



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 75 OF 2013

Appeal from original conviction and sentence by the Resident Magistrate (I.W. Gichobi, RM) in Criminal Case No. 430 of 2012 at the Senior Principal Magistrate's Court at Mwingi

FRANCIS MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

Francis Musyoka, the appellant, was charged at the lower court in Mwingi with defilement contrary to section 8(1)(3) of the Sexual Offences Act. The particulars are that on the 13th day of July 2012 at [particulars withheld] in Migwani District of Kitui County intentionally caused his penis to penetrate the vagina of M K a child aged 14 years.

The appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The alternative charge is alleged to have been committed on the same date and time as the main charge and the victim is the same girl M K aged 14 years.

The prosecution case

M.K, PW1, (particulars withheld) attended overnight Christian fellowship commonly known in Kiswahili as “kesha” at a local church near her home. The time was about 7.00PM and the date was 13th July 2012. She found there were no people and decided to go to buy a torch at a shop belonging to the appellant. The appellant seduced her but she refused. He gave her Kshs 100 and she accepted his sexual advances. The appellant told her to go into the shop through the back door. They had sex and after about 20 to 30 minutes PW1 walked out of the shop and went back to the church.

It seems that their little secret was out. As the girl was entering the shop using the back door, one Stephen Kitanda Kimeli, PW3, who was in a nearby bar spotted the girl going into the shop through the back door. Perhaps out of concern of just sheer curiosity, PW3 suspected something and decided to sit outside and wait to see what happens.

After about 30 minutes, the girl came out through the back door. PW3 knew the girl and within no time, word went round. By the time the girl reached the church, even the pastor knew.

Her mother, A M K, PW2, was informed about the matter the following day. She took her daughter to

hospital and reported the matter to the police. PW1 was treated and the P3 form completed. The appellant was later arrested and charged.

The defence case

The appellant denied committing the offence. He testified under oath and stated that on 13th July 2012 he was in the shop with his wife Felistus Wango Kilumba, DW2, at 7.00PM. He testified that after the wife cooked food at the shop, they went home at 8.00PM. He denied that PW1 went to his shop that day. He said he did not have a grudge with PW1's family but was claiming a debt of Kshs 700 from her. He attributed his problems to another case he had with one Kombo Mbai which he said caused that complainant to report to the church that the appellant should be jailed.

DW2 testified that after she joined her husband at the shop on 13th July 2012 and they closed business at 8.00PM and went home. She said it is lie that PW1 was defiled. She said PW1 had a debt with them of Kshs 700.

After considering the evidence from five prosecution witnesses and two defence witnesses, the trial court was convinced that the offence was committed. She convicted the appellant and sentenced him to twenty years in prison. The appellant is dissatisfied with the conviction and sentence and has come to this court on appeal.

Petition of appeal

By his amended petition of appeal, the appellant has raised four grounds which I have summarized as follows:

- i. That the charge sheet is defective.
- ii. That the prosecution did not prove its case beyond reasonable doubt.
- iii. That there were contradictions in the prosecution case.
- iv. The mode arrest was not established.

Submissions by the appellant

In support of the grounds of appeal, the appellant has submitted that the charge is defective because it cites section 8(1)(3) of the Sexual Offences Act and not section 8(1) as read with section 8(3) of the Sexual Offences Act; that the particulars do not state that the male genital organs penetrated the female genital organs but instead gives the names of the genital organs themselves which is against the law; that the record of the court fails to show that the charges were read over to the appellant and that he responded to them.

He further submitted that the evidence is inconsistent and contradictory and does not prove the case beyond reasonable doubt; that the evidence of the doctor is contradictory on the date the complainant was examined and that the mode of arrest has not been established because it is not shown who arrested the appellant.

Submissions by the respondent

The state conceded to the appeal submitting that section 124 of the Evidence Act is not applicable and that section 211 of the Criminal Procedure Code was not complied with.

Determination

As required of this court sitting on first appeal, I have examined all the evidence and evaluated it afresh. I have also considered the grounds of appeal.

Starting with the defective charge, it is true that the section quoted is section 8(1)(3) of the Sexual

Offences Act. The appellant challenges this and I agree with him that the prosecution ought to have brought the charge under section 8(1) as read with section 8(3) of the Sexual Offences Act. Despite this, it is my considered view that the charge gives adequate particulars to enable the appellant understand the charge he was facing. The record shows that he participated in the trial in a manner that indicates that he understood the charge. He was also represented through-out the trial by a legal counsel. I take the view that the appellant was not prejudiced as a result of this error. It is a type of error that is curable under section 382 of the Criminal Procedure Code which provides as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Failure to correctly word the charge does not in my view occasion failure of justice. Further, the appellant did not raise this issue during the trial despite having a defence counsel.

I have considered the issue that the charge is not worded properly in describing the genital organs and find that it has no merit and I hereby reject it.

The manner in which the appellant was arrested is being questioned. I have examined the evidence of Corporal Mutiso Nyamai, PW5, who arrested the appellant. I find no issue with the manner in which he was arrested.

I will discuss the issue on inadequate and contradictory evidence together. PW1 testified that she was seduced by the appellant and she agreed to have sex with him. She said she was not forced into it but agreed after she was given money. During her testimony in cross examination and re-examination PW1 admitted that she had had sex with the appellant more than once before. Her hymen was found broken. She was a sexually active girl and she said the appellant used to give her money every time they had sex.

The evidence of a minor who is a victim of a sexual offence can be relied on to base a conviction on and does not require corroboration as long as the court records the reasons for believing the child's evidence.

I have however considered the evidence of PW3 who, though he did not witness first-hand the offence taking place, saw PW1 enter the appellant's shop through the back door and coming out after 30 minutes. PW1 estimated the time she stayed with the appellant inside the shop as between 20 to 30 minutes. This evidence corroborates that of PW1.

I have considered the defence of the appellant and the evidence of DW2 his wife. The evidence that the girl did not go to the appellant's shop cannot be true.

I have noted that the trial magistrate correctly analyzed all the evidence and was convinced that the charge had been proved beyond reasonable doubt. On my part, I have considered the evidence for the prosecution and the defence. I arrive at the conclusion that the evidence is adequate and proves beyond reasonable doubt that the appellant committed this offence.

PW1 said she was not forced to have sex with the appellant. She is a minor who has no capacity to consent to sex. She is a child who requires protection from people like the appellant.

The learned state counsel conceded to this appeal. I am surprised that he did so. He relied on the failure of the trial court to comply with section 211 of the Criminal Procedure Code (CPC) and submitted that he

did not know whether section 124 applies in this case. I agree with him that the record does not show that section 211 CPC was complied with. Does this failure nullify the trial in the lower court? My answer is in the negative. I have said that the appellant had legal representation. The appellant gave a sworn defence and called his wife as his witness. Either the magistrate failed to indicate compliance to that section or actually omitted to comply. The appellant though put his defence in a manner that shows no injustice or prejudice was occasioned to him. In my view, this is an error that is curable under section 382 CPC above especially when there is no injustice was occasioned on the appellant. (**see Daniel Chege Kamundia & 2 others v. Republic [2006] eKLR**).

Conclusion

The appeal has no merit in my view and I fault the state counsel for conceding to it. The appellant was properly tried and convicted. There is adequate evidence in support of the charge. I have no reason whatsoever to disturb the findings of the trial court. I hereby confirm the conviction and uphold the sentence. The appellant shall continue serving the sentence. I make orders accordingly.

Dated, signed and delivered this 17th March 2014.

S.N.MUTUKU

JUDGE