



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 180 OF 2012

FRANCIS NDUNGU MAKIRI APPELLANT

VERSUS

REPUBLICRESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO (J.N. MWANIKI S.R.M) IN CRIMINAL CASE NO. 942 OF 2010 DELIVERED ON 20TH JUNE 2011)

JUDGMENT

The appellant herein FRANCIS NDUNGU MAKIRI was on 20th June 2011 convicted by Mr. J.N. MWANIKI (S.R.M) for the offence of defilement of a girl contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act** and sentenced to life imprisonment.

He has now filed this appeal against both conviction and sentence in which he raises eight (8) grounds of appeal. During the hearing of the appeal, he referred to his written submissions adding that during the trial, PW1 said he was called SAI but he is not SAI. The state through Mr. Omayo State Counsel opposed the appeal saying he was properly convicted and he was not framed as he now alleges. He urged me to dismiss the appeal against both the conviction and sentence.

As a first appellate Court, I have re-examined the evidence as I should – **OKENO VS REPUBLIC 1972 E.A 32 and PANDYA VS REPUBLIC 1957 E.A 336.**

Five (5) prosecution witnesses testified. The complainant who was aged nine (9) years at the time she testified told the Court in an un-sworn statement following a voire dire examination that on 11th November 2010, the appellant who was his neighbour called her into his house while she was playing with other children and proceeded to cook ugali for her and one M (PW2). He then asked M to leave, then he closed the door and did bad things to her and threatened her with death if she screamed. She later reported the incident to her mother and neighbours arrested appellant and took him to the Police station. She was taken to hospital for examination.

JM (PW2) was also aged eight (8) years at the time of the trial and also gave un-sworn testimony following an oral examination. He re-called that on the material day, he was at the appellant's house whom he identified as SAI. After appellant had cooked ugali for them, he asked the witness to leave. The witness left but saw appellant doing bad things to M. He saw appellant remove M 'S clothes and sleep on her. He saw this by peeping through the window. LI (PW3) is the mother to complainant and said she is also called M. She stated that at about 2 p.m. on 11th November 2010 she went home and when her mother asked her what she had been doing at the home of SAI, she said SAI had engaged in

sexual intercourse with her. She said SAI who is the appellant is their neighbour and he was arrested and escorted to the Police station while the complainant was taken for medical examination.

P.C ANNE ACHIENG (PW4) of SAGANA POLICE STATION testified that a complaint of defilement was reported to her on 11th November 2010 which she booked and escorted the complainant to Sagana Health Center where she was examined and her P3 Form (Exhibit 4) was filled. The complainant later identified the appellant as the person who had lured her into his house. The witness took possession of the complainant's skirt, blouse and pants (Exhibit 1, 2 and 3).

NANCY KURIA (PW5) is a Clinical officer based at Sagana Health Center. On 12th November 2010, she examined the complainant aged about nine (9) years who gave a history of having been sexually assaulted by a known person on the previous day. On examination, she had an inflamed external genitalia that was red and swollen. Her hymen was also broken. No spermatozoa was seen by the witness who however concluded that the complainant had engaged in penetrative sexual intercourse. The witness filled and signed the P3 Form which she produced as exhibit (Exhibit 4).

In his un-sworn statement in defence, the appellant confirmed that the complainant was his neighbour and that on 11th November 2010, he was on his way home at 7.30 p.m. when about ten (10) people attacked and arrested him. He was then taken to the Police station and charged the following morning.

In his appeal, the appellant apart from stating that he pleaded not guilty has also raised issues such as that there was no evidence of defilement, that there was a long standing dispute between him and the complainant's mother, that he was not taken for medical examination, that his defence was not considered, that the prosecution lied to the Court about the time of his arrest and that the trial magistrate erred in law and in fact by failing to consider that the clothes of PW1 produced as exhibits were soiled portraying that the act was done in the bush or garden.

On the ground of appeal that there was no evidence of defilement, the complainant's P3 Form (Exhibit 4) not only indicated that her hymen was ruptured and there was evidence of an inflamed genitalia but also goes on to state in paragraph 6 as follows:-

“There is evidence of penetration”

Further, NANCY KURIA (PW5) the Clinical officer who examined the complainant a day after the incident confirmed in her oral testimony that the complainant ***“had engaged herself in penetrative sexual intercourse”***. Therefore, the ground of appeal that there was no evidence of defilement is not supported by the record herein and must be dismissed.

The claim that the complainant's clothes were soiled and therefore the act was done in the garden is also not borne out of the evidence. In her testimony, P.C. ANNE ACHIENG (PW4) only said the complainant's skirt and blouse ***“were dirty while the pants had been washed”***. There is no mention of any soil if that is what the appellant is alluding to when he talks of the act being done in the garden or bushes. That ground of appeal is also dismissed.

On the ground of appeal that there was a long time dispute between the appellant and the complainant's mother, the complainant's mother testified as PW3 and in cross-examination by the appellant, she denied the existence of any such dispute. She said as follows when that issue was put to her by the appellant:-

“I have been to your home but not inside your house. My animals don't stray into your shamba. We have never been made to pay you over your crops destroyed by our cows. We have no boundary dispute with you. We have no grudges with you”.

And even in his defence, the appellant did not allege that this case could have been maliciously instigated by the complainant's mother due to a grudge between them. As his defence was brief, I

reproduce it below:-

“I am FRANCIS NDUNGU MUKIRI. I reside [Particulars withheld] I know the charges against me. I know complainant, my neighbour. On 11th November 2010 I left home on the morning for casual labour at somebody’s shamba. While walking back home at about 7.30 p.m. and near my home about 10 people attacked and arrested me. They took away my watch and shoes and blocked my mouth with a piece of cloth. They escorted me to Police station whereat I was locked up without being informed the reason of my arrest. I was arraigned in Court the following day. That is all”.

Clearly if there was any grudge between him and the complainant’s mother which could have resulted in this case being framed against him, that would have come out in his defence. There is however no suggestion in his own defence that this case was instituted maliciously. That ground of appeal similarly fails.

The other ground is that he was infact arrested by a mob and not the police and therefore the trial magistrate erred in law and fact in not considering that the prosecution lied to that effect. P.C. ANNE ACHIENG (PW4) only told the Court that she was the Investigating officer and not the arresting officer. She never said appellant was arrested by the police. She only said the appellant was arrested at night. Even if the appellant was arrested by a mob as he states, nothing turns on that. A member of the public is entitled in law to make an arrest. **Section 34 of the Criminal Procedure Code states as follows:-**

“A private person may arrest any person who in his view commits a cognizable offence or whom he reasonably suspects of having committed a felony”.

According to the complainant’s mother (PW3), she and others arrested the appellant after this report had been made to her by complainant and he was taken to the Police station. That was perfectly in order. That ground of appeal similarly fails and is dismissed.

The appellant also says he was not taken for medical examination. As there was no suggestion that the complainant was infected with any sexually transmitted disease following the defilement, there was no need to medically examine the appellant. That ground similarly fails.

The appellant also raises the issue that there was no independent witness. In his submissions, he says the trial magistrate relied on a pack of lies. It is true that the only eye witness to this incident were the complainant (PW1) and M (PW2) who gave their respective ages as 9 years and 8 years at the time that they were testifying. The complainant’s age was confirmed by NANCY KURIA the Clinical officer (PW5) and is indicated on the P3 Form (Exhibit 4) as 9 years. This witness being a medical practitioner, her evidence as to age can, in the absence of any other contradictory evidence, be taken as a correct assessment of the complainant’s age and the Court is obliged to accept such assessment. The trial magistrate having been satisfied that the complainant and PW2 were children of tender years as defiled in the **Children’s Act**, proceeds to conduct a voire dire examination before allowing them to give un-sworn testimony. The said voire dire examination may not have been as exhaustive as was set out in the case of **KINYUA VS REPUBLIC 2002 I K.L.R 256** but in my view, it substantially achieved what was intended because in the course of his judgment, the trial magistrate observed as follows:-

“The Court did conduct a voire dire by putting several probing questions to the complainant (PW1) and PW2 and did form an opinion that although they did not understand the nature of an oath, they were possessed of sufficient intelligence and did understand the duty of speaking the truth to justify taking their evidence”

It is clear from the above that the trial magistrate who had the benefit of observing and hearing the complainant was satisfied that she understood ***‘the duty of speaking the truth’***. The law allow a Court to convict on the evidence of a child witness in a sexual offence if it is satisfied that the child witness ***“is telling the truth”*** – see **Section 124 Evidence Act**. It is clear from the proceedings herein that the trial magistrate was so satisfied and was entitled to found a conviction on the complainant’s evidence.

On my part, he was entitled in taking that path. The complainant's testimony was cogent and her account of what transpired was vivid and her recognition of the appellant who was their neighbour cannot be faulted as the incident happened during the day.

Although the trial Court regarded the evidence of the complainant's mother as corroborative, I think such evidence could only be corroborative of the fact that the complainant had indeed been defiled. The complainant's mother did not actually witness the defilement but if corroborative was required, it is to be found in the evidence that the appellant was the only adult person who was in contact with the complainant on the day she was defiled and had an opportunity of committing the offence – **MALONZA VS REPUBLIC 1986 K.L.R 426**. Nonetheless, the trial magistrate having found as he did, that the complainant was speaking the truth, he was entitled to base a conviction on such evidence and he cannot be faulted on that. Therefore, the ground of appeal that the appellant was convicted on evidence that was not independently verified is unfounded and is rejected.

The other complaint is that the evidence against him was from members of the same family. Only two of the witnesses were family members and there is no law that prohibits family members from testifying against a suspect. I also do not discern any contradictions in the prosecution case. That ground of appeal similarly fails.

The complaint that his defence was not considered is also lacking in merit. In his judgment, the trial magistrate indicated that he had "***considered the charge herein, the evidence on record and exhibits produced***". The evidence on record obviously included the appellant's defence and the trial magistrate concludes in his judgment as follows:-

"After a careful analysis of the evidence on record, I have come to the conclusion that there is sufficient evidence to support and substantiate complainant's allegation against the accused person"

Having re-evaluated the evidence, I am satisfied that the appellant was properly convicted. I accordingly dismiss the appeal against conviction.

On sentence, **Section 8 (2) of the Sexual Offences Act** is couched in the following mandatory terms:-

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"

The trial magistrate had no other option with regard to that sentence which is lawful.

Ultimately therefore, the appellant's appeal against both conviction and sentence is hereby dismissed.

B.N. OLAO

JUDGE

11TH FEBRUARY, 2014

11/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Appellant – present

Sitati for State – present

COURT: Judgment delivered this 11th day of February 2014 in open Court.

Appellant present in person

Mr. Sitati State Counsel present

Right of appeal explained.

B.N. OLAO

JUDGE

11TH FEBRUARY, 2014