



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 66 OF 2014

MUSYOKA NGOMO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(From the conviction and sentence in Mwingi Senior Resident Magistrate's Criminal Case No. 651 of 2013 – G. W. KIRUGUMI – RM).

J U D G M E N T

The appellant was charged in the subordinate court with attempted defilement contrary to Section 9(1) as read with (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 10th June 2012 at [particulars withheld] Sub location in Mwingi East District within Kitui County attempted to do an act which could have caused penetration of his male genital organ namely penis into the female genital organ namely vagina of KM a girl aged 13 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 intentionally did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of KM a girl aged 13 years. He denied both counts. After a full trial, he was convicted of indecent act and sentenced to serve 10 years imprisonment. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 11th August 2014. Before the hearing of the appeal he filed an amended petition of appeal and written submissions. He relied on the amended grounds of appeal. His grounds of appeal are as follows:-

1. That the magistrate erred in law and fact to convict him without considering that the age of the complainant was not ascertained.
2. The trial magistrate erred in law and fact to convict him without considering that the prosecution case was not proved beyond reasonable doubt.
3. The trial magistrate failed to note that the prosecution case was contradictory and full of inconsistencies.
4. The trial magistrate ignored the fact that there was a grudge.
5. The medical report was dubious and unworthy to be admitted as evidence.
6. The trial magistrate failed in law in convicting him without putting into consideration that this case emanated out of a retrial from the High Court and that prosecution witnesses fabricated new evidence to destroy his life.
7. The trial magistrate upon execution of judgment failed to consider his defence which was strong enough to rebut the prosecution evidence.

At the hearing of the appeal, the appellant relied on his written submissions which I have perused. He also submitted orally that the prosecutor at the retrial was the same one in the initial trial which was an

injustice. He submitted further that the Probation Officer gave a report before the case was completed. He also complained that the evidence tendered by the complainant during the retrial differed from that tendered in the initial trial.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant did not ask for a new prosecutor during the re-trial. In any event there was nothing wrong with the prosecutor being the same as that of the initial trial.

With regard to the probation report, counsel submitted that the appellant did not raise any issue on the probation report during the trial. On the contention that the charge and the evidence differed, counsel submitted that such was a new ground of appeal which should not be considered. Counsel submitted also that there were no contradictions in the prosecution evidence and that if such contradictions existed then they were minor and curable. On crucial witnesses not being called, counsel submitted that there were no known eye witnesses. In addition in sexual offences usually only close relatives get to know about the incident. Counsel further added that the investigations were well conducted and that PW4 testified on behalf of the doctor who filled the P3 form and the basis for doing so was laid down before that witness tendered evidence as required under Section 77 of the Evidence Act.

It was counsel's contention that PW2 heard screams and approached the scene where she witnessed the appellant running away. PW3 did not mention F M as alleged by the appellant. Counsel submitted further that prosecution proved their case against the appellant beyond reasonable doubt. PW4 gave detailed testimony confirming penetration as the hymen had been broken.

On identification counsel submitted that the appellant was well known to the complainant who mentioned his name. The mother of the complainant PW2 also knew the appellant well and witnessed the incident. It was on record also that the appellant had attempted to withdraw the case. Counsel wondered how the appellant would try to withdraw the case if he did not commit the offence.

In response to the prosecution counsels' submissions, the appellant submitted that the evidence of the doctor differed from the contents of the P3 form. The doctor said the child was 17 years which was different from 13 years in the P3 form. He also stated that he complained at the retrial about the same prosecutor prosecuting him, but did not know why the magistrate did not record the same. He stated that the evidence of PW5 the investigating officer differed with that of PW3.

During the trial, the prosecution called 5 witnesses. PW1 was the complainant. After being examined on her intelligence and her understanding of an oath, she was sworn. She stated that she was in class 3 and did not know the appellant before. That on the date in question she had gone for a long call in the bush at [particulars withheld]. The appellant then came from behind and dragged her for about ½ km and asked for sexual intercourse. He made her lie down on the ground, folded her legs upwards and had sexual intercourse with her for about 1½ hours. He then offered her Kshs 50/= which she refused. She was later picked by Salim and another lady. She stated that the appellant had put her underpants on a tree. She was cross examined and stated that her mother PW2 also went to the scene. She denied having been told to lie.

PW2 was E M the mother of the complainant. It was her evidence that the complainant was born on 16th November 1995. She relied on her clinic card. It was her evidence also that on the day in question, she had gone to fetch firewood and heard the complainant's voice in the bush. As she approached, she found a man running away while the complainant was lying on the ground. She lifted up the complainant and took her home. According to her, the appellant was the man who ran away while wearing his clothes. The police came later and found the underwear of the complainant. She did not mention names of other two people who were said by the complainant to have gone to the scene. In cross examination she insisted that she was alone at the scene. She stated that she met two women on her way home but did not tell them about the incident.

PW4 was Inspector Ibrahim Salim. He stated that on 10th June 2012 at 8.50 Pm a report was made at Ukasi Police Station by a lady and her daughter. The report was to the effect that the daughter or child

was about to be raped when the mother arrived at the scene. The complainant (child) who was present said that she knew the culprit. On the following day, the witness saw the appellant on the road with another man and took him to the police station where the complainant identified him as the culprit. He handed over the case to Corporal Zena to carry out investigations. It was his evidence that he visited the scene of the incident and recovered the panty of the complainant on a tree. He was cross examined at length by the appellant. He stated that he knew the appellant before and denied having an affair with the wife of the appellant.

PW4 was Dr. Joseph Odour who produced a P3 form filled by Dr. Ogeto. The remarks in the P3 form were that there were bruises on the right arm and back of the thighs. The complainant was said to be 13 years old. The injury was classified as harm. The hymen of the complainant was missing and the conclusion was that defilement had occurred. The doctor stated that the entries in the P3 form were extracted from treatment notes. He was then stood down to produce the treatment notes, but did not come back to court to produce the same until he was brought under arrest. When he came back to testify on 28th April 2015, he stated that the treatment notes were not found in the hospital.

PW5 was Corporal (woman) Zena Cherotich the Investigating Officer. It was her evidence that she took the complainant to the hospital and that the appellant was arrested and charged. According to her, the child was aged 17 years as she was born in 1995. She stated that the mother of the complainant worked as a casual labourer at the police lines. In cross examination she stated that the complainant did not show to her any injuries suffered. She was not aware of the disagreement between the appellant and Inspector Salim on the allegation of the Inspector having an affair with his wife.

When put on his defence, the appellant tendered sworn testimony and called one witness. It was his evidence that his wife had an affair with Inspector Salim. He became aware of this affair. It was also his evidence that the mother of the complainant was the link between his wife and Inspector Salim and that they had a disagreement and that was why he was implicated in the case. He stated that on the day in question he was at a funeral the whole day.

DW2 was K M the father of the appellant. He testified that he knew of the disagreement between his son the appellant, Inspector Salim and the mother of the complainant. He also testified that on the day of the alleged incident the appellant was at a funeral with him.

At the end of the defence case, the appellant made long submissions. The prosecution did not make any submissions.

This is a first appeal. As a first appellate court, I am duty bound to evaluate all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno –vs- Republic (1972) EA 32.***

I have evaluated the evidence on record. The appellant has complained about the same prosecutor prosecuting him at the retrial. There is no law or rule of practice that prevents the same prosecutor conducting the prosecution at a retrial. In any event, I find no prejudice caused to the appellant due to the same prosecutor prosecuting him at the retrial. I dismiss that complaint.

The complainant is said to be aged 13 on 11th June 2012. That is what is in the P3 form. The mother stated that she was born in 1995. In effect she should have been about 17 years of age at that time. The P3 form was said to have been filled from treatment notes. Those treatment notes were however not produced in court. They were said by PW4 not to be available at the hospital. The complainant also did not tell corporal Zena that she was injured.

In my view the evidence on the medical aspect is wanting in many ways. It could not be relied upon for a conviction. No wonder the magistrate did not find any evidence of attempted defilement.

The magistrate however convicted on an the offence of indecent act on a child. In my view, the conviction cannot be sustained. The complainant clearly gave a story about how she was defiled for 1½ hours. If that was true then it could not amount to an indecent act. In addition, the complainant was said to

have been seen only by the mother at the scene. However she mentioned other people who went there who were not called to testify. The mother PW2 also stated that on the way home, she and the complainant met two other ladies but they did not inform them about the incident. In my view it is unbelievable that the mother of the complainant would not have told these women about such an incident on her daughter and wait until night time and then go report the incident to the police. The prosecution evidence is not believable.

The appellant also put a strong defence about an affair between his wife and Inspector Salim which involved the complainant's mother as a go between. It is of note that the complainants' mother denied working at the police station, while the police evidence from the investigating officer is that she worked there on casual basis. PW2 the complainant's mother is therefore not a truthful witness. Her evidence could not be relied upon.

The appellant also raised an alibi defence. That defence was not a surprise to the prosecution because the appellant had seriously cross examined key prosecution witnesses about his not being involved in the alleged crime. The burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt. Such proof requires that the prosecutions tenders evidence to dispell any alleged alibi

. They did not do so in the present case. It means the prosecution did not discharge its burden of proof.

From the evidence on record, I am of the view that the allegations here in against the appellant might most probably have risen from an existing bad relationship between the appellant, the mother of the complainant and Inspector Salim. I give the benefit of doubt to the appellant.

In conclusion, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawful held.

Dated at Garissa this day of 13th July 2015.

GEORGE DULU

JUDGE