notwithstanding the trial court properly convicted and sentenced him under the provisions of Section 8(1) as read with 8(3) and that the maximum sentence of twenty (20) years was proper.

22. That penetration was proved beyond reasonable doubt; **PW1** had vividly narrated what transpired; her evidence was corroborated by **PW6** who made a finding of penetration.

23. On the issue of crucial witnesses to be called Counsel stated that not all witnesses are called to testify; that the prosecution chooses the relevant witnesses required to prove its case; that a total of six (6) witnesses called and that their evidence was not contradictory and was consistent.

24. Lastly the appellant raised the defence of alibi but he did not call Dennis Onditi as a witness.

25. Counsel humbly submitted that the prosecution proved its case beyond reasonable doubt and prayed that the appeal be dismissed.

26. Counsel prayed that the appeal be dismissed and that the conviction and sentence be upheld.

ISSUES FOR DETERMINATION

Taking into consideration the above submissions these are the issues framed for consideration;

- (i) Whether the appellants rights were violated;
- (ii) Whether the prosecution failed to call crucial witnesses;
- (iii) Whether there were material inconsistencies in the prosecution's case;
- (iv) Whether the prosecution proved its case to the desired threshold;
- (v) Whether the trial court disregarded the appellants defence without giving sound reasons.

ANALYSIS

27. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32**.

Whether the appellants rights were violated;

28. The appellant contends that his rights were violated as the witness statements and the Occurrence Book had not been provided to him despite having requested for them.

29. One of the elements of a fair trial includes the prosecution providing the accused person(s) with the charge sheet and all the witness statements and documents in advance so as to enable them prepare for the trial.

30. Having perused the record it is noted that on the 23rd December, 2011 the matter was to proceed for hearing but was adjourned because the appellant requested only for the witness statements and the trial court duly ordered that the prosecution provide him with the witness statements.

31. On the 15th March, 2012 the matter proceeded for hearing and it is noted that the complainant testified

and was cross-examined by the appellant and after she was stepped down the appellant revisited the issue of witness statements; thereafter the record shows that on the 29th March, 2012 the matter proceeded for further hearing and from this date to the conclusion of the trial the record shows that the issue of the witness statements was never brought up again by the appellant; the record also shows that as the trial proceeded the appellant was always present and that he fully participated and that he was accorded an opportunity to cross-examine all the prosecution witnesses; at the close of the prosecution case the appellant was invited to defend himself and he gave a sworn statement in defence; the circumstances of the trial shows that the appellant was able to conduct his case throughout and the court finds nothing apparent that demonstrates that the appellant was not provided with the requisite witness statements.

32. As for the Occurrence Book there is nothing on the court record that shows that the appellant ever made such a request at any stage of the trial.

33. The issue of double jeopardy was also raised by the appellant that he had been arrested twice over the same offence; but in this instance this issue does not obtain due to the fact that when the appellant was first arrested he was mistakenly released before being arraigned in court; in short there was no trial and therefore there was no previous conviction (*autre fois convict*) or previous acquittal (*autre fois acquit*) arising from the first arrest.

34. This court is satisfied that the record does not reflect any procedural unfairness as contended by the appellant and is further satisfied that the appellant was accorded a fair trial.

35. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the prosecution failed to call crucial witnesses;

36. The appellant submitted that essential witnesses like the neighbor known as Mama John was never summoned by the prosecution to testify.

37. Reference is made to Section 143 of the Evidence Act which provides that the prosecution is not obligated to call a particular number of witnesses, in the absence of any provision of law to the contrary, to prove any fact; having perused the record this court is satisfied that the prosecution was not obligated to call this witness as any evidence proffered by her would have only been hearsay as she was not present when the offence was being committed; that **PW1, PW2 and PW3** had all consistently narrated what had transpired on that material date; and that the court finds that there were no loop holes or gaps that needed or could have been filled by this witness.

38. This court is satisfied that failure to call this witness was not deliberate nor adverse to the prosecution's case.

39. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether there were material inconsistencies in the prosecution's case; Whether the prosecution proved its case to the desired threshold;

40. The appellant contends that he was not the one who committed the offence and was being used as a scape-goat; that it was the complainant's father who had committed the offence; in her testimony the complainant had stated that she had been defiled by a person she knew and described him to a neighbor known as Mama John; she also described the appellant to the police and her description of the appellant was that he had a squint in one eye; she even knew where he worked and led the police to the quarry; this court finds that the identification was by recognition and is satisfied that the appellant was positively identified.

41. On the issue of penetration this court has perused the complainant's evidence which is corroborated by the evidence of Dr. Ann Kabuthi (**PW6**) in that upon examination of **PW1** a broken hymen was found and the doctor confirmed that there was vaginal penetration. The P3 Form was tendered into evidence as an exhibit in support of the evidence of **PW6** and was marked as **PExb.3**.

42. As for the age of the complainant this was established by the Age Assessment Report which was tendered into court as exhibit **(PExb.2)**.

43. The appellant alluded to the fact that the trial court failed to consider the inconsistencies in the evidence of the prosecution witnesses with respect to the mode of his arrest; that he was arrested together with the complainant's father and taken to the police station; that he the appellant was released but later re-arrested; upon his re-arrest the complainant stated that she pointed him out at the quarry; the evidence of **PW2** the father of the complainant was that he was the one who took him to the quarry; whereas the evidence of the arresting officer was that they met members of the public frog marching the appellant and that they took over and arrested him.

44. It is this court's considered view that the variance in evidence on the mode of arrest is immaterial and does not go to the root of the matter; this is because this evidence relates to the second arrest and the issue of identification had already been established; **PW3** explained to the court that the appellant on the first arrest had been taken to the DC's camp but was released by mistake by the police officers whom he had been left with under guard.

45. This court is satisfied that there were no contradictions or inconsistencies on the issue of identification at the stage of the second arrest and this court finds no good reason that warrants interference with the trial court's conclusion.

46. This ground of appeal is found lacking in merit and is disallowed.

Whether the trial court disregarded the appellants defence without giving sound reasons.

47. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defence case casts any doubt on the prosecution's case.

48. Upon perusal of the judgment it is noted that the trial court considered the defence of alibi raised by the appellant and made the following observation;

“In his defence the accused told the court that he was arrested together with one Denis Onditi because the police found them with a bottle of changaa.....”

“Sgt Patrick Kamau (PW3) is the one who arrested the accused and the issue of the accused having been arrested for being in possession of a bottle of changaa was not at all canvassed and the same is an afterthought which I dismiss with haste.”

“I have considered the evidence on record and find that the prosecution has proved its case against the accused beyond reasonable doubt and I accordingly convict him as charged in the main count.”

49. Having perused the appellant's sworn statement and his alibi defence this court concurs that it does not in any way dislodge or controvert the evidence of the prosecution witnesses (**PW1, PW2 and PW3**); the appellant never called his alibi witness one Denis Onditi to testify.

50. This court is satisfied that the trial court analyzed the appellants' statement of defence and his alibi and weighed it against the evidence tendered by the prosecution and gave good reasons for disregarding as it did not cause any doubt on the prosecution's case.

51. This ground of appeal is found lacking in merit and is disallowed.

FINDINGS

52. For those reasons this court makes the following findings;

- (i) This court finds that the appellants rights were not violated;
- (ii) The prosecution was under no obligation to call the so called crucial witness;
- (iii) There were no material inconsistencies in the prosecution's case and that the prosecution proved its case to the desired threshold;
- (iv) The trial court properly disregarded the appellants defence and gave sound reasons.

DETERMINATION

39. 53. The appeal is found to be lacking in merit and it is hereby disallowed.

40. 54. The conviction and sentence are hereby affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 8th day of September, 2016.

HON.A. MSHILA

JUDGE.