



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 74 OF 2014

S N..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(From the decision in original Criminal Case No. 165 of 2012 at P.M's court at Kyuso)

J U D G M E N T

The appellant was charged in the subordinate court with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 29th May 2007 at [particulars withheld] Sub location Mwingi District within Eastern Province caused penetration of his genital organ namely penis into the genital organ namely vagina of AMM a child under the age of 11 years. In the alternative he was charged with 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 touched the genital organ, breasts and buttocks of AMM a child under the age of 11 years. He denied both charges. After a full trial he was convicted on the main count and sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, he has now come to this court on appeal. He filed initial grounds of appeal on 2nd August 2014. He however filed amended grounds of appeal before the hearing of the appeal. His amended grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and facts to convict him without considering that the complainant's age was not ascertained.
2. The prosecution evidence was contradictory and inconsistent.
3. The prosecution case was fabricated by PWI's relatives hence forcing the complainant to adduce false evidence by way of coercion.
4. The Doctors' evidence was manipulated by the witness hence unworthy to be relied on for safe conviction.
5. There was no DNA test conducted to ascertain the truth of the prosecution allegations.
6. The P3 form did not support the prosecution case.

The appellant also filed written submissions which have perused. At the hearing of the appeal, the appellant relied on the written submissions.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the trial court had the opportunity to observe the complainant and other witness testify. The magistrate was convinced that the complainant was a minor of tender years in accordance with the provision of Section 2 of the Children's Act.

Counsel emphasized that the appellant was an uncle of the complainant. Counsel submitted that though a step sister of the complainant stated in evidence that the complainant was 5 years of age, the disparity of the age did not matter since the child was below 10 years.

Counsel also submitted that the P3 form was produced by a person who was not its maker. However the basis for doing so was laid down in court. The entries in the P3 form also established that sexual intercourse had occurred as the hymen of the complainant was broken and parted. In addition the appellant had tried to settle the matter out of court.

On identity of the appellant, counsel argued that there was no possibility of mistaken identity and that the evidence of the defence witnesses was hearsay evidence. Counsel submitted further that there were no contradictions and inconsistencies in the prosecution evidence. With regard to allegations of existence of a grudge counsel submitted that that issue was considered by the trial court. Counsel submitted further that there was no fabrication of a charge against the appellant. There was also no manipulation of the complainant. Counsel added that a DNA test was not a mandatory requirement in sexual offences.

In response to the prosecuting counsel's submissions, the appellant submitted that the evidence of PW1 differed on the 1st, 2nd and 3rd days. According to him, that was evidence of coaching. The appellant submitted that the P3 form did not connect him with the offence. According to him, the hymen would have been broken using a finger. He denied having tried to settle the matter and said that it was his family which had tried to do so. He insisted that there was an existing grudge between him and PW3 due to land issues.

During the trial the prosecution called 5 witnesses. PW1 was the complainant. On the 1st day, she was not willing to give evidence. She was thus stood down. When she came back, she stated that on the day in question 29th May 2007 she was left at home with 2 other children. She stated that she was 16 years old and was in class seven. At about 8 Pm his uncle the appellant came home on a bicycle, pulled her to a nearby river removed her pants and had sexual intercourse with her. He then left her there and went away.

PW2 H K was a step sister of the complainant. It was her evidence that she came back home on the 29th May 2007 at 8.00 Pm and found the complainant crying. According to her, the complainant stated that she was defiled by the appellant at 6.00 Pm. She also stated that the complainant was a Standard 3 pupil. They slept until next morning when they informed an uncle J M about the incident.

PW3 was J M an uncle of the complainant. It was his evidence that a report on the incident was made to him on 30th May 2007. He reported the matter and took the child to hospital. According to him the appellant disappeared from the area for about 2 weeks. He denied the existence of a land dispute and emphasized that the appellant in fact wanted to settle the matter out of court.

Pw4 was Francis Saku. It was his evidence that he was a clinical officer who examined the complainant. The complainant was said to be 10 years of age. On examination he found that the hymen of the complainant was slightly parted. He produced the P3 form as an exhibit.

PW5 was Police Constable Simon Yego the Investigating Officer. He testified that following a report, he arrested the appellant and charged him. He stated that initially the appellant pleaded guilty.

When put on his defence the appellant choose to give sworn testimony. He denied the charge. He stated that a 7.00 Pm he was not at the scene but was at place called Katabauwo.

DW2 was J M a step brother of the appellant. He stated that the charge was a frame up because of an existing land dispute.

DW3 was M M a sister of the appellant. She maintained that the charge was a frame up and that the incident of defilement did not occur.

DW4 was F M an uncle of the appellant. He stated that he was aware of an existing land dispute on the ancestral land. That is the evidence for the prosecution and the defence.

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 reevaluated the evidence on record. The appellant has raised several grounds of appeal. From the records this incident occurred in 2007 however the criminal case herein was filed in 2012. Though it is not clear from the proceedings this appears to have been a retrial.

The age of the complainant is in doubt. There is evidence that it was 5 years. There is evidence that it was 10 years. There is also evidence that she was 16 years. The complainant said that she was in Standard 8. PW 2 on the other hand stated that the complainant was in class 3. On the first day of trial, the complainant was not willing to tender evidence and she was stepped down. In my view with these contradictions and the conduct of the complainant, it is difficult for the court to determine the credibility of the evidence tendered by her and also about her. The gap created in my view creates a doubt in the prosecution case. The benefit of the doubt has to be given to the appellant, which I hereby do.

Though the appellant was convicted of defilement, the medical evidence is simply that the hymen was slightly parted. It cannot thus be said that there was penetration. It cannot be said that partial parting of the hymen was caused by sexual penetration. In my view it could have been caused by other factors. Again because of the mere partial parting of the hymen, there is a doubt as to whether the offence alleged was committed. The benefit of that doubt has to be given to the appellant which I do.

In addition to the above, the complainant clearly stated that she was with 2 other children at home when the appellant came on a bicycle and took her away to the river and defiled her. None of these 2 children was called to testify or any reason given for the failure to be called as witnesses. They were certainly crucial witnesses. In the case of *Bukenya -vs- Uganda [1972] EA 549,* the court held that where crucial witnesses were not called to testify and the evidence of the prosecution is not particularly strong, the court is entitled to make an inference that the evidence of those witnesses would most probably be against the prosecution case. I make that advance inference in the circumstances of this case. On that basis also the prosecution has failed to prove its case against the appellant.

Consequently and for the above reasons, I find that the conviction of the appellant is not sustainable. 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 and delivered this 2nd day of July, 2015.

GEORGE DULU

DULU