



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.97 OF 2010

MARK KARIUKI NTHIAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 748 of 2008 at the Magistrate's Court at Runyenjes by HON. D.O. ONYANGO – SRM on 23rd June 2010

J U D G M E N T

MARK KARIUKI NTHIA was charged with the following offences;

Defilement of a girl contrary to section 8(1) as read with sub-section (3) of the Sexual Offences Act No.3 of 2006.

The particulars of the charge being that;

MARK KARIUKI NTHIA: On the 21st day of October 2008, in Embu District within Eastern Province had unlawful carnal knowledge of JM a girl of the age of 15 years.

Alternative Count

Indecent Act contrary to section 11(1) of the Sexual Offences Act No.3/2006

MARK KARIUKI NTHIA: On the 21st day of October 2008, in Embu District within Eastern Province unlawfully and indecently assaulted JM a girl of the age of 15 years by touching her private parts.

The Appellant plead not guilty to both counts and the matter proceeded to full hearing. He was then convicted of the main count and sentenced to 25 years imprisonment. He was dissatisfied with the Judgment and filed this appeal against both conviction and sentence. He raised the following grounds;

1. ***That the trial Magistrate erred in both points of law and fact by convicting the Appellant***

- without considering that he was in custody when the alleged offence was committed.*
2. *That the learned trial Magistrate erred in both points of law and fact by convicting the Appellant without considering that he was not arrested following the report of the alleged offence.*
 3. *That the learned trial Magistrate erred in law and fact by continuing to hear the Appellant's case even after the Appellant urged him not to since he had already presided over a similar case and sentenced the Appellant to ten (10) years (Cr. Case No.757/08).*
 4. *That the learned Magistrate erred in law and fact by convicting the Appellant despite weak prosecution witnesses and contradictions.*
 5. *That the learned Magistrate erred in law and fact by rejecting the Appellant's defence without sufficient reasons.*

The facts of the case are that PW1 then aged 15 years old was coming from Karurumo market on 21/10/2008 at about 6pm where she had gone to the Posho Mill and to buy medicine. While near Karurumo Primary School she saw the Appellant standing on the road holding a bicycle. He was seated on the seat of the bicycle but not riding it. She knew the Appellant as Kariuki whom she had been seeing at Karurumo repairing bicycles. She passed by him and after going for about 300m the Appellant bypassed her riding his bicycle and parked it in a bush about 70m ahead of her. He came to her direction and held her and dragged her into a nearby bush. He held her neck using his arm as he dragged her. She tried to scream but he produced a knife and threatened her with death if she screamed. He removed her skirt, biker and pant and pushed down his trousers. He then defiled her. When he was through he left her in the bush. She went to the nearest home which is PW2's home. She found him and reported to him what had happened. He escorted her to the scene and she picked the medicine, flour and shoe which she had dropped. He escorted her home and when her mother (PW3) arrived they reported to her what had happened. PW3 immediately took her to Karurumo Health Centre and she was treated. The next day they went back to the Health Centre and thereafter to the Runyenjes Police Station to report. She left at the station the white T-shirt, grey skirt, biker and pant (EXB 3-6) which she had worn on the material day. She gave the Appellant's name to the Police and to the Headmaster, who later arrested him and she confirmed to them he was the Kariuki who had defiled her. PW2 confirmed what he had been told by PW1 and what he did. The same to PW3. The medical evidence by PW4 and PW5 confirmed that indeed PW1 had been defiled (EXB 1 and 2). PW4 also did an age assessment PW1 and confirmed that she was 16 years old. PW6 an officer from Runyenjes confirmed that PW1 had given the name of the suspect. This was on 22/10/2008. She called Administration Police Officers at Karurumo to assist arrest the suspect as he was a known bicycle repairer. She was informed on 23/10/2008 that he had been arrested. PW7 was the arresting officer. He arrested the Appellant on 22/10/2008 at 5.50pm.

In his unsworn statement of defence he stated that on 21/10/2008 he was arrested. At 11am the incharge called him to his office where he met the assistant chief with four (4) others including the chief, Headmaster of Karurumo School and two policemen. He was called to the office of the incharge to see the complainant (PW1) who told him nothing. He was then locked up in the cells. He stated that since he was in the cells on 21/10/2008 he could not have defiled PW1 on 22/10/2008.

When this appeal came for hearing the Appellant presented the Court with written submissions raising the following issues;

- i. That from the charge sheet he was actually in custody when this offence was committed.
- ii. The Court relied on the evidence of a single witness
- iii. There was no evidence of defilement
- iv. Defence was not considered

The State through the learned State Counsel Mr. Miiri opposed the appeal saying the Appellant was identified by the complainant who knew him and even his children. He further said there had been no good reason raised for the learned trial Magistrate to disqualify himself.

The duty of a first appeal Court as this one is to reconsider and evaluate the evidence on record and arrive at its own conclusion. It should not lose sight of the fact that it did not see or hear the witnesses. This

was the holding in the case of *KIILU & ANOTHER –V-S REPUBLIC [2005]1 KLR (174)*

- i. ***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 conclusions.***
- ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions by the Appellant and the State plus the grounds of appeal. I have equally considered the evidence on record. On the 1st and 2nd grounds the charge sheet shows that the Appellant was arrested on 21/10/2008 and arraigned in Court on 23/10/2008. This issue was raised in the Appellant's defence and was addressed by the learned trial Magistrate in his Judgment at page 31 lines 33 through to page 32 lines 1-7 when he stated as follows;

“Having carefully listened to the evidence of the prosecution witnesses it is clear in my mind that the date of 21/10/2008 appearing on the charge sheet as date of arrest of the accused is clearly an error. From the evidence of PW6 and PW7 the accused was arrested on the 22/10/2008. Infact from the evidence of PW6 he received 2 calls on the 23/10/2008 that the accused was already arrested and was at Karurumo APs Camp. It is clear that the accused having noted the error on the charge sheet seeks to take advantage of the same for his benefit. Having carefully considered the entire evidence I find that the said error does not affect the substance and credibility to be attached to the Prosecution case”.

I entirely agree with the learned trial Magistrate on this finding. The evidence of the witnesses is clear that the Appellant was arrested on 22/10/2008, the report having been made on the same date. Secondly he did not at any time tell the Court which was this offence that he had been arrested for on 21/8/2008. The 1st and 2nd grounds must fail. Coming to the 3rd ground the record shows that the plea was taken by the same Court on 23/10/2008. The hearing commenced on 23/2/2009 before the same Court. The 5th witness testified on 18/5/2009. When the matter next came for hearing on 14/9/2009 the Appellant asked the learned trial Magistrate to disqualify himself from hearing the case because he had been sentenced by the said Court in a case of a similar nature. The Court heard his application and made a Ruling in the following words at page 17 – lines 12-27

“Court: I have heard the application by the accused asking that I disqualify myself from handling this case. I have also heard the objection by the Prosecution. It is clear that the reason the accused is not comfortable with this Court is because he is already serving a long jail sentence in respect to different case. I have noted that at least 5 witnesses have already testified in this case. Merely by reason that I have handled a different case where the accused was convicted is not good enough for me to disqualify myself. The accused has not brought any evidence to indicate that there is likelihood of bias in the event that I proceed with this case. The Court is capable of handling each case on its own merit and come to a conclusion based on the evidence on record. To ask that I disqualify myself would be tantamount to punishing the witnesses. It appears that as the accused is serving the sentence, he no longer sees the urgency of having this matter completed. The Court will not offer the accused the luxury of choosing which Court to go as to disqualify myself at this stage will be tantamount to prolonging the hearing of this case. Application is dismissed”.

The Court well considered the application. If the Appellant had any genuine reason to make the learned trial Magistrate disqualify himself he could not have waited for five (5) witnesses to testify before raising the issue. Secondly he had to show that there was a likelihood of the learned trial Magistrate being biased against him. There was none shown. Grounds 3 also fails.

Ground 4

The complainant was confirmed to have been 15 years at the time of the commission of the offence. The doctor (PW4) later examined her for age assessment and found her to be 16 years. The medical evidence by PW4 and PW5 confirmed that PW1 had been sexually penetrated. Though there was no eye witness besides PW1 her evidence was corroborated first of all by PW4 and PW5. Her conduct after the incident also gave support to her evidence. She went to the nearest home and found PW2 to whom she reported. PW2 went to the scene with her and found the flour, medicine etc. PW1 and PW2 immediately reported to PW1's mother (PW3) when she arrived home. She was taken to hospital. When she reported to PW2 she gave him the name and description of the defiler. She did the same to her mother (PW3) and her Headmaster. All this led to the immediate arrest of the Appellant. It is the name and description of the Appellant which she gave that led to the arrest of the Appellant. Upon the arrest she was called and she confirmed that the Appellant was the person who had defiled her. This Court finds corroboration of PW1's evidence in all these pieces of evidence. Still on PW1's evidence I find that throughout her evidence even after being recalled for cross examination she insisted that the offence occurred at around 6.00pm and it was not dark hence her ability to identify the person who defiled her. The learned trial Magistrate stated this of PW1 at page 32 lines 11-15;

“Though the accused has been identified only by PW1, I find PW1 to be both intelligent and consistent in her evidence. She was subjected to the thorough cross-examination by the accused even after being recalled for further cross-examination yet she remained consistent and steady in her evidence”.

I have no reason to fault that finding of fact. That ground also fails.

The learned trial Magistrate well considered the defence of the Appellant and found it to be an afterthought based on the error that was in the charge sheet. Ground 5 also fails.

After analyzing the evidence on record together with the grounds of appeal I am satisfied that the learned trial Magistrate arrived at the correct decision and I have no reason to make me interfere with it. The Appellant was a repeat offender of a similar offence. He was sentenced to 25 years imprisonment. The minimum sentence under section 8(3) Sexual Offences Act is 20 years. Considering that he was a repeat offender, I find the sentence to be lawful. The result is that the appeal is dismissed.

Right of appeal explained.

DATED AND DELIVERED AT EMBU THIS 13TH DAY OF FEBRUARY 2014

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c