



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 09 OF 2015

RUTH MARURA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 909 of 2013 of the Senior Principal Magistrate's Court at Voi – Hon. Kadima – Resident Magistrate)

JUDGMENT

The appellant was Convicted and sentenced to five (5) years imprisonment for the offence of Sexual assault contrary to section 5(1) (a) (ii) as read with section 5(2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that:-

“On diverse dates between the month of September, 2012 and September, 2013 at [Particulars Withheld] Village within Taita–Taveta County she intentionally penetrated the vagina of E M a child aged thirteen (13) years with a tube gadget”.

In the second Count, the particulars are that:-

“On diverse dates of September, 2013 at [Particulars withheld] Village Taita–Taveta County the Accused unlawfully and intentionally penetrated the vagina of E M a child aged thirteen (13) years with a tube gadget”

The appeal is premised on ten grounds.

The main one being that the Conviction was against the weight of evidence adduced by the prosecution.

Secondly, that the case for prosecution was wrought with inconsistent and contradictory evidence and in particular. That between PW 1, PW 2 and the Doctor as to the time of the commission of the offence.

Thirdly, that there was no corroboration of evidence adduced by PW 1 and PW 2.

Fourthly, that the trial magistrate used balance of convenience as the standard of proof in determining the criminal charges facing the Accused person.

Further that the trial magistrate did not consider the defence put forth by the Accused and the fact that there did exist a grudge between the appellants father and the local assistant chief.

This being the first appellate Court, its duty bound to evaluate and analyze the evidence on record from the lower court so as to arrive at its own conclusion bearing in mind that I did not have the opportunity of observing the demeanour of the Witnesses.

Brief facts

The two Complainants E M, and E M were standard seven pupils at [Particulars Withheld] primary school together with PW 3 one M R. The three started a habit of baking cakes in the school.

M R (PW3) would provide baking powder and eggs towards that exercise whereas PW 1 would provide money for the rest of the ingredients.

The scheme of things was later discovered by the teachers in the school and when the girls were confronted, they mentioned the Accused (appellant) as the source of the money and they further revealed that the funds were given to them in return for sexual favours. These sexual favours are the subject of the charges of sexual assault for which the Accused was Convicted and sentenced to five (5) years imprisonment on each count.

In his judgment the learned trial magistrate found favour with the evidence of the two complainants and dismissed evidence of PW 3 who was in the business of baking cakes with the complainants and who could have shed some light on the ongoings between the girls as of little evidentiary value to the matter at hand.

This is what PW 1 told the Court (at page 12 line 3),

“ I was given money by Marura on 3 occasions totaling Ksh. 680/=. We used to make cakes every time I was given money. The head boy discovered that we bake. Our lady teacher asked me where I got the money. I told her it is Marura who gave me the money after doing sexual acts on me. I knew I had been sexually assaulted on the third day. When pretending to appear drowsy she removed my clothes turned me sideways and she lied besides me. She had a red item which she used to hide in her hand bag”.

At page 11 line 10 she sates,

“She used to bring groundnuts I eat and I could momentarily lose my sense. I could sleep. She gave me the groundnuts on three occasions. She could remove my clothes. I realized when I gained consciousness”.

PW 2 testified of a date in the month of April, 2013 when E PW 1 invited her to go and play at Maruras place. This is what she told the Court (at page 15 line 11),

“We found Marura alone, she called us and offered us juice. She told us to go and climb the bed and sleep which was unusual.

Marura removed my panties, I was startled. It was around 2:00 pm when I woke up she told me to take my pants back and go home. When I was going home she gave me Ksh. 100/=. E was bakings cakes in school with M. When E was asked where she got the money she said she was given the money by Marura”.

PW 3 M R whose evidence was treated as lacking in value told the Court (at page 18 line 13)

“When we were baking the cake in school, E told me she had stolen the money from her father ... she told me not to tell anyone she had stolen money from her father instead.

She said I say she had been given by Ruth. She came with 1 kg of flour. I came with eggs from our home, E brought blue band, sugar and milk. She came with Kshs. 200/=. Later which she said she stole with another sister from her father”.

Its instructive to note that the learned trial magistrate did not proceed to evaluate the evidence of PW 3 Vis-a-vis that of PW 1 and PW 2 and arrive at a conclusion one way or the other but simply dismissed it outrightly.

This evidence contradicted that of PW 1 and PW 2 as to the source of money for baking cakes which had placed the Accused as the giver for purposes of sexual favours.

Further, on the issue of contradictory evidence PW 1 testified to the effect that the Accused used to offer her groundnuts which would make her drowsy and get a black out such that she would not know what had been done to her.

PW 2 in her evidence under cross examination testified that (at page 16 line 14),

“We were given juice at 10:00 a.m. in the morning by Marura. There was nobody else in the house. She told us to go and sleep in bed. I was with E. I was not given any groundnuts that day “.

The question therefore, that comes to mind is, was it groundnuts or juice which were given to the two Complainants ostensibly to drug them?

Medical evidence

A P3 form in respect of E M (Police Exhibit No. 1) was filed by Doctor Jane on 18th October, 2013. It shows date and time of alleged offence as between September, 2012 and September, 2013. It shows approximate age of injuries as one week.

Details of injuries to the genitalia are shown as normal but with whitish foul smelling discharge. The P3 form in respect to PW 2 E is dated 11th October, 2013 and is shown to have been filed on 18th October, 2013 by Dr. Jane. The approximate age of injuries is shown as 2 hours. Date and time of alleged offence is shown as September, 2013.

Details to the genitalia show that it was normal, there was no discharge.

These two P3 forms are not in tandem with the charges facing the Accused for which she was convicted. The act of sexual assault is said to have taken place between the month of September, 2012 and September, 2013. Yet when presented before the Doctor on 18th October, 2013 the age of injuries is stated to be approximately one week old.

As regards the 2nd Complainant the date of offence is shown to be on diverse dates in the month of September, 2013. The Doctor who filed her P3 form on 18th October, 2013 estimated the age of injuries as two hours.

The evidence of the Doctor and that of the Complainants and the charge sheet are hugely inconsistent.

The Court does note that a pre consent form was produced by the prosecution amid serious objections from the defence. This document was generated on 4th February , 2014 close to a year and half later after the alleged commission of the act.

I am satisfied that the evidence by PW 1 and PW 2 is contradictory in nature with that of PW 3 and the Doctors evidence does not corroborate it.

This case was not proved beyond doubt and it was unsafe to convict the Accused.

The appeal has merit and its allowed. The appellant is set at liberty unless otherwise lawfully held .

Judgment delivered dated and signed this **8th** day of **July, 2015**.

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M. MUYA

JUDGE

8TH JULY, 2015

In the presence of:-

Okuthe for the Accused.

Masila for The State

Court clerk Musundi

M. MUYA – JUDGE