REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 32 OF 2013

FRANCIS MURIITHI MUSA …… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 294 OF 2010 IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO - HON. J.N. MWANIKI (SRM)

JUDGMENT

This is an appeal by FRANCIS MURIITHI MUSA over a conviction on a charge of defilement contrary to ***Section 8(1)*** as read with ***Section 8(2) of the Sexual Offences Act No. 3 of 200*** which charge was reduced to attempted defilement contrary to ***Section 9(1) of the Sexual Offences Act*** by the trial Court in Baricho Senior Resident Magistrate's Court Criminal Case No. 294 of 2010. Upon conviction, the appellant was sentenced to 12 years imprisonment. The appellant felt aggrieved and appealed both against the conviction and sentence.

The brief summary of the case at the trial Court indicates that the appellant was accused that on 23rd March 2010 in Kirinyaga County defiled one CWK, a minor aged 10 years. The minor testified at trial Court and told the Court how the complainant tricked her into a bush and defiled her. The prosecution called five witnesses and the trial Court found that the evidence adduced was sufficient to convict the appellant on the reduced charge of attempted defilement based mainly on the evidence of PW5 (a Clinical officer, who filed the P3 form) who opined that there was evidence of attempted defilement.

The appellant herein being dissatisfied with the trial Court's findings lodged this appeal and raised the following grounds in his petition:-

1. ***That the charges preferred against were false and malicious hence the reason he pleaded not guilty***
2. ***That the learned trial magistrate erred in law and in fact by convicting him on an offence of attempted defilement when the evidence adduced could not prove the same beyond reasonable doubts.***
3. ***That the learned magistrate erred in law and in fact by failing to set out clearly the point for determination and the reasons when he came up with a decision to convict him for attempted defilement while the initial charge was defilement***
4. ***That the learned magistrate erred in law and fact by failing to address himself on whether there was attempted defilement or not and if there is a grudge between the appellant and the child's***

parent and/or the grandparents.

5. ***That the learned magistrate erred in law and fact by rushing to unfair conviction in the face of contradictions and inconsistencies inherent in the proceedings (sic).***
6. ***That the learned magistrate erred in law and fact by dismissing his defence which was not shaken by prosecution.***

The appellant did file handwritten submissions in support of the above cited grounds. The appellant argued in his submissions that the trial magistrate placed undue weight on unsworn evidence of the complainant and PW2 both of who were minors after they told the trial Court that they did not know the meaning of an oath. The appellant argued that being young witnesses their evidence could be manipulated and that the trial magistrate failed to warn himself in replying in relying on such evidence.

On the evidence of the Medical officer (PW5), the appellant contended that the witness testified that there were no spermatozoa or bruises seen when the minor was examined. He also submitted that no age assessment was done though this was a new ground in itself as the same was not raised in the grounds of the petition of appeal.

The appellant further contended that the evidence of PW1 was a fabrication and that the evidence was rehearsed. He also submitted that the trial Court failed to address a long standing dispute between him, PW3 and PW4 who he submitted are his neighbours. He also submitted that the case against him was not proven and that the trial magistrate convicted him on a charge that was not presented in Court.

The respondent through Mr. Omayo for State opposed this appeal and supported both conviction and sentence.

On the question of identification, the State submitted that the appellant was well known to the complainant and PW2 and that the two witnesses properly identified the appellant and that the clothes worn by the victim were produced as exhibits and the conditions of the clothing (soiled) corroborated well the evidence of the complainant. Mr. Omayo also pointed that at the evidence adduced by the prosecution showing a clear chronology of events from the time the complainant was sent by PW3 (her grandmother) to a posho mill, the time of the incident, time the report made, and to the time the complainant received treatment. The State submitted that the seven witnesses proved that an offence of attempted defilement had been committed by the appellant.

On the ground of personal differences between the appellant and the relatives of the complainant, the State submitted that the appellant did not bring out the differences from prosecution witnesses who testified apart from the fact that they were neighbours. Mr. Omayo however pointed out that this fact of being neighbours showed that there was positive identification of the appellant as the person who committed the offence.

On the sentence, the State submitted that the law provides for a minimum sentence of ten years under the section that the appellant was convicted and that the 12 years meted out cannot be termed excessive.

I have considered the appeal both on the grounds raised in the petition and the submissions made by the appellant. I have also considered the oral submissions made in opposition to the appeal by the State through Mr. Omayo. In my view the issues raised by this appeal are as follows:-

i. ***Whether the age of the minor is a ground in the appeal filed and whether the same was ascertained at the trial Court***
ii. ***Whether the prosecution at the trial proved their case to the required standard to warrant a conviction***
iii. ***Whether the defence raised by the appellant particularly on personal differences had basis and whether the same was considered by the trial Court***
iv. ***Whether the trial Court was correct to convict the appellant on a charge other than the one he was charged with.***

1. The appellant in his petition of appeal raised 6 grounds as stated above and none of the ground concerns the age of the complainant. He did not seek leave of this Court to raise further grounds and I do not find that the ground raised on age is an afterthought raised without leave of this Court. However, even if the same had been raised, I do find that the age of the complainant was established by the trial Court prior to voire dire examination. The Court established that the minor was 10 years and in class four from the minor herself. The appellant was given an opportunity to cross-examine the complainant and the issue of age was not brought showing that the appellant never doubted the age given. I am however inclined to point out that the trial Court and indeed the prosecution could have done a lot better by ensuring that the issue of age was established to avoid doing injustice to either side. Having said that I am nevertheless not persuaded that this ground of appeal was not properly raised in the petition of appeal. The trial Court taking into consideration the fact that the child told the trial Court that she was in class four and aged 10 years old, the Court must have been clear in its mind that complainant was indeed a minor aged 10 years. The trial Court had the opportunity to observe the complainant when testifying and I find that in his judgment, he made observations that both the complainant and PW2 were young children and though they did not appreciate the reasons of an oath, they both possessed sufficient intelligence and understood the duty of speaking the truth. The trial magistrate properly conducted a voire dire examination and he cannot be faulted on that nor can it be taken that he conducted a vore dire examination on children who were over 12 years. The ages of the complainant and the evidence in my view were not contested and cannot form a good basis for this appeal for the reasons aforesaid.
2. I have evaluated the evidence tendered by the prosecution and I am persuaded that the 7 witnesses called gave consistence evidence to the offence to which the appellant was convicted. It should be noted as a matter of law that offences of this nature does not require corroboration. ***Section 124 of the Evidence Act*** provides that the evidence of a complainant or the victim in sexual offences can on its own stand the test of law so long as the trial Court for reasons to be recorded has basis to belief that the witness is speaking the truth. In this present case, the evidence of PW3 and PW2 gave a clear account of events that took place and corroborated the evidence of the complainant. The clothes worn by the complainant were produced and the trial Court noted that they were soiled which is consistent to what the complainant told the Court that she was pinned down and defiled at the shamba. The appellant contended that the evidence relied on by the trial Court were circumstantial but I do find that the evidence adduced was direct and the identification of the appellant was positive as he was a neighbour. Both PW1 and PW2 positively identified him as the person connected with the offence committed. The trial Court was correct in assessment of evidence in that regard.
3. On the issue of defence, I note from the proceedings that the appellant in his cross-examination of PW3 and PW4 made attempts to show that there was some differences between him and them previously. The appellant however gave unsworn defence and gave scanty details concerning the differences and apart from alleging that the complainant's mother had caused his wife to be jailed, he gave no further details or source of differences. He cannot fault the trial magistrate for not considering the same. The weight of the defence part forward when weighed on the scales of justice with what the prosecution adduced clearly showed that the defence was outweighed by far. The appellant's contention that his defence was not shaken by the prosecution is baseless and ironical because the appellant gave no chance to the prosecution to shake the defence having chosen to give unsworn statement in defence. I do find that the trial Court duly considered the defence by the appellant and placed correct weight on the same vis viz the prosecution's case.
4. The trial Court was also faulted by the appellant for convicting him on a lesser charge other than the one he was charged with. As an appellate Court, I have evaluated the evidence tendered and the sentiments made by the trial magistrate particularly on the evidence of PW5 whose evidence was found to be inconclusive on the issue of penetration (an essential element in sexual offences). The trial magistrate was correct both in his sentiments and his assessment and decision to convict the appellant on the lesser charge of attempted defilement. Under ***Section 180 of the Criminal Procedure Code***, the law provides as follows:-

> ***When a person is charged with an offence and the facts are proved which reduces it to a minor offence, he may be convicted of the minor offence although he was not charged***

with it".

The learned magistrate was correct though one can sense from the sentiments expressed that the trial magistrate was at pains considering the evidence given by the minor, the mother (PW3) and observations made by the Clinical officer who observed that the hymen was torn and observed traces of blood. I have also noted the definition of "***penetration"*** given under ***Section 2 of the Sexual Offences Act 2006*** which shows that penetration does not have to be complete to be considered penetration in law to warrant a conviction under ***Sexual Offences Act 2006***. The appellant should therefore consider himself lucky in view of sentiments expressed in the judgment and the fact that the trial Court convicted him rightly so on a lesser charge of attempted defilement.

5. On sentence, the State submitted that the sentence provided under ***Section 9(2) of the Sexual Offences Act*** is not less than10 years imprisonment. The appellant herein was sentenced to serve 12 years and I have no basis to interfere with the discretion of the trial Court in that respect. The sentence is lawful and lenient given the circumstances and mitigation advanced by the appellant.

In conclusion, I find no merit in this appeal. It must fail. I dismiss it. Conviction and sentence is upheld. It is so ordered.

R.K. LIMO

JUDGE

7/5/2015

7/5/2015

Before

Hon. Justice Limo

State Counsel – present

CC – Willy

Appellant – present

Omayo for State present

Francis Muriithi Musa (Appellant) in person present

COURT: Judgment dated, signed and delivered in the open Court in the presence of Omayo for State and Appellant in person.

R.K .LIMO

JUDGE

7/5/2015