



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 6 OF 2013

ALFRED MURIITHI MBUNGU.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 182 of 2010 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA - PM on 1/2/2013

J U D G M E N T

ALFRED MURIITHI MBUNGU the Appellant herein was charged with the offence of Defilement contrary to section 8(1) (2) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

ALFRED MURIITHI MBUNGU alias MUCHANGI: On the 29th day of December 2009 in Mbeere District within Eastern Province defiled MN a child aged 15 years.

ALTERNATIVE COUNT

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;

ALFRED MURIITHI MBUNGU alias MUCHANGI: On the 29th day of December 2009 in Mbeere District within Eastern Province committed an act of indecency with MN a child aged 15 years by touching MN on her private parts.

The Appellant denied the charges and the matter proceeded to full hearing. Eventually the Appellant was convicted on the main count and sentenced to twenty (20) years imprisonment. He thereafter filed this appeal citing the following grounds;

1. The Appellant pleaded not guilty before the trial Magistrate
2. The learned trial Magistrate erred in law and facts when he relied on prosecution evidence which was inconsistent and uncorroborated.
3. The learned trial Magistrate erred in law and facts when he relied on evidence of a single witness.
4. The learned trial Magistrate erred in law and facts when he failed to observe that there was a grudge between the Appellant and PW4.
5. The learned trial Magistrate erred in law and facts when he failed to consider that the first report

- did not reflect the Appellant herein nor gave any description.
6. The learned trial Magistrate failed to consider the fact that the doctor's report did not support the evidence of PW1 and that the Appellant herein was not examined and a DNA test was not conducted to clear the doubts therein.
 7. That no cogent reasons were given as to why the Appellant's defence was rejected.

When the appeal came for hearing the Appellant presented the Court with written submissions. His main submission is that the complainant did not know the person who defiled her.

M/s Ing'ahizu for the State conceded the appeal on the ground that age was not proved. She however asked for an order for a retrial, which the Appellant vehemently opposed.

Brief facts of this case are that PW1 was on 29/12/2009 in the filed playing with others when a man sent PW3 to call her. She went and he told her to go with him to his home to pick a letter. She went with him and on the way he made her fall on the ground. Once on ground he had sex with her and later took her upto her home. She reported to her mother (PW2) and a report was made. She was treated at Ishiara District Hospital and a P3 form was filled. The Appellant was later arrested.

This is a first appeal and this Court is enjoined to re-evaluate the evidence on record. I am alive to the fact that I did not see nor hear the witnesses. I am guided by the case of **OKENO –V- REPUBLIC [1972]E.A. 32** which has been followed by many others. In the case of **KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174** the Court of Appeal held thus;

- i. ***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. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
- ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions by the Appellant and the learned State Counsel. I have equally considered the grounds of appeal and the evidence on record. The State has conceded the appeal on the ground of age. I am satisfied that though PW1 alleged to be fifteen (15) years there was no evidence adduced to prove her age. The next issue is whether this Court should order for a retrial. The Court of Appeal in the case of **EKIMAT –V- REPUBLIC [2005]1 KLR 182** outlined matters which a Court should consider before ordering for a retrial. This is what was held;

- i. ***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the Prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame it does not follow that a retrial should be ordered.***
- ii. ***A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.***

One of the issues to consider which to me is major is whether upon consideration of the admissible or potentially admissible evidence, a conviction might result. When this matter took off before the trial Court the Appellant was unrepresented. The matter proceeded and an advocate came on record when six (6) witnesses had testified. Mr. Momanyi made an application for recalling of witnesses. On 6/11/2011 an order was made for PW1 – PW4 to be recalled for further cross-examination. As at the time the Prosecution closed its case on 27/8/2012 only PW4 had been recalled. There were warrants of arrest issued against the rest but they failed to turn up.

The Appellant in his sworn defence denied the charge. He said he had been framed because of a land dispute with PW2. The chief (PW4) is a brother to PW2. On the 19/12/2009 he had met PW1 with her boyfriend she is married to. The record shows that the Prosecution did not give the Court any reason why the witnesses could not be availed for further cross-examination.

The issue of identification is very vital in this matter. PW1 was called by a man she did not know. PW3 who was sent to call the complainant did not know this man either, but she followed him. She at page 12 lines 15-28 states as follows;

“I confirm that it was the accused who defiled me. I don’t know how the arrest herein was made.

Cross-examined by accused: Reuben did not give me the name of the suspect. There was no eye witness at the scene. I first told my mother about the whole issue. I reported that it was Muchangi who defiled me. I don’t know when you were arrested. I visited the hospital and did inform the police that Muchangi defiled me. You had given me your name as Muchangi. I don’t know if you have any grudge with the chief.

Re-examination by Prosecutor: I did not know the accused prior to the incident. He gave me his name as Muchangi. He showed me his identity card showing the other names herein”.

She says the man told her he was Muchangi. He then showed her his identity card which had different names. So which names did she give to the police as the names of the defiler? PW6 the arresting officer stated that they booked the Appellant with the name of Alfred Muriithi. And that the Muchangi name is an *alias* name. He does not however say that it is PW1 who gave him the name of Alfred Muriithi. It is also PW6’s evidence that the report was made at Ishiara Police Post on 30/12/2009. The P3 (EXB1) form shows the following;

- i. Report was made on 29/12/2009.
- ii. She was raped in a nearby bush by ***a person unknown*** to her.
- iii. She also told the examining doctor that the person who sexually assaulted her was unknown to her.

I am alive to the fact that all these things being told by the police and doctor were being said after;

- i. PW1 had been told by the defiler that his name was Muchangi.
- ii. PW1 had been shown an identification card of the defiler bearing names other than Muchangi.

PW3 who was sent to call PW1 stated that he was playing football and was in a group of several people when a man sent him to call PW1. He states at page 16 lines 8-9;

“I informed the lady and she showed willingness of going to where the accused was”

None of the “***several people***” who saw PW1 leave the field and follow this strange man testified. Secondly if the man was unknown to PW1 and PW3 how was he arrested? Even if he was arrested by other unknown means why did the investigating officer fail to arrange for an identification parade so that PW1 and PW3 could identify him? The Court therefore relied on the evidence of PW1 and PW2 to convict the Appellant. How was this evidence? Was it credible? In the case of ***KILU & ANOTHER (Supra)*** the Court of Appeal stated this about such a witness;

“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 unreliable witness which makes it unsafe to accept his evidence”.

From this evidence its clear PW1 was not a truthful witness. Her uncle (PW4) and PW6 could not

explain how they came to arrest and re-arrest the Appellant. I went all the way to analyse this evidence to show that a retrial was very very unlikely to result in a conviction. The result is that the appeal is allowed and the conviction quashed. The sentence is set aside. The request for a retrial is declined. The

Appellant to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c