



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.16 OF 2011

CHARLES NJERU KIMANI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by S.M. MOKUA Principal Magistrate Siakago in Criminal Case No. 793 of 2009 on 26th February 2010)

J U D G M E N T

CHARLES NJERU KIMANI was charged with the offence of **Defilement contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. The particulars as stated in the charge sheet were as follows:-

On the 6th day of August 2006 in Mbeere North District of Eastern province, defiled JMM a child aged 2 years 9 months.

The appellant denied the charge and the case proceeded to full hearing. He was eventually convicted of the charge and sentenced to life imprisonment. He was aggrieved by the judgment and filed this appeal against both conviction and sentence. He raised the following grounds:-

1. ***He pleaded not guilty.***
2. ***The learned trial Magistrate erred in both point of law and facts by convicting him on a case without any evidence.***
3. ***The learned trial Magistrate failed in both points of law and facts by failing to consider that the prosecution failed to summon the government analyst who undertook the analysis.***
4. ***The learned trial Magistrate erred in both point of law and facts by failing to consider that the grudge between him and PW1.***
5. ***The learned trial Magistrate erred in both point of law and facts by failing to give due consideration to his defence.***
6. ***The learned trial Magistrate erred in both point of law and facts by failing to consider that the charges of the prosecution case were defective.***

The prosecution had called a total of four (4) witnesses. The complainant was a minor aged about 2¾ years and was a daughter of PW1. In her evidence PW1 said she had visited her sister on 6/8/2006. That evening her sister and husband went to a wedding ceremony leaving PW1 with the children the complainant included. She put the children to sleep by 8 p.m. and went to the kitchen to await her sister's return.

While there she heard a child screaming. She went to check and found the door open. She entered and found the appellant therein. She screamed and her sister who was not far came and found the appellant

inside the house. On checking the complainant's clothes and sheets she found them to be wet. She took the child to hospital and the matter was reported. The appellant was arrested but ran away and was re-arrested in August 2009. The appellant was not known to PW1 prior to this incident.

The Gituburi sub-area (PW2) received the report of this incident on 8/8/2006. The appellant who was a herds-boy in the village was arrested but he ran away before reaching the police station. They apprehended him in August 2009 and took him to Siakago police station. PW3 re-arrested the appellant on 18/8/2009 from PW2 and others.

PW4 examined the child and produced the P3 (PEXB1). He further produced treatment notes of the complainant on behalf of a clinical officer called Elizabeth (PEXB2). The appellant had no objection to the production. The appellant gave an unsworn statement saying PW1 was his girlfriend though she was with child. She wanted him to marry her but he declined since she was older than him. He married another woman and PW1 framed up this charge against him.

When this appeal came for hearing the appellant presented the court with written submissions raising the following issues:-

- ***There is contradiction on the exact time the offence occurred.***
- ***There are crucial witnesses who were not called to testify.***
- ***The P3 form PEXB1 was filled in 2009.***

The State through learned State Counsel Mr. Wanyonyi conceded the appeal on the following grounds.

- ***crucial witnesses were not called to testify.***
- ***The doctor's findings were not conclusive.***
- ***The defence of the appellant was overlooked.***

As a first appeal Court I have the duty to re-evaluate the evidence adduced and come to my own conclusion. I am alive to the fact that I did not have the advantage of seeing or hearing the witnesses. I am guided by the case of ***AJODE VS REPUBLIC [2004] 2 KLR 81*** where the Court of Appeal stated:-

“In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen or heard the witness and make allowance for that.”

I have considered the submissions, the grounds of appeal and the evidence on record. It has come out clearly that this alleged incident occurred on 6/8/2006 at night. PW1 said she only came to know the appellant at the time of incident. She told the Court that she had been left with her sister's children and the complainant. All these children were asleep presumably in the same room. The Court was not told what the ages of these children were. If they were older than the complainant why were their statements not recorded?

Given that the time of incident was at night, it was imperative that the learned trial Magistrate establishes that the conditions were favourable for a positive identification. Secondly PW1 was a single identifying witness, hence the extra need for the learned trial Magistrate to be cautious with her evidence.

I will first of all examine the conditions that prevailed at the time of the alleged commission of this offence. This is what PW1 stated in her evidence at page 6 lines 20 -27

“After eating I realized that the kids wanted to sleep. This was at 8.00 p.m. I prepared and ensured that they were asleep. I got back to the kitchen and awaited for the return of my sister. Shortly I heard a child screaming. I went to check on what was up. I found the door having been opened. I got inside and found someone thereat. I screamed and by that time my sister was not far. The fellow I saw was at the point where the children were. My sister came about and on opening the door accused was found therein”.

From this narrative there is no mention of what enabled her on this night to identify this stranger in the house. There was no form of light mentioned. In the case of **WAMUNGA VS REPUBLIC [1989] KLR 424** the Court of Appeal held as follows:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction“.

The learned trial Magistrate did not even attempt to interrogate the conditions for a favourable identification. Its clear PW1 was the only identifying witness who testified. The Court of Appeal in the case of **KIILU & ANOTHER VS REPUBLIC [2005] KLR 174** held thus:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.”.

The leaned trial Magistrate states in his judgment that PW1's evidence was straight forward and he was convinced that PW1 found the appellant in the children's room. Since the circumstances of the identification are found to be wanting the Court ought to have looked for corroborating evidence to support it. First of all the appellant was not arrested at the scene. Therefore the only other evidence to corroborate PW1's evidence could have been that of:-

- (i) Her sister
- (ii) The children who were with the complainant in the same room.

None of these witnesses mentioned in (I) and (ii) were ever called to testify. And the only logical inference to make is that their evidence would not have supported that of PW1. In **JUMA NGODIA VS REPUBLIC [1982 – 1988] 1 KAR 454** the Court of Appeal held:-

“The prosecutor has in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced, would, if produced have been unfavourable to the prosecution.”

I do find that the failure to call the witnesses mentioned in (i) and (ii) was a serious omission with the above inference being adopted. PW2 a sub-area went to arrest the appellant who he said was a herds-boy. Where did he get his description from? PW1 did not know the appellant before. The medical evidence of PW4 is also wanting. The incident allegedly occurred on 6/8/2006 and PW1 said the complainant was treated on 8/8/2006. Why was the P3 not filled soon thereafter? PW4 examined the child on 19/8/2009. Besides what he picked from the treatment notes of 8/8/2006, what were his own findings? Was the hymen freshly broken? Its nowhere noted that there were bruises and/or any bleeding. This piece of evidence was not conclusive as correctly pointed out by learned State Counsel.

There having been allegations of a love relationship between the appellant and PW1 it was important that the prosecution proves beyond doubt that it is the appellant who was at the scene on that material night. My finding is that the learned trial Magistrate did not properly analyze the facts before him. The State has rightly conceded this appeal which I find to have merit. I allow it and quash the conviction. The sentence of life imprisonment is set aside.

The appellant to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13TH DAY OF FEBRUARY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Miiri for State

Appellant

Njue CC