



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 168 OF 2012

ZABLON ONGONYO MATOKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the conviction and sentence dated 5th September,
2013 of J.WERE,SRM In Keroka SRMCR. CASE. NO. 296 OF 2008)*

JUDGMENT

Introduction

1. The appellant herein Zablon Ogonyo Matoke was the accused in SRM's court at Keroka Criminal case No. 296 of 2012. He was charged in count 1 with defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 26th day of April, 2006 at [Particulars Withheld] in Masaba District within Nyanza province, he unlawfully and intentionally committed an act which caused penetration on L O. a girl aged 10 years.

2. In count II he was charged with indecent assault on a female contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 26th day of April 2008 at [Particulars Withheld] in Masaba District within Nyanza province, unlawfully and indecently assaulted L O. a girl aged 10 years by touching her private parts namely vagina. The appellant pleaded not guilty to both counts.

The Prosecution Case

3. PW1 was L O. (the complainant) a minor aged 11 years at the time she was testifying in court. After a voire dire examination was conducted on her the trial court formed the opinion that the minor did not possess sufficient intelligence to understand what an oath means. Therefore, she gave an unsworn statement. She then narrated to court how on the material day she had gone to church with her younger brother G and stayed there until 4.00p.m. They then left church and as they went home they met appellant near his home. After greeting them, he told them that he had lost his phone. He instructed them that should they find it, they should give it to their father to give it to him(appellant). Shortly afterwards, he told them that he had found his phone. After some further exchange, PW1 climbed a guava tree to get some guavas which her younger brother wanted. When she got down from the tree, appellant told her she would pay for the guavas. He then slapped her brother, who ran away. On sensing danger, PW1 also

began to run but unfortunately her shoe came off and she fell down. The appellant who was armed with a knife threatened PW1 telling her that he would cut off her hand. He then got hold of her by the neck, took her to a nearby maize plantation and ordered her to remove her clothes. PW1 refused to do so, but the appellant removed PW1's panty. He removed his penis, applied saliva on it and inserted it into PW1's vagina. As he did so, he threatened that he would kill her if she screamed.

4. The appellant defiled PW1 several times and after he was done, he left. PW1 also went home. Upon arrival at home, her mother, J K, PW2 asked her where she had been and why she was not walking properly and why her clothes were cramped. After PW1 explained to PW2 that the appellant had defiled her, PW2 took PW1 to Gesima Hospital from where they were referred to Keroka District Hospital and later to Keroka police station. PW1 was admitted at Keroka District Hospital for 2 days.

5. At the police station, the report was received by Number 62561 Sgt. Moliche Kimani who testified as PW5. PW5 stated that after booking the report, he escorted PW1 to the hospital for treatment. Later, the appellant was arrested by AP's and taken to the police station. Subsequently after investigations and recording of statements the appellant was charged with the two counts. PW5 produced the following exhibits:-

- *P. Exhibit 1 – white trouser and a black belt*
- *P. Exhibit 2 – blue shirt belonging to appellant*
- *P. Exhibit 3 – Black and white striped dress belonging to PW1*
- *P. Exhibit 4 – PW1's sweater*
- *P. Exhibit 5 – PW1's pant*

6. At Kisii District Hospital, PW1 was examined by Jackson Murauni, PW4 who was a clinical officer at the said hospital. PW4 testified that on examination of PW1, he found that she had pain and bruises on the neck. She also had a cut wound on the right palm; an injury that could have been caused by a sharp object.

7. On examination of PW1's genitalia, PW4 established that her clitoris was painful and tender as well as bruised. The hymen was broken and her vaginal canal was wide open, though no spermatozoa were found since he examined her some 5 days after the alleged offence. PW4 confirmed that the broken hymen was evidence of penetration.

8. In her evidence, PW2 told the court that PW1 was 10 years old and a standard 6 pupil of [Particulars Withheld] primary school. She also testified as to what PW1 narrated to her concerning her (PW1's) encounter with the appellant. PW2 also testified that she knew the appellant before.

9. PW3 was D O K, PW1's father. His testimony corroborated PW2's testimony as to what PW1 told PW2 and also concerning PW1's age. PW3 confirmed that he knew the appellant whose home was not too far away from his own. PW3 accompanied both PW1 and PW2 to the hospital and to the police station. Apparently, at some point, the appellant's mother had been employed by PW3 but in the course of that employment, the appellant stole PW3's radio. During cross examination PW3 told the court that the dispute over the radio had long been resolved before the incident in question.

The defence Case

10. The appellant gave an unsworn statement and said he was coming from the shop when he met some children taking his guavas. The children ran away. The next day, PW3 swore to fix the appellant because of a quarrel the two had had at a drinking party. In the night of that second day, he was arrested on allegations that he had defiled PW1. He denied committing the offence. He contended that the whole reason why he was charged was an issue of personal vendetta where PW3 wanted a shamba in order to settle the issue of the radio stolen by the appellant.

Judgment of the Trial Court

11. After a careful analysis of all the evidence that was placed before him, the trial court was satisfied that the prosecution had proved its case beyond any reasonable doubt, although it is not clear whether the conviction was on Count I or Count II. However from the sentence, it appears that the appellant was convicted on Count I and sentenced to life imprisonment.

12. There is no mention of Count II, but strictly speaking Count II should have been an alternative to Count I and not a full count on its own. It is therefore alright that the trial court did not make any finding on it or pass sentence on it.

The Appeal

13. Being dissatisfied with both conviction and sentence, the appellant preferred his appeal on the following

home-made grounds:-

1. *That the learned trial magistrate erred in law and fact by not appreciating that the prosecution evidence was discredited, speculative and lacked probative value.*
2. *That the learned trial magistrate erred in law and fact by not considering the evidence adduced by the doctor that there was no spermatozoa of the appellant found in the complainant.*
3. *That the learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant and the provisions of the Constitution hence null and void.*
4. *That the learned trial magistrate erred in law and fact in basing the appellant's conviction on evidence that was contradictory and by failing to analyze the said evidence.*
5. *That the learned trial magistrate erred in law and fact by not considering that there was a grudge between the appellant and the family of PW2 and PW3.*

14. Reasons wherefore, the appellant prays that the appeal be allowed, the conviction quashed and the sentence set aside or varied as the honourable court may deem just.

Duty of this Court

15. This is a first appeal. On a first appeal, the appellate court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court is also under a duty to carefully weigh and consider the judgment of the trial court with a view to establishing whether the conclusions reached by the trial court have any legal basis. See generally **Okeno –vs- Republic [1972] EA 32; Mwangi –vs- Republic [2004] 2 KLR 28; Ngui –vs- Republic [1984] KLR 729 and Pandya –vs- R[1957] EA 336.**

The Submissions

16. At the hearing of the appeal, the appellant relied on his written submissions. I have carefully read those submissions, the gist of which is that there was no evidence upon which the trial court could have convicted the appellant. The appellant also submitted that some critical witnesses such as the village headman were not called to testify thereby casting some doubt on the evidence given by PW1, PW2 and PW3 particularly as regards the allegation that the incident was first reported to the village elder. The appellant also submitted that the trial court failed to exhaustively examine the appellant's defence and thereby occasioned a miscarriage of justice. The appellant also wondered why only members of the same family testified against him.

17. For the respondent, Mr. Shabola opposed the appeal and submitted that the entire prosecution evidence was consistent and corroborative and that the medical evidence clearly showed that PW1 was defiled. Counsel submitted that there could not have been any mistaken identity since the offence was committed during the day. Counsel urged the court to find and hold that the entire appeal lacks merit and

to dismiss it altogether.

Issues for Determination

18. I have now considered and weighed all the evidence adduced before the trial court and the following are the issues to be determined by this court:-

- *Was the complainant defiled?*
- *Was the age of the complainant established?*
- *Was the appellant identified by the complainant as the person who defiled her?*

Findings

19. Regarding the first question the complainant herself in her unsworn testimony stated:-

“He had a knife. He then threatened me and held the knife at my hand. He also held my neck. He then took me to a maize plantation. He said if I scream, he would kill me.

He asked me to remove my clothes and I refused. He removed my clothes, my pants. He applied saliva on his thing and put it in me (his penis into my vagina). He said if I screamed he would kill me.”

PW1’s testimony was corroborated by pW4 the clinical officer who stated:

“When I examined her, she had pain and bruised on the neck. She had a cut wound on the right palm. The injuries were 5 days old. The weapon used was sharp. The injury was harm.”

20. On whether or not PW1 was defiled, PW4 stated:- **“When I examined her genitalia and treatment notes from Gesima and Keroka sub-district Hospital the clitorises was painful and tender. She was also bruised. It was also wide open and hymen broken/raptured.....There was evidence of penetration because of broken hymen and the bruises and the vagina was very wide open.”**

Conclusions

21. From the above testimonies of the complainant and the clinical officer, I am convinced beyond reasonable doubt that indeed the complainant was defiled. One of most critical elements of defilement being penetration was proved by medical evidence.

22. Secondly with regard to whether the age of the complainant was determined, I have looked at the entire proceedings in the lower court and it is evident that no birth certificate or any baptismal card was produced to establish the complainant’s age. However the complainant’s mother PW2 and her father PW3, both attested to the fact that the complainant was 10 years old. In the case of **Francis Omuromi – vs- Uganda Court of Appeal criminal Appeal No. 2 of 2000** it was held:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victims parents or guardian and by observation and common sense....”

23. Similar sentiments were followed in **Fausitne Mghanga v. Republic (2012) e KLR** where Nzioka J citing **Mangunyu -v.- Republic** where Hon. Justice W. Ouko citing reference from **I.E. Collingwood’s Criminal Law of East and Central Africa(London; sweet and Maxwell) 1967 Ed. of page 123,** observed:-

“Age may be proved by a birth certificate, or particularly in the case of Africans, by the

evidence of a person present at the birth.”

24. In the instant case PW2 who gave birth to PW1 attested to the fact that the complainant was 10 years old. There could be no better evidence than what PW2 gave on the issue of age. Therefore the age of the complainant in this case was proved beyond reasonable doubt for purposes of the charges against the appellant.

25. Thirdly, and the most crucial issue is whether or not the appellant was identified by the complainant as the person who defiled her. According to the complainant's evidence in chief she stated:-

“I saw the person previously. I can identify the person. He is the one in the dock.”

26. In addition to the above piece of evidence, the complainant was able to even identify in court the clothes that the appellant was wearing on the material day. It is also worth noting that the defilement took place between 4.00-5.00p.m. and at such time there is usually light from the sun and visibility is very clear. I do not doubt that the circumstances under which the offence was committed were conducive for proper and error free identification.

27. Furthermore PW3 the complainant's father during cross examination stated:-

“When you were brought to Gesima, she identified you and you admitted. The girl had described you before we came to arrest you. You have done wrong to me before. I had employed your mother and you stole my radio. 1st time that I have a grudge with you but it's complete as we have socialized before.”

28. The above statement clearly proves that the appellant was positively identified by the complainant and that her description helped PW3 to arrest the appellant and she even recognized the clothes the appellant wore. The appellant's contention that he was fixed by PW3 for having refused to allow him to graze in his land as compensation for the stolen radio cannot stand because he was positively identified as the person who defiled PW3's daughter. It is my considered view that the appellant tried to take advantage of what PW3 had told the court regarding the stolen radio to say that the case against him was a frame-up. The defence by the appellant in my view did not shake the prosecution's evidence.

29. The appellant has also alleged in his petition of appeal that the learned trial magistrate failed to analyze the evidence. This allegation cannot be correct because the judgment of the trial court summarizes all the evidence both by the prosecution and the defence. The trial court then sets out the issue for determination, namely whether the appellant defiled the appellant. He then went on to make his findings on the issue. In effect, I am satisfied that the learned trial magistrate complied with the provisions of **Section 169** of the **Criminal Procedure Code**. In the premises, the appellant's complaint that the learned trial court failed to analyze the evidence has no basis and is accordingly dismissed.

30. The appellant also complained that the whole of the prosecution case was based on contradictory, speculative and discredited evidence. An analysis of the entire evidence set out above clearly shows that the evidence was firm, consistent and remained unshaken even under tough cross examination. In any event, the appellant's own statement in defence agrees in very material particulars with the testimony of PW1. The court finds that by slapping and therefore scaring away PW1's brother, the appellant was creating a perfect opportunity to attack PW1. Indeed he made good his threat to PW1 that she would pay for taking the guavas from his tree.

31. As regards the doctor's evidence, PW4 stated that he examined PW1 some 5 days after the ordeal, so that by that time there could not have been any surviving spermatozoa in PW1's vagina because they would all have been dead within 72 hours from the time of discharge.

32. In conclusion, this whole appeal lacks merit and I dismiss it altogether. The sentence meted out against the appellant was legal as it is the mandatory sentence provided by law. There is no basis for interfering with the same. The appellant has a right of appeal to the Court of Appeal within 14 days from

today.

Judgment dated and delivered at Kisii this 5th day of June, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:-

Present in person for the Appellant

Mr. Majale (present) for the Respondent

Mr. Bibu - Court Assistant