



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL CASE NO.59 OF 2011

(An appeal against original conviction and sentence of Kericho PM Sexual Offence Case No.15

of 2010 – Hon. J. Kwena – Principal Magistrate delivered on 7th December 2011)

GIBSON KIPKOECH ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Gipson Kipkoech Rotich, hereinafter referred to as the Appellant, was tried and convicted for the offence of defilement in violation of Section 8(1) as read with Section 8(3) of the Sexual Offences Act number 3 of 2006. He was thereafter sentenced to serve 15 years imprisonment. Being aggrieved, the Appellant filed this appeal to challenge the decision.

The Appellant put forward the following grounds of appeal:

1. The learned Magistrate erred in law and in fact in that she erroneously admitted as evidence hearsay evidence as there was no eye witness to the alleged offence. This prejudiced the Appellant seriously and particularly as the learned Magistrate relied on the same inadmissible evidence in her judgment thereby convicting the Appellant on inadmissible evidence.
2. The learned Magistrate erred in law and in fact in that she failed to consider the fact that the prosecution failed to establish the actual age of the complainant by either producing a birth certificate or sending the complainant for age assessment.
3. The judgment was bad in law and never considered the Appellant's unsworn evidence at all. It was biased and never analyzed evidence before the court.
4. The learned Magistrate erred in law in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have defiled the complainant if any.
5. The evidence of the prosecution witnesses was so contradictory and full of discrepancies that it should not have been relied upon to convict the Appellant.
6. The complainant was taken for medical examination after one month and this period was long enough for any other person either to have defiled the Complainant or had sex with her and hence

concluding that the Appellant was the one who defiled the complainant was not beyond reasonable doubt and in any event the complainant's evidence was never corroborated and hence it was unsafe to convict on such evidence alone.

7. The decision went against the weight of evidence before the Court.
8. The learned Magistrate erred in Law and in fact in convicting the Appellant of the offence of defilement whereas there was no evidence to support the same charge for the Appellant was not taken to hospital for medical examination.
9. The 15 years sentence awarded was bad in law as no reasons were given for the same.
10. That the Appellant did not have the benefit of a legal counsel.
11. The sentence awarded was harsh and excessive in all circumstances of the Appellant and of the case before the court.

The case that was before the trial court is simple and straight forward. The Prosecution's case was supported by the evidence of five witnesses. Betty Cheptanui (PW1) told the trial court that on 1st October 2010, the Appellant together with two other people had visited her home to have a drink popularly known as Chang'aa, brewed by her mother (G C). PW1 was sent by her mother to collect some utensils outside the house. PW1 claimed that she met the Appellant outside. The Appellant is said to have grabbed PW1, carried her shoulder high to the nearby bush where he defiled her from 7.00 p.m. to 9.00 p.m. and thereafter it is alleged that he took her to the home of one C after which she was taken home. G C (PW5) corroborated the evidence of PW1 which is to the effect that the Appellant had visited her house to partake Chang'aa. PW5 stated that at 8.00 p.m., she went out to check on PW1 when she noticed her absence. PW5 alleged she saw with the assistance of moonlight the Appellant and her daughter (PW) go away as the Appellant held her by the hand. PW5 further alleged that at 11.00 p.m. she went to check her daughter at the Appellant's home but she did not find her there hence she went to sleep. In the morning of 2nd January 2010, PW1 told PW5 the ordeal she underwent the previous night. PW5 said she reported the matter to the village elder who in turn advised her to report the same to the police. PW5 booked a report at Sondu Police Station where the victim was referred to Sondu Health Centre. On the basis of the aforesaid complaint, the Appellant was arrested at Sondu Stage. Edith Mutai (PW3) stated that she attended to PW1 on 6th February 2010 at Sigowet Dispensary with a history of sexual assault on 1st January 2010 by a person known to the complainant. According to PW3, the P.3 shows the complainant was treated on 1st January 2010 and the P3 filled on 6th January 2010. In cross-examination PW3 stated that the complainant went to hospital at Sondu on 4th January 2010 and was referred to Sigowet Dispensary to fill the P3 on 6th January 2010. PC. H J (PW4) confirmed having escorted the complainant to Sondu Health Centre for treatment on 4th January 2010.

When placed on his defense, the Appellant gave unsworn testimony in his defence. He stated that he had gone to the complainant's home on 1st January 2010 to drink some Busaa and left at 7.00 p.m. He went back to the house of PW5 when he heard screams and discovered that one by the name Reuben Bii, a person the Appellant left behind had assaulted PW5. The assailant fled that homestead when members of the public responded to the screams of PW5. The Appellant stated that he saw the complainant (PW1) asleep in her father's house. He denied committing the offence.

On appeal the Appellant put forward 11 grounds. Mr. Motanya, learned advocate for the Appellant summarized those grounds to three main grounds namely:

- i. That since there was no age assessment of the complainant, it was difficult to determine the lawful sentence.
- ii. That the medical evidence set out in the P3 is not in tandem with the oral evidence of the clinical officer (PW3).
- iii. The evidence of the complainant were never corroborated.

On the first ground, the record shows that the charge sheet indicates that the complainant was a girl aged 13 years. When the complainant testified before the trial court, she stated that she was aged 14 years. Her mother (PW5) stated that the complainant is aged 15 years old. Miss. Kivali learned prosecution counsel was of the view that the complainant was aged between 13 and 15 years. She urged this court to find that Appellant is serving an illegal sentence of 15 years imprisonment yet he should be serving life imprisonment. The learned prosecution counsel urged this court to correct the error under Section 382 of the Criminal Procedure Code. There is no dispute that the complainant was not medically examined to establish her true age. The prosecution gave the estimate age as 13 years. The age of the victim in sexual offences is critical in that it is used to determine the appropriate sentence under Section 8 of the Sexual Offences Act. There is doubt in this appeal because it is difficult ascertain the actual age of the victim to mete out the proper sentence.

In the second ground of appeal, it is the submission of Mr. Motanya, learned advocate for the Appellant that there is no nexus between the evidence of the clinical officer and the medical report presented to court. It is further argued that the medical evidence tendered did not connect the Appellant with the offence. It is the argument of Miss. Kivali that there was sufficient evidence to sustain a conviction. I have re-evaluated the evidence tendered by the prosecution to establish its case. The handwritten and the typed proceedings indicates that PW3 stated that the complainant visited Sigowet Dispensary with a history of sexual assault on 1st January 2010. PW3 further went ahead and stated that the complainant was treated on 1st January 2010 and issued with a P3 form which was filled on 6th January 2010. PW3 produced the P3 form as an exhibit in evidence. In cross-examination PW3 said that the complainant went to hospital on 4th January 2010 where she was referred to Sigowet Dispensary for the filling of the P3 form. PW3 further admits that she filled the P3 form on 6th January 2010 though she did not treat the complainant. I have critically examined the P3 form issued by the OCS, Sondu Police Station. The same indicates that the case was reported to Sondu Police on 6th January 2010. The same also shows that the P3 form was duly signed on 6th February 2010. In cross-examination, PW3 contradicted himself when she claimed she filled the P3 form on 6th January 2010. It is clearly recorded in the P3 form twice that PW3 filled the P3 form on 6th February 2010. With respect, I agree with the submissions of Mr. Motanya that the evidence of the clinical officer (PW3) who filled the P3 is so contradictory and that no court ought to believe her evidence. It is a very important piece of evidence which should be consistent to sustain a conviction. Some doubt has been entertained in my mind. Is it that the evidence were manufactured or it was a genuine mistake. If it was a genuine mistake, then why was that contradiction not clarified? In the circumstances the law enjoins me to give the Appellant the benefit of doubt.

The final ground argued by Mr. Motanya is to the effect that the complainant's evidence was never corroborated. Again, Miss. Kivali did not address her mind to this issue. It is the evidence of the complainant that the Appellant defiled her. According to the evidence of PW1, there were three men plus the Appellant who had visited her home to partake some Chang'aa brewed by PW5. It is her evidence that PW5 sent her out of the house to collect some utensils and when she stepped out of the house, she was grabbed by the Appellant who carried her shoulder high to a nearby bush where he defiled her. It is also her evidence that the appellant put off the lantern lamp before he came out of the house. By that time one out of the four men had gone away leaving two inside the house. In re-examination the complainant stated that it is actually her mother who put out the lantern lamp to force her customers go away. The complainant stated that she was taken for treatment on 2nd January 2010. PW3 states that PW1 was taken for treatment on 1st January 2010. But the treatment notes of Sondu Health Centre, shows that PW1 was actually taken for treatment on 4th January 2010. The child's mother (PW5) appears to state that she actually took the child to hospital for treatment the next day i.e. on 2nd January 2010. It is clear from the evidence of PW3 that the medical evidence and that of her mother (PW5) did not corroborate the evidence of the complainant. In fact the complainant substantially contradicted herself when giving her testimony. With respect, I agree with the submissions of Mr. Motanya that there was no cogent evidence that corroborated the complainant's evidence. In view of the apparent contradictions in the evidence of PW1, there was need to corroborate her evidence. That corroboration did not arise.

In the end I find the appeal to be well founded. I allow it with the consequential order that the conviction

is quashed and the sentence set aside. The Appellant should be set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 11th day of July 2014

J. K. SERGON

JUDGE

In the presence of:

Motanya for Appellant

Miss. Kivali for Director of Public Prosecutions.