REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 140 OF 2013

(An appeal against both conviction and sentence of the Senior Resident Magistrate's court at Vihiga in Criminal Case No. 697 of 2012 [S. N. MWANGI, AG. SRM] dated 9th July, 2013)

JOHN VOI ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with defilement of a girl child contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of charge were that on 24th of July 2012, in Vihiga County within Western Province intentionally and unlawfully defined a girl child namely B A by causing his genital organ namely penis to penetrate into the genital organ namely vagina of the said girl aged 9 years. In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the same Act. The particulars were that on the same day and place wilfully and unlawfully caused his genital organ namely penis to make contact with the genital organ vagina of a girl namely B A aged 9 years.

He denied both charges. After a full trial, he was convicted on the main count of defilement. He was sentenced to serve life imprisonment.

Being dissatisfied by the decision of the trial court, he has now appealed to this court on several grounds, against both conviction and sentence. He initially filed a petition of appeal in person. Later, his advocate, M/S Lugadiru & Company filed a petition of appeal. At the hearing of the appeal, Mr. Lugadiru, learned counsel who appeared for the appellant, relied on both petitions of appeal.

Counsel submitted that the trial magistrate erred in convicting on the evidence of PW1 who was a minor, which was not corroborated. Though PW1 was with her sister and other children before the incident occurred, none of the children was called in court to testify. Counsel added that the investigating officer did not tell the court that there was an education day which the complainant had to attend. There was also no evidence that the investigating officer went to the scene of the incident, as no such indication was made in his diary. Counsel also added that there was a contradiction in the date of the alleged incident. Though the charge sheet indicated the date of offence as 27/7/2012, PW3 stated that the incident occurred on 7/7/2012. This in counsel's view was a material contradiction.

In addition, counsel submitted that the complainant did not tell anyone about the incident for two days. The Clinical Officer, PW5 also stated that the complainant was not in school uniform when he saw her. The conclusion of the Clinical Officer that the penetration was un-consented to was not factual, as he was not present at the scene. Counsel also complained that the learned trial magistrate was partisan by conducting proceedings upto 5 p.m. In counsel's view, the fact of that the magistrate sat upto 5 p.m., indicated that she had a bias in favour of the prosecution.

Counsel emphasized that there was no evidence that the minor complainant had identified the appellant as the culprit. Lastly, counsel submitted that the Assistant chief who arrested the appellant was also not called to testify.

The learned Prosecuting Counsel, Mr. Oroni conceded to the appeal. Counsel submitted that the evidence of the complainant PW1 created doubts. She stated that she was taken to the kitchen alone. The grandfather, PW2 stated that he knew the appellant well before the incident. It would therefore beat logic for them to make a report to the police without mentioning his name or description being given.

In addition, the age of the minor complainant was not conclusively proved. Only an immunization card, which was not certified or stamped, was relied upon to establish the age. In counsel's view, that immunization card was not sufficient to establish the age of the complainant. Lastly, counsel argued that the appellant put a strong alibi defence which was not shaken.

The facts of the prosecution case are that on the 24/7/12, the complainant PW1 B A, was coming home from attending a public function at [particulars withheld] Primary School. It was around 4 p.m. and she was alone. She met a person who told her to go close to him to give her a sweet. When she approached him, he gave her two sweets, held her hand and took her to his kitchen. In the kitchen was firewood, cooking pots and a bed. He removed his clothes as well as her clothes after closing the door, and told her to part her legs. He then put his “dudu” into her vagina, and thereafter wiped her and himself with a shirt which was on the bed. He cautioned her not to tell anybody, about the incident, otherwise he would cut her into three pieces. The complainant went home and did not tell anybody.

On the 26/7/12 which was after about two days, the complainant was with her grandmother. It started raining. The grandmother PW3 M O asked her to climb some steps to avoid the rain. The complainant found it difficult to do so because of pain. On noticing this, the grandmother PW3 checked her and found that she had been defiled. Her grandfather PW2, J O was informed. The complainant was then taken for treatment. The matter was also reported to the police. The Clinical Officer, PW5 – Sammy Chelule produced the P3 form and treatment notes. He did not treat the complainant. The appellant was later arrested by members of the public and handed over to the police. He was subsequently charged with the offence.

When put on his defence, the appellant gave a sworn statement. He stated that on 24/7/12 he was at home with his wife Makungu. That he did not go anywhere that day. That he was arrested on 27/7/12 on the road leading to Gisambai where he had gone looking for traditional vegetables for his wife who was ill. He called his wife Edith Makungu as DW2 as a witness. He also called a neighbour, Robai Misoga as DW3. Both DW2 and DW3 supported his story. They testified on oath and were cross-examined.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial court thus convicted and sentenced him. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see the witnesses testify to determine their demeanour, and give an allowance for that – see the case of ***Okeno -vs- Republic [1972] EA 32***.

I have re-evaluated the evidence on record. I will deal with some preliminary issued first.

The learned counsel for the appellant has challenged the credibility of witnesses on the variance of the dates. He stated that PW3 said that the incident occurred on 7/7/12 while the charge sheet indicated that theoffence was committed 27/7/12. Having perused both the original and typed record, I am of the view that, even if PW3 did so, that was not a material contradiction. The date of the offence as per the charge sheet is actually 24/7/2012. The point is that in July 2012 the incident is alleged to have occurred. The date of occurrence was not a major item of dispute at the trial. It cannot therefore be fatal to the prosecution case.

Counsel has raised the issue of the magistrate sitting after 5 p.m. In counsel's view, that was an indication of bias in favour of the prosecution side. I do not think so. Once in a while, courts sit beyond the official working hours whether over lunch break or in the evening. Unless there is something else or a specific reason to indicate bias, the fact that a court sits outside working hours alone, cannot in itself constitute bias.

The counsel for the appellant has also submitted that the complainant did not tell anybody about the incident for two days. That in my view is not a valid complainant. A child who is threatened with dire consequences after a sexual assault as was stated in evidence in this case, would most probably be afraid of the threatened consequences and keep quiet in the false hope that keeping quiet is a safer solution. Secondly, it is common knowledge that even adults avoid making public the occurrence of sexual assaults, because of the shameful tag that the same is held by the public and society. I find nothing unusual about the conduct of the complainant.

The learned Prosecuting Counsel submitted that the age of the child was not established since reliance was merely placed on anunstamped immunization card. I have perused the card. It is in the name of B A the complainant. The date of birth is written as 25/3/03. The card and its contents were not contested at the trial. In my view, the fact that the immunization card was produced without any contest or questions on its authenticity and contents, even in the absence of an age assessment report, established the age of the complainant.

I have perused both the proceedings and the judgment of the trial court. The conviction of the appellant was grounded on the evidence of identification of the appellant by a single witness, a minor PW1. The learned trial magistrate cited a number of relevant cases on identification by a single witness. The cases cited were that of ***Roria -vs R. [1967] EA 583***, ***Kiarie -vs- Republic*** , ***Charles Maitanyi -vs-Republic [1986] KLR 198***, and the celebrated English case on identification i.e. ***Regina. -vs-Turnbull [1976] 3WLR 445*** which listed comprehensive consideration by the courts in determining the value of evidence of identification. The learned magistrate also cited Heiden on Evidence 2nd Edition, Butterworth where the value of the evidence of children of tender years was highlighted. Lastly, the learned magistrate cited Section 124 of the Evidence Act (Cap. 80), which states under its provisal that the evidence of a child victim of a sexual offence, need not be corroborated provided the court is convinced that the child is saying the truth and gives reasons for so believing the child.

In our present case, the learned magistrate stated in the judgment as follows -.

> ***"In this particular case I did conduct a*** *vore dire* ***examination and I am satisfied that although the complainant didn't testify under Oath, she told the truth as to what happened to her as earlier stated, the accused person was unknown to her and no grudge existed between them and identified him at a stage. That I am convinced that the complainant was truthful. This I do state bearing in mind of the defence witnesses who testified of how the accused person never left his home on the material day, but I do wonder, would an innocent minor without a good reason wake up one morning and make such serious allegations against one specific person and not forgetting having been identified at a public bus stage and she went further to take her grandparents to the accused's home same having been verified by the investigating officer who visited the scene."***

The evidence on record is that the complainant PW1 knew the place where the incident occurred.

It was in a kitchen of the culprit. She did not know the appellant before. However, the grandmother PW3 knew the appellant well. PW2 the grandfather of the complainant also knew the appellant well. It is of note that PW3 did not record in her police witness statement that she was taken to the kitchen of the appellant by the complainant. Indeed, if PW2 and PW3 had been taken to the scene, even if the appellant was not known to the complainant, it would be easy for them to report the incident to the wife of the appellant DW2, and neighbours immediately and to make a similar report to the police.

The evidence on record however does not show that PW2 and PW3 were taken to the scene of the incident by the complainant immediately after the incident was known on 26/7/2012. There is no indication that they reported to DW2 or neighbours that they were looking for the appellant. The appellant was merely identified a day later on 27/7/2012 because the complainant pointed at him at a bus stage. It is therefore clear to me that the complainant did not positively identify either the appellant or the scene of the incident. If that had been the case, then it could have been common knowledge and the defence witnesses who came to testify would know that the appellant was being sought. It is my view that the identification of the appellant by the minor was far from positive. Though in law, it did not require corroboration, it was not believable. The learned magistrate in my view, erred in convicting the appellant on the evidence of identification by PW1.

The other reason why this appeal will succeed is that the appellant gave a sworn alibi defence. He called two defence witnesses who also testified on oath and were cross-examined. The evidence of the appellant and his two witnesses was consistent and not shaken by the prosecution. It simply displaced the prosecution case. An accused person is not in law required to prove a defence of alibi. The burden is always on the prosecution to prove that the accused has committed an offence beyond reasonable doubt – see ***Leonard Aniseth –vs- Republic [1963] EA 206***.

In the present case, the appellant infact went beyond his duty to merely establish a reasonable doubt. He proved his alibi through his sworn evidence and that of his two defence witnesses DW2 and DW3. The learned magistrate therefore erred in dismissing the defence of the appellant casually.

Though the alleged offence is a serious offence, the prosecution was duty bound to prove that the offence occurred. The prosecution was also bound to prove that the accused person was the culprit beyond any reasonable doubt. Even if the complainant PW1 herein was defiled, the evidence on record does not connect the appellant to the alleged defilement. The conviction cannot therefore be sustained.

In the result I find that this appeal has merits. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 8th day of May, 2014

George Dulu

J U D G E