



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 164 OF 2012

SIMON MUIA PETER KOTI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by E.K. NYUTU Resident Magistrate Karaba in Criminal Case No. 400 of 2012 on 6th October 2008)

J U D G M E N T

1. **SIMON MUIA PETER KOTI** the appellant herein was charged with the offence of **Attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006.**

The particulars as stated in the charge sheet were as follows:-

“On 14th day of August 2007 in Mbeere District of the Eastern Province attempted to defile EKJ a child aged 6 years”.

2. He was also charged with an alternative count of ***Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.***

The particulars as stated in the charge sheet were as follows:-

“On 14th day of August 2007 in Mbeere District of the Eastern Province, committed an act of indecency with EKJ a child aged 6 years by touching her private parts”.

3. The appellant denied the charges and the matter proceeded to full hearing. As a result the appellant was convicted on the alternative count and sentenced to ten (10) years imprisonment.

4. He was aggrieved by the judgment and filed this appeal citing the following grounds:-

(a) ***The trial Magistrate erred in law and facts by failing to hold he was truly framed up.***

(b) ***The trial Magistrate erred in law and facts by failing to hold the prosecution had failed to prove prima facie against him.***

(c) ***The trial Magistrate erred in law and facts by failing to hold none of the prosecution witnesses was an eye witness.***

(d) ***The trial Court failed to hold prosecution evidence on record in contradictory.***

(e) ***The trial Court erred in law by failing to consider his defence.***

5. The prosecution case is premised on the evidence of five witnesses. PW1 (ENK) a child aged 6 years gave unsworn evidence after the Court took her through a *voire dire* examination. It was her evidence that the appellant whom she knew the appellant as he used to work for her grandmother PW2 (BMM).

6. On the material day he asked her to go with him to the shamba leaving her brother S at home. S then followed PW2 to where she had gone for a meeting and reported to her what was happening back at home.

7. PW2 (BMM) and PW3 (PMM) on receiving this report embarked on looking for PW1. They followed footprints but later reached a place where the footprints could not be seen PW2 called out PW1's name. The appellant appeared from a gully and took off. PW2 grabbed him but he overpowered her and ran away.

8. They saw PW1 emerge from the same gully and she had no pants. The black pants (EXB1) was found in the gully. A report was made to PW4 (Cpl. Samuel Kirui). DW5 (Dr. Simon Wambugu Mwangi) who examined PW1 made a finding that she had not been sexually assaulted. The appellant went to the police station and he was charged.

9. In his unsworn defence the appellant denied the charges. He said PW2 had given him the work of cutting trees and had promised to pay him. They went to the shamba for her to see what work he had done and she refused to pay him. She then decided to frame him up. And he went to the police station to report her refusal to pay him.

10. When the appeal came for hearing the appellant presented the Court with written submissions. He questioned the credibility of the evidence of PW1 whom he said had been coached by others. That the medical evidence discredited her evidence.

He further submitted that the police woman who interviewed PW1 was never called as a witness. Finally he submitted on the violation of his constitutional rights though not one of the grounds of appeal.

11. Ms. Mbae for the State opposed the appeal saying there was ample evidence to warrant the appellant's conviction.

12. She submitted that he did not explain what he was doing with PW1 in a trench and why he ran away. Her submission was that the charge of indecent assault against the appellant had been proved.

13. This is a first appeal and this Court is enjoined to re-evaluate the evidence and grounds of appeal and come to its own conclusion. I am also alive to the fact that I did not hear nor see the witnesses. The Court of Appeal in the case of ***PATRICK & ANOTHER VS REPUBLIC [2005] 2 KLR 162*** stated the following on the duty of a 1st appeal Court.

“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. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions”.

14. I have considered the submissions by both the appellant and the State plus the grounds of appeal. I have equally considered the evidence.

15. All the grounds of appeal relate to the weight given to the evidence that was adduced. I will therefore deal with them jointly.

16. The report that was made to the police at Karaba on 14.8.2007 5 p.m. was one of defilement of a 6 year old ENK (PW1).

PW1 in her evidence at page 10 lines 18 – page 11 line 1:-

“I removed my panty. Then accused did bad things to me. I felt pain. I did not scream. He lay on me. When I heard my mother calling me, the accused jumped off me”.

17. The words ***“He did bad things to me”*** is usually taken to mean ***“He had sex with me”***. With a statement like this the result of any medical examination would confirm penetration or even an attempt.

18. PW5 (Dr. Simon Wambugu Mwangi) who examined PW1 made this find at page 27 lines 3 – 10:

“It was unclear from history whether the patient had been defiled. On examination, the girl was in fair general condition. There was no obvious bruising on examination. Patient was wearing a pink underwear.

On physical examination, the external genitals were normal, vaginal wall had no bruises. The hymen was intact. I took a vaginal swab for laboratory tests. Pus cell were seen. There was no spermatozoa seen. Bacterial was seen.

Tests for syphilis and HIV were negative. We put the patient on prophylaxis for HIV. There was no medical evidence of sexual contact”.

This evidence ruled out any sexual contact or attempt.

19. PW1 was the only witness to the complaint of defilement. What she complained of turned out to be untrue.

20. When this failed the Court had to analyze the evidence and see if the alternative charge had been proved. The particulars of the alternative charge were as follows:-

“On 14th day of August 2007 in Mbeere District of the Eastern Province, committed an act of indecency with EKJ a child aged 6 years by touching her private parts”.

21. The appellant in his defence explained how he had been framed up by the complainant's grandmother (PW2) for whom he had been cutting trees. And the reason was that she refused to pay him for the work done.

22. It is therefore clear that the appellant and the first two (2) witnesses knew each other. PW2 had left PW1 and Steve (her grandchildren) at home when she went for a meeting. It was Steve who went to inform her that the appellant had taken PW1 to the shamba.

23. It is not clear what the age of Steve is but this was a crucial witness in this matter.

24. The fact that the attempted defilement count did not succeed did not automatically confirm the alternative count. Evidence had to be led to confirm those particulars of indecent assault.

25. This is what the learned trial Magistrate stated in her judgment while convicting the appellant at page 40 lines 6 – 13:-

“I therefore find that there is no sufficient evidence to sustain a charge of attempted defilement and I accordingly acquit the accused of this offence.

I am however satisfied that the evidence is sufficient to sustain a charge of indecent act with a child as the behaviour of the accused during and immediately after the offence demonstrated a

guilty mind. The accused had an intention of conducting an act of a sexual nature against the child when he took her to a secluded part of the shamba without the knowledge of her grandmother inside a gully, ordered her to remove her pant and lay on top of her”.

26. The star witness in this was PW1. She told the Court that the appellant took her to the shamba, asked her to remove her pant, did bad things to her. She felt pain and he lay on her. The evidence of the doctor discounted all this.

27. It goes a long way to show that PW1 was not being truthful. And if she was not truthful in this, could she be trusted in any other piece of evidence?

My finding is that her evidence had to be corroborated for the Court to rely on it.

28. The Court of Appeal in the case of ***KIILU & ANOTHER VS REPUBLIC [2005] 1KLR 174*** stated thus:-

“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.

29. If what PW1 said is not what happened to her then what exactly was done to her? She never said the appellant touched her private parts. Steve did not testify to confirm the report PW2 alleges to have received from him.

Secondly S could have indeed confirmed if the appellant went to the shamba with PW1.

30. PW2 said she had followed footprints. The time was 3 p.m. There is no mention of it having rained. Where would footprints have come from at a time as that?

31. The appellant may have been with the child as she was used to seeing him cut trees for PW2 at her home. The issue of attempted defilement, indecent act and missing pant were not satisfactorily proved.

The appellant took himself to the police post at Karaba. According to him he was going to report the failure by PW2 to pay him for work done.

32. This may be true or not true. But given the unreliable evidence of PW1 and her grandmother (PW2), my finding is that the Prosecution did not prove its case to the required standard. The result is that the appeal succeeds. The conviction is quashed and the sentence set aside.

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

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF MAY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Mbae for State

Appellant

