REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 42 OF 2013

JOSEPH WAMALWA MUKHWANA…….APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT

The appellant Joseph Wamalwa Mukwana was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, with an alternative count of indecent act to a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The Appellant was convicted of the offence of defilement and sentenced to 21 years imprisonment.

The particulars of the offence were that the appellant on the 17th day of December 2010 at [particulars withled] location in Bungoma South District within western province, intentionally and unlawfully caused his penis to penetrate the vagina of E K W a child of 13 years.

Being aggrieved and dissatisfied with conviction and sentence the appellant has appealed to this court on the following grounds:

1. That the learned trial magistrate erred in law and facts in failing to take proper account of the credibility of the prosecution witnesses and thereby convicting the appellant on the basis of the same in which he suffered prejudice.
2. That the learned trial magistrate erred in law and facts in failing to consider that the prosecution case was speculative, descendible and fabricated in material particular.
3. That the learned trial magistrate erred in law and facts in trying to convict and sentence the appellant upon information on charge sheet which was defective in substance and invalid.
4. That the time he was arrested he stayed seven days in police station cells without them taking him to court, thus questioning what they were looking for and yet he had an existing dispute of money with the complainant.

He sought to have the conviction quashed and the sentence set aside.

In his submission the appellant informed the court that he was arrested on 18/12/2010. He was a businessman. That the complainant came from the sugar plantation, while he was standing not far from there. He was accosted by members of the public, he ran away and the next day he was arrested when he went to look for his property. That he only knew about an accident case and not a defilement one. In other words he was not aware of the allegations

The state through learned State Counsel Mrs. Njeru told court in reply that the appellant was charged with defilement and that PW2 in her evidence stated that she had sent the complainant PW1 to go fetch water

at around 5/6pm and when PW1 took long to return she became anxious and went to look for her. That while approaching the school gate she saw a bicycle and a jerrican, she checked in the neighborhood and heard noises from the bush. She went home and told her husband. The two went to the scene and found the accused in the act. His trousers were upto the knee. When the appellant saw them he tried to run away but they subdued him and took him to the village elder. While at the village elder's home the appellant disappeared and they reported the matter and the appellant was arrested two days later. Medical examination was done two days later and no evidence of sexual intercourse was established. That the court found that defilement was not proved by the medical evidence but that the evidence of the prosecution witnesses was overwhelming. The offence was fully proved and the sentence passed was within the law. She urged the court to dismiss the appeal.

As a first appellate court this court has a duty to re-examine, analyze and re-evaluate the entire evidence a fresh so as to come up with its own independent finding, bearing in mind that the trial court had the advantage of re-examining the witnesses. See the case of ***KARIUKI KARANJA -VS- REPUBLIC (1986) KLR, 190***

The prosecution called a total of 4 witnesses.

PW1 E K W testified that on 17/12/2010 at around 7 pm she had gone to fetch water when she was approached by the appellant who was riding a bicycle. The appellant alighted and held her by the neck. That it was not dark yet. That the appellant tore her clothes (t-shirt) plus her pants and fell on her, removed his long trouser to the knee and slept she tried to resist but he slapped her and inserted his penis into her vagina.

Her mother and father came together with her brothers and found the appellant in the act. The appellant was arrested and taken to the village elder from where he escaped but was later arrested. She went to [particulars withheld] health center and was referred to Bungoma District hospital. That the matter was reported to the police station and a p3 form was issued to her.

PW2 testified that on 17/12/2010 she returned home at 7.00 pm. And found that PW1 had gone to fetch water from the school. She waited for long and when PW1 had not returned, she went out to look for her and saw a jerrican near the gate and heard sounds from the sugarcane plantation. That she became afraid and went to call her husband. The two came back and found the appellant on top of PW1 having sexual intercourse. That the appellant's long trouser was at his knees. On noticing them the appellant left PW1, they arrested him and took him to the village elder from where the appellant escaped but he was later re-arrested. PW2 went on to testify that the complainant never slept at home that night due to fear. She came the following morning and was taken to [particulars withheld] heath center then to Bungoma District Hospital.

PW3 testified that he examined PW1 on 20/12/2010. Her blouse as torn and that she complained of pain in her abdomen. She was treated for the prevention of pregnancy and HIV. That her sexual organ had no injuries and he thus concluded that there was no evidence of penetration. That he assessed the age to be 13 using the dental formula.

PW4 testified that on 18/12/2010 while in his office at the Bungoma police station he received a report from PW1 and PW2 alleging that PW1 was defiled by the appellant the previous evening while she had gone to fetch water. He took PW1 for examination and later took statements. He issued p3 form that was filled later. That the appellant was arrested by administration police at [particulars withheld] and later charged with defilement.

The court found the appellant had a case to answer. In his unsworn defence the appellant **JOSEPH WAMALWA MUKHWANA** testified that he sells maize and beans for a living. That on 18th February, 2010 he was at his place of work at 6 am till 12pm when his wife called him telling him that she was sick. On his way back home he found an accident at the junction. That he was beaten and taken to Bungoma and then brought to court and charges read to him which he denied.

From the evidence above it is clear the age of the complainant was determined. PW3 the doctor who examined PW1 testified that he arrived at the age of 13 through examining the dental formula. PW1 and PW2 also indicated this to be the age. I am therefore satisfied the age of PW1 was proved.

Section 8(1) provides that;

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Section 8(3) provides that;

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less twenty years."

In STEPHEN NGULI MULILI VERSUS REPUBLIC CRIMINAL APPEAL NO.90 OF 2013, the Court of Appeal in making reference to the "Golden thread" in the "web of English common Law" as the duty for the prosecution to prove its case as stated in the notable case of DPP VS WOOLMINGTON (1935) UKHL

The court of appeal also referred to MILLER VERSUS MINISTRY OF PENSIONS (1947) 2 ALL ER 372 where it was stated;

"That degree is settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course if it is possible, but not in the least probable, the case is proved beyond doubt, but nothing short of that will suffice."

The prosecution therefore had a duty as always to prove the evidence against the appellant herein beyond reasonable doubt.

This court is also cognizant of Section 124 of the Evidence Act and the proviso to it that gives an exemption to sexual offences as relates to corroboration.

In the offence of defilement penetration must be established. It is the evidence of PW3 that in his examination he found that PW1 had no injuries in her sexual organ. He therefore concluded that there was no penetration. The learned trial magistrate in his judgment convicting the appellant based his judgment on the evidence PW1 and PW2 the findings of PW3 notwithstanding. The trial magistrate in his judgment stated:

" It is my finding that the fact the doctor held three days after the material day was no evidence of penetration cannot be used as conclusive evidence that penetration did not occur o 17/12/2010."

Under ***section 2*** *of the Sexual Offences* ***Act*** *"Penetration"* is defined to means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

Although there is claim by PW1 that the appellant inserted his penis in her vagina , this fact was not established by medical examination. There is no doubt in my mind, from the evidence on record that the appellant removed his trouser and lay on PW1 and was found in that position by PW2 and her husband. The question I pose is whether he penetrated PW1? In the absence of medical evidence to that effect I find it unsafe to solely rely on the evidence of PW1 in this regard.

It is my considered view of the evidence on record that the actual situation was, that the appellant attempted to defile PW1 and was found in the process by PW2 and her husband, in the circumstances the correct charge against the appellant therefore would have been attempted defilement contrary to Section

9(1) of the Sexual Offences Act.

Section 9(1) provides;

"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement"

Section 9(2) of the said Act provides;

"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

The appellant raised the issue of delayed prosecution as he was arraigned in court after 7 days. From the charge sheet the appellant was arrested on 18/12/2010 and apprehended in court on 24/12/2010. Article 49 (1) (f) of the Constitution guarantees the rights of an arrested person. It provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than 24 hours after being arrested.

It is trite law that where there is a violation of any Constitutional right, it must be raised at the earliest opportunity possible. In MWALIMU VS. REPUBLIC (2008) KLR 111, the Court of Appeal, when considering Section 72 (3) and 84 of the retired Constitution in a similar issue, stated as follows:

"4. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity."

The appellant did not raise the issue with the trial court. Had he raised it, the state would have been called upon to explain the delay. The complaint is made rather late in the day. In any event, even if this court were to find that a violation was committed, it would not vitiate the charges against the appellant. There are other remedies available to him, should the complaint be merited. This for now in my considered view is not the correct forum to raise the said issue or offer redress.

Having faulted the charge against the appellant and having found that he was guilty of attempted defilement I set aside both the conviction and the sentence meted out to the appellant by the trial court. I proceed to substitute the charge with that of attempted defilement. I convict the appellant accordingly under this charge and sentence him to 10years imprisonment from the date of the first conviction.

Dated and Delivered in Bungoma this 2nd day of October, 2015

ALI-ARONI

JUDGE

In the presence of

State Counsel……..

Appellant/Counsel…….