



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 72 OF 2014

C M M APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(from the original conviction and sentence in Mwingi SRM Criminal case No. 583 of 2013 – G W Kirugumi –RM)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to Sec 8 (1) as read with sec 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 23rd October 2013 at [particulars withheld] in Mwingi Central District within Kitui County intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of TKM a girl aged 1 ½ years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of TKM a girl aged 1 ½ years. He pleaded not guilty to both counts. After a full trial he was convicted on the main count. He was then sentenced to serve life imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his grounds of appeal initially on 2nd August 2013. On 16th March 2015 however, he filed amended grounds of appeal which he relied on. He also filed written submissions.

His grounds of appeal in the amended petition are as follows:-

1. The learned trial magistrate failed to consider that there was a grudge between him and the complainants family which caused the allegations.
2. The trial Magistrate erred in convicting him without considering that the prosecution evidence was inconsistent contrary to Section 163 of the Evidence Act.
3. There was no positive identification of the assailant.
4. There was no proof to establish his presence in the alleged house.
5. That the prosecution failed to prove their case beyond reasonable doubt contrary to Section 109 and 110 of the Evidence Act.

During the hearing of the appeal, the appellant relied on the written submissions and elected not to make any submissions. I have perused the submissions.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that Section 124

of the Evidence Act did not require corroboration of evidence given by women. In counsels view that disposed of ground 1 of the petition on appeal. On ground 2 counsel submitted that the appellant did not state which crucial witnesses were not called to testify. Counsel also submitted the appellant did not give any proof of forgery of the P3 form. Counsel submitted that all the ingredients of the offence had been proved and that the court considered the appellant's defence before conviction. His mitigation was also considered. Counsel argued that the prosecution had proved its case against the appellant beyond any reasonable doubt.

In response, the appellant stated that he had nothing to add.

At the trial the prosecution called 5 witnesses. PW1 was B S K the mother of the complainant. It was her evidence that the complainant was born on 2nd December 2011. That she had lost the clinic card and had not obtained a birth certificate. She stated that on 23rd October 2013 in the afternoon at 3.30 pm, the complainant went to the house of the appellant which was 500 metres away from the witnesses house. The appellant was in his house. Shortly thereafter, she heard the complainant crying. When she went there she found the door was opened. She called the name of the child but she did not answer and after 5 minutes, the child came out of the house and was not properly dressed as the front of the clothes faced the back. When she enquired from the child what had happened, she said in Kiswahili "hapa maa". According to the witness it meant grandfather has done something here in my private parts.

Thereafter, the appellant who was the grandfather of the complainant came out of the house while his pants and trousers was not zipped. He stated that the child wanted ground nuts but when he gave the child ground nuts the child threw them away and started crying. When the witness checked the private parts of the complainant, she found some signs of slight bleeding and watery stains. The witness washed the child and the child then slept. When the father of the child came home at 6.30 Pm, she told him the story and they went to Mwingi hospital and the doctor asked them to report the incident to the police the child was then treated at the hospital. The doctor said that the hymen was broken. After 2 days the child could walk without crying. This witness was later recalled and produced a birth notification of the child.

PW2 was B M the father of the complainant. It was his evidence that on the 23rd October 2013 he left his home at 12 noon and visited his cousin leaving his wife PW1 and the complainant at home. His uncle the appellant was also in the same compound. He went back home at 5.30 Pm to find the child lying on the seat crying. When he enquired from his wife she told him that the child went to the appellants house and started crying loudly. When she went there to enquire the child pointed at her private parts and mention the nick name of the grandfather. She informed him that on checking the private parts of the child, she found them to be reddish and bleeding and washed her. They then proceeded to Mwingi hospital with the child. On the next day he did not see his uncle (the appellant) at home but he saw him again on Friday in his house washing clothes. When he asked him about the incident, the appellant denied. In cross examination he admitted that he had a land dispute with the appellant.

The complainant did not testify as she was too young to tender evidence.

PW3 was doctor Joseph Mutua of Mwingi hospital. It was his evidence that he received a message from the OCS Mwingi police station to treat a patient. However it was Doctor Mustach who saw the patient and treated her. This witness was stood down as it was stated that Doctor Mustach would be available.

PW4 was Doctor Mustach. It was her evidence that she saw the patient on 23rd October 2013. The patient had a history of rape by her grandfather. He found that the hymen was broken and that there was a small vaginal tear. He filled the P3 form the next day. According to him the child was about 2 years old. He produced the P3 form and treatment card and a report from the laboratory as well as a post rape care form as exhibits. In cross examination he stated that the tear must have been caused by the penis as, if it was caused by another object, it would have been a more severe injury.

PW5 was Cpl. Lucy Kanyua Mulila attached to Mwingi Police Station. It was her evidence that on 23rd

October 2013 at 1130 Pm she was called to the report

office to attend to a child who had been defiled. She took the child and the parents to Mwingi District Hospital. The child was crying a lot. The child was pointing to her private parts and saying Maa Maa and the mother explained that she meant grandfather. The next day a colleague went and arrested the appellant. When interrogated the appellant stated that he was framed.

When put on his defence, the appellant gave unsworn testimony. He stated that he was framed. That he had brought up the father of the complainant among others and would never do anything such as what was alleged against him. He stated that the complainant's father had constructed his house on his land. That the complainant's father had been jailed for 2 years and he plotted to have him arrested for defiling his daughter. That the complainant's father he divorced his 1st wife and married another one who framed him. He denied the incident and stated that he could not rape a child of one year. He called one witness Mumbao Mutysia who testified as DW2. The witness was a prisoner serving a sentence at Waita prison. He confirmed that there was a land dispute. He stated that the father of the complainant had stated that he would frame the appellant because of the land dispute.

Faced with this evidence the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted and sentenced the appellant. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-examine all the evidence on record and come my own conclusion and inferences. I have to take in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of **Okeno –vs- Republic (1972) EA 32.**

I have evaluated the evidence on record. Though the appellant claims that the evidence of the prosecution witnesses was inconsistent I find no inconsistency in the evidence of the prosecution witnesses. They all stated the same story but in different degrees of details. That does not amount to inconsistency. The appellant has also not pointed out any specific inconsistency in the prosecution evidence. I dismiss that ground.

The appellant has stated that there was no positive identification of the assailant. The evidence on record is that the complainant went to his house. She started crying in that house. That the mother PW1 went to that house and picked the complainant. There is no indication that there was anybody else in that house. There was no indication that anybody else could have committed the offence. In my

view, the only person who could have committed the offence, according to the evidence on the record was the appellant. I thus dismiss that ground.

The appellant has complained that there was a land dispute between him and the complainant's father and that he was thus framed. Indeed from the evidence on record, it is clear to me that such a land dispute did exist. However the complainant's father was not present when the incident occurred. Secondly even when he came home, he did not report the matter to the chief or to the police and instead took the child to hospital for treatment. In my view that cannot be the conduct of a person who is very eager to implicate another with a criminal offence. It is in fact the doctor who advised the complainant's father to report to the police. Even though there was a land dispute between the appellant and complainant's father therefore, I find that the allegations against the appellant was not motivated by the land dispute. I dismiss that ground of appeal.

The appellant has also argued that the prosecution did not prove its case against him beyond reasonable doubt. There was also the issue of age of the complainant. In my view the age of the complainant was established through verbal and documentary evidence. On penetration, the doctor, in cross examination stated that the injuries found in the vagina of the complainant could only be caused by penetration of a male genital organ. Even assuming that such would have been caused by a finger, in my view the circumstances of this case are such that the appellant was the culprit.

The complainant also did not give evidence. In my view because of her age, it was not necessary or possible for her to tender evidence. The evidence of the mother PWI who was near the scene, who heard her cries, who went and picked her from the house of the appellant, and who talked to the appellant, in my view was sufficient. Provided such evidence was believable and was believed, by the trial court, the same would cover the gap of the failure of the complainant to testify. I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt. I will thus uphold the conviction.

On sentence, the sentence is that which was prescribed by law. I will also uphold the sentence.

Consequently, I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 3rd day of June 2015

GEORGE DULU

JUDGE