



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 151 OF 2015

MICHAEL ANGARA PAUL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an Appeal arising from the Judgment and sentence of Hon. Nyigei RM dated and delivered on 25th November 2015 in the Original Tamu SRMC NO. 16 OF 2014]

JUDGMENT

The Appellant was convicted on a charge of Defilement, Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act and sentenced to serve twenty years imprisonment. He is however currently out on bond pending the hearing and determination of this appeal.

The Appeal is based on grounds that the trial Magistrate did not consider there were glaring contradictions in the appeal; that the Complainant was an unreliable witness due to her mental status; did not consider the defence of alibi and instead put too much weight on the Prosecution's case; relied on dock identification and failed to appreciate that the medical reports contradicted the findings of sexual assault, and further that the Magistrate erred by failing to appreciate it was unsafe to convict in the absence of crucial witnesses. He also raised a supplementary ground by annexing the proceedings of **Tamu Criminal Case No. 17 of 2014**.

Mr. Nyanga, Advocate who represented the Appellant at the hearing of this appeal argued the grounds of appeal together. He begun by submitting that the charge and witnesses in **Tamu Criminal Case No. 17 of 2014** were the same as in this case but the accused was different yet in that case the accused was acquitted. He then submitted that the Complainant's sister ought to have noticed something was wrong with her in the five days they were together as she was mentally challenged. He submitted that the Appellant was charged because of the bar talk yet the said bar talk was not mentioned in the investigations. He contended that it was the investigating officer's evidence that he never heard anything a bar. He stated that the trial Magistrate did not appreciate the evidence of the doctor that the victim required no treatment as she was in good condition. He contended that had penetration occurred between the 11 year old and a male adult there would have been bruises and tears the child would have been limping. He stated that the loss of hymen was as a result of a previous sexual encounter which the victim admitted had occurred. He also stated that even the doctor was of the opinion that there would have been bruises on the Appellant's penis yet there was none. He urged that there was not enough evidence in the P3 form to convict the Appellant. Further that the alibi mounted by the Appellant was totally ignored. He contended that it was clear from the bar talk that the Appellant was victimized because he had won a tender to distribute Coca Cola. He stated that it was not practical that the offence could have been

committed in the shop as the Appellant's wife was there. He argued that the trial Magistrate totally ignored the evidence of the defence witnesses and did not consider that the Prosecution omitted to call crucial witnesses such as Mama Janet and Ben. He contended that had they been called the result would have been different bearing in mind that the Complainant is mentally challenged. He submitted that as the Complainant did not know the Appellant and was only told who he was by Mama Janet, the dock identification ought to have been preceded by an identification parade. He stated that the Appellant was a well known businessman and had people seen him with the Complainant they would have come out to say so. He submitted that the record shows that the Complainant was coached by her sister and that had the Court considered her mental condition it would have arrived at a different conclusion. He stated that her answers were not rational. He urged this Court to note the contradiction in the evidence of the witnesses and resolve them in the Appellant's favour.

On the age of the Complainant he submitted that it was never ascertained as it was invariably said she was 12, 13 and 15 years.

Counsel also submitted that the trial Magistrate did not analyze the evidence and so failed to comply with Section 169 of the Criminal Procedure Code. He stated that the manner of the Appellant's arrest was questioned and that the Appellant was never informed of the charge. He stated that the charge was based on hearsay evidence and was never proved beyond reasonable doubt and that the conviction ought to be quashed and the sentence set aside.

This appeal was opposed. Mr. Muia, Prosecution Counsel submitted that each case must be taken on its own merit and that the Complainant had different evidence regarding the two cases. He submitted that in this case the Complainant's evidence was clear and unshakable and that she positively identified the Appellant. He pointed out that she stuck to her story despite going to Court two times and despite rigorous cross-examination. As for her age he submitted it is a non-issue and regarding the witnesses who were not called he referred this Court to the observation by the trial Magistrate that they would have made no difference to the case. Mr. Muia urged this Court to reject the appeal and uphold the sentence.

In response Mr. Nyanga stated that this case originated from bar talk and that under Section 150 of the Criminal Procedure Code the Court had power to call any witnesses so as to establish the truth. Regarding the birth certificate he stated that it was obtained after the commencement of this case. He also stated that the Court itself acknowledged the girl was mentally challenged. He reiterated that her evidence was inconsistent and hence the reason for the proceedings in the other case where her own neighbour was acquitted. He contended that mens rea was not established; that nobody saw the Complainant and the Appellant together yet the offence allegedly occurred in the busiest street in Muhoroni Town.

As the first appellate Court I have considered and evaluated the evidence afresh so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the benefit of seeing the witnesses testify.

This complaint was reported to the police by the Complainant's sister upon hearing bar-talk about a woman who was selling her sister to old men and upon confirming that the girl allegedly sold was her sister, now the Complainant. When the Complainant was taken to the doctor for examination it was confirmed that she had had a sexual encounter. The Clinical Officer did however clarify that the perforation of the hymen was not fresh. It is my finding that although the Complainant admitted to having had sex before, in the instant case she was very clear that it was the Appellant who defiled her. She vividly narrated how he went to their home and found her with her younger sister. How he asked her to go collect Kshs.30/= from his shop, how when she went there he asked her to sleep on a sack on the floor then asked her to remove her pant and to spread her legs before inserting his penis to her vagina. When he was done he told her not to tell anyone. He had given her Kshs.30/= and told her to buy chapati. It is my finding that the Complainant could not have made this up. She was very consistent and remained unshaken despite rigorous cross-examination by the defence counsel. The trial Magistrate who had the benefit of seeing her testify noted that although she suffered from slurred speech her mental health was normal. Indeed Contrary to the submission by Mr. Nyanga the Clinical Officer's evidence was that he could not communicate with her as she had slurred speech. Nowhere did he state that she was

mentally challenged. More often than not such people, and there are many in our society, are regarded as mentally challenged yet that is not always the case. The record shows that the Complainant communicated well with the Court although she stammered at times. Mr. Nyanga also submitted that she was coached. The Complainant knew that the Appellant had a shop and even knew where it was. She already knew him and all that Mama Janet did was to tell her his name. It is my finding that this does not amount to coaching. It is not unusual that one would know someone but not know their name. It is also my finding that her evidence is so strong that it renders that of the defence completely unconvincing. The fact that another man who she alleged had defiled her was acquitted has not watered her evidence in so far as this Appellant is concerned. That evidence which was introduced as a supplementary record of appeal ought not to have been admitted in the first place as the leave of the Court was not sought as provided in Section 350 (2) of the Criminal Procedure Code. Like the trial Magistrate, I have considered the Appellant's defence, comprising his own testimony and those of his witnesses, and my finding is that it could not stand given the cogency of the Prosecution's case. That the Clinical officer did not find any abrasions on the appellant's penis is not material to this case. Neither is the fact that she was not limping. As is clear from the record this crime was discovered a number of days after it occurred and secondly the Complainant who is the victim being the only witness to the crime the need for corroboration is precluded by Section 124 of the Evidence Act.

The trial Magistrate properly analyzed the evidence and like her I am satisfied that the charge against the appellant was proved beyond reasonable doubt. The complainant's age was confirmed by a birth certificate. Whereas it is true that the birth certificate was obtained when the proceedings had commenced it is common knowledge that the entries thereof are obtained from a register kept by the Registrar of Births and Deaths and indeed the certificate has an endorsement that it shall be received as evidence of the dates and facts contained therein. This would of course be unless the contrary is proved. There is nothing in the record to show that this certificate is not genuine.

For the reasons above, I find no merit in this appeal and accordingly reject it. The conviction and sentence of the lower Court are upheld.

Signed, dated and delivered at Kisumu this 6th day of October 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the state

Mr. Nyanga For the Appellant

CC: Serah