



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 144 OF 2014

(Appeal from the original conviction and sentence by the Principal Magistrate Hon. E. K. Usui Macharia at Kwale law courts in Criminal case No. 549 of 2012 ion 14th July, 2014)

S K.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant S K has filed an appeal contesting his conviction and sentence by Hon. E. K. Usui, Principal Magistrate Kwale law courts on the 4th July 2014.

The appellant was arraigned in court having been charged with defilement contrary to Section 8 (1) as read with section 4 of the Sexual Offences Act, 2006.

The particulars of the offence were that:

“On the 15th day of April , 2012 at about 3.00pm at [particulars withheld] village in Kwale county within coast Region, the appellant unlawfully and intentionally committed an act which caused his penis to penetrate into the vagina of R K M, a child aged 17 years”

In addition, the appellant faced an alternative charge of Indecent Assault with child contrary to section 11(1) of the Sexual offences Act, 2006.

The appellant pleaded not guilty to both charges and his trial commenced on 22nd June, 2012.

After the full trial, the appellant was convicted upon being found guilty of the main charge and sentenced to serve fifteen (15) years imprisonment. Being aggrieved by the conviction and sentence, the appellant filed an appeal in which he set out five (5) grounds of appeal:

1 That the learned trial magistrate did not consider that section 19 of oath and statutory Declaration Act was not complied with.

2 That the learned trial magistrate failed in law and fact by not considering that the charge of defilement was not proved to the required standard of law hence the sentence recorded was unsafe.

3 That the learned trial magistrate did not consider the prosecution's case was not proved to the required standards of law thus violation of section 109 of the evidence Act.

4. That the learned trial magistrate failed to see that the case was not proved to the required standard of law thus violating of section 109 of the evidence Act.

5 That the learned trial magistrate erred in law and fact in failing to consider defence which was reliable.

SUMMARY OF EVIDENCE.

The prosecution's case was supported by the evidence of seven (7) witnesses.

Pw1 R K M, who is the complainant in this case, testified that she was a form two (2) student at **[particulars withheld]** Girls and aged 17. She identified a birth certificate showing she was born in 1995. She told court that on 15.4.2012, she was washing clothes at the well and when she finished, she put water on a basin, hid behind a bush and bathed. Pw1 said that she was picking her clothes when she saw a person she knew, carrying a panga behind her. She identified that person as her step brother, who is the Appellant in this case. She said he told her that he had always wanted to have sex with her and had to do it on that day. The complainant said that she tried screaming but the appellant went on to throw her on the ground, put his finger in her mouth so she could not scream and she bit him so hard that he bled. She said that the appellant proceeded to have sex with her and she got injured on the mouth and walked in pain. The appellant warned her not to see anyone while pointing a panga at her. She picked her clothes and went home where she informed relatives and neighbors. Her mother took her to Kwale police station and then hospital.

In cross examination, Pw1 confirmed that the appellant was her brother. She also said that she was born in 1993. She said that the first time the appellant followed her while she was from the shops, threw her into the ground but she screamed and was rescued.

Pw2, M K M, told court that she was the complainant's mother, the complainant being her 6th born daughter. She also said that the appellant was her step son. She then went on to state that on 15.4.2012 at 3.00pm she was at her shamba having left the complainant who intended to go and wash clothes at home. That she was called by a neighbour's child at 3.00pm who informed her that the complainant had been sexually attacked by the appellant. She rushed home where she found so many people. She called for a motor cycle and headed to Kwale police station. The police then recorded the report and took the compliant to hospital.

Pw2 told court that the appellant had ran away but was arrested by motor cyclists. She further said that he had attempted to do this to the complainant while she was in standard 8 but she informed the headmaster who called him and he asked forgiveness. And for the shake of peace in the family she had forgiven him. She also told the court that the complainant was bleeding from the mouth since she had suffered injuries and had pieces of grass on the head.

In cross examination, by the appellant, Pw2 said that they had no grudge as a family. She said that the appellant never bothered her other daughters. She confirmed that she saw the appellant injured on the head when he was beaten by her son H, after they differed long before this case. She denied ever suing the appellant over land and denied ever wanting to destroy him.

Pw3, M R, said that on 15.4.2012 she was working at Tingeti when she was called by one C M who told her that the appellant had had sex with the complainant, who is her child. She rushed to R's

(complainant's) place where she found her sitting on a bench and was crying. She said that there were about 14 people. She saw the complainant's mouth was swollen and she told her that the appellant had inserted his fingers in the mouth. She saw she was also bleeding from the mouth and had soil and grass in the mouth. They called the community police and village clan men who they informed of what had happened. The complainant according to Pw3, was taken to Kwale police station where the matter was reported was and P.C Chirchir took her to hospital. She also confirmed that the appellant had ran away but was arrested on 17th at Chilimani and handed over to the police.

When cross examined. Pw3 told court that she had known the appellant for over 20 years. She denied knowing of family disputes. She said that on arrest the appellant was found with a panga and that is why he was attacked by members of public.

Pw 4 Manyole Kabi, a member of community policing, told court that on 15.4.2012 at 4.00 pm he received a call from M while at Benjani village and informed that a child by the name R K had been defiled. He went to their house and found many people. The child was then put on a motor cycle and taken to the police station and then hospital. And on 17th, Pw4 said that Pw 3 M called to tell him that the appellant was at Chilimani village where they went and found that he had been arrested after being attacked. That the police picked the appellant from Vuga stage where he was handed over to them.

In cross examination, Pw4 said that he was not aware of any family dispute in the appellant's family. He said that the appellant was attacked by members of public and that he (Pw4) was also injured when he tried to defend him.

Pw 5, Mangale Chikereso another member of community policing stated how on 15.4.2012 he was at home when he left for the shopping center. That on the way, he met Mwanoyota who informed him that he had a report that the appellant had defiled the complainant. He went to complainant's home and found she had gone to hospital. He was called on 17th and found the appellant running away at Cherimani. He called Mwangote and informed him. They went there and found appellant already arrested. They took home to Vuga since a group of people were baying for his blood. They called the police who picked him.

In cross examination, he confirmed that he was related to complaint's mother but was testifying as a member of community policing. He also confirmed that there were family differences but they were in court for complainant's case.

Pw 6 Cornelius Machage, a clinical officer at Kwale hospital testified to court that on 16.4.2012, the complainant one R K was taken there for examination while alleging that she had been defiled. He examined her and saw she was frightened. He assessed that her mouth was tender and she had a laceration on the lip. He also observed that her upper limbs were painful and had another laceration on the right inner thigh. He observed that her genitalia was normal with no bruise had whitish discharge with no hymen. He filled and signed the P3 form which he produced as exhibit P1 and the lab report request and results as exhibit P3.

Pw 6 also examined the appellant who was alleged to have been attacked by a mob. He found that he had a cut wound on the upper lip and a bite mark on left under finger what was fresh. He also filled a P3 form which he produced as exhibit 4 and treatment notes as exhibits P5.

In cross examination, Pw6 said the appellant had been attacked by a mob. He said that the appellant had an injury which was on left index finger but did not know if it was on the right finger.

Pw7, Senior Sergeant Joseph Kimani gave evidence on behalf of the investigating officer, Samuel Chirchir who had gone on transfer and handed over the file to him. He said that he had read and understood the file. The evidence therein was that on 15.4.2012, the complainant and her sister had made a report of defilement which was alleged to have been committed against her by her step brother. He said that the report was booked and the complainant taken for medical examination. Her age was also assessed as being 17 years. He identified the birth certificate as exhibit P1.

He said that on 17.4.2015, the appellant was attacked by members of public and the OCS was called to rescue him. That is when he was taken to the station.

The appellant was placed on defence and he opted to give a sworn statement and called 3 witnesses.

The appellant, S K M, said that on 20.4.2012 he was this home where he woke up to do his usual chores. That he was given food from home and then went out to work. He explained to court that there is a well on the road behind the house. The appellant said that he had differed with the younger step sister over food and she came to the well, put down a bucket and removed all clothes. He told her to wear her clothes but she refused. And when he turned the other side, she insulted him. They then called his younger brother and the complainant said that she had worn clothes. The appellant hit her on the face and walked away. He started feeling guilty and turned to go back home. There he learnt that they had conspired with her sister to fabricate charges.

The appellant said that on the 3rd day they went to the police station to know what was happening and he received a call from the OCS. That on the way he was attacked by some men he knew and he ran to report to the chief. The police were called and he was taken to the police station and later to hospital for treatment. He was later charged with the present offence which he denied. He said that they were step families and had a family grudge.

When cross examined, the appellant said that the father have a grudge. He said that he was the one who paid the complainant's school fees and had lived with her since she was 1 year old. He confirmed that the well was 100 meters from the house and that he had met the complainant there. He also said that the complainant refused to give him food and insulted him.

Dw2, H S K testified that he was the appellant older brother. He also confirmed that the complainant, R, was his step sister. He said that the appellant beat the sister when he found her with a phone with a boy's contact and that he did it in his presence. He saw his sister crying on that day and on asking her what the matter was she told him that she had been assaulted. That after three days these charges were fabricated.

Dw3 F K told court that the appellant was her 3rd born son and the complainant R, her step daughter. She said that her co-wife threatened her after their shamba was subdivided among the family and after a few days she heard the accused had assaulted her daughter sexually. That he was arrested after three days and since they are both her children she said the police would deal.

Dw 4 J K M also gave evidence confirming that the appellant was his step brother and the complainant his sister. He said that his brother beat R over a phone she carried in school and after three days it was alleged he had defiled her. That he was arrested and charged.

SUBMISSIONS.

When the appeal came up for hearing, the appellant, who was unrepresented at the hearing, opted to

rely entirely on his written submissions which had been duly filed.

M/s Ocholla for the state, who appeared for the respondent gave oral submissions opposing the appeal.

She submitted that Article 50 (2) (c) of the Constitution was complied with as the appellant was supplied with copies of witnesses statements before the hearing date and he did not indicate to court that he had not been furnished with the same. He in fact proceeded to cross examine all the witnesses.

M/s Ocholla also submitted that Pw1, the complainant was aged 17 years old and therefore a *voire dire* examination was not conducted as she was not a child of tender years.

She further submitted that there was doctor's evidence under exhibit P2 showing that the complainant hymen was absent. She then submitted that the two ingredients of the offence of defilement were proved, that is, the age of the victim and penetration. She went on to state that the appellant was a step brother to the complainant and therefore not stranger to her.

Finally, she submitted that the trial magistrate was right in dismissing the appellant's defence as his evidence was in consistence with that of his witnesses. She summarized by urging the court to uphold the conviction and sentence against the accused since the same was lawful.

COURT'S FINDINGS.

This is the first appellate court and its duty in determining appeal was clearly set out in the case of OKENO Vs REPUBLIC (1992) E.A 32, as follows:

“/The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusion, in deciding whether the judgment of the trial court should be upheld, as well as of course as deal with any questions of law raised on the appeal”.

I have analyzed and evaluated the evidence which was adduced before the trial court, while bearing in mind that I did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor(see *Odhiambo vs Odhiambo*, Appeal No. 280 of 2004 (2005) e KLR)

On the issue that the appellant was denied a fair trial during the trial when the magistrate subjected him to a full trial process without witnesses statement and case ordered to start *denovo*, I wish to point out that this was raised in the memorandum of appeal. And even then, on perusing the court records, I established that on 22.6.2012, the trial commenced before the said trial magistrate who taken the plea, Hon. E. Usui and there was no order for the case to start *denovo*. There was however no order for the appellant to be supplied with witnesses statements but he proceeded to cross examine them throughout the trial.

With regard to the issue that a *voire dire* inquiry of pw1 was not properly conducted by the trial court, I find that the evidence before the trial court reveals that pw1 who is the complainant was said to be 17 years old and a birth certificate (Exhibit P1) confirming this produced as exhibit.

Section 19 of Oaths and Statutory Declaration Act, Cap 15 deals with evidence of children of tender years.

Under the children's Act. A child of tender years is defined as

“a child under the age of 10 years”

The sexual offence Act adopts this meaning for purposes of that Act.

This then means that, the complainant having been said to have been 17 years old at the time the offence is alleged to have taken place, did not qualify to be called a child and therefore a *voire dire* examination or inquiry was not necessary in the case. I hence find that her evidence was properly taken.

On the issue of whether the medical evidence proved that the appellant defiled the complainant, I wish to state that, for the offence of defilement, two ingredients are required to be proved, and these are, the age of the victim and penetration.

From the evidence adduced before the trial court, the age of the victim was proved to be 17 years at the time of the alleged incident.

As for penetration, I find that it was Pw1's (complainant) evidence that the appellant threw her on the ground, put his finger in the month and proceeded to have sex with her" on 15.4.2012. According to Pw2, 3,4,5, and 7 she was taken to hospital on the same day. Pw6, the clinical officer who examined her testified and produced a P3 form (exhibit) in which he indicated his results showing that he had observed that the complainant's neck was tender, upper limbs painful and had a laceration on the lip and right inner thigh. He however indicated that her genitalia was normal with no sores/abrasion but her hymen was absent.

From the evidence of Pw1 (complainant) On the sexual intercourse was forceful, therefore one would expect evidence of some bruising or abrasion noted to have been occasioned.

In fact even the trial magistrate noted that:

“Although no fresh injuries were noted in the complainant vagina, her hymen was missing.”

With such findings, one wonders when the said hymen was broken. If it had been broken on the 15.12.2012, there would have been fresh bruising and bleeding noted. And even if it would have been broken on another day, the sex having been forceful, there should have been evidence of bruising. With such evidence missing, one is bound to wonder if the compliant was actually defiled as she alleged. This being the case, I find a doubt was raised in the evidence of the prosecutor, which benefit the trial magistrate ought to have accorded the appellant.

On the issue of the trial magistrate dismissing the appellants defence that the offence was fabricated against him because of a grudge in the family since it was polygamous, the evidence of bad blood between them kept springing when some witnesses testified.

For instance, during re-examination, Pw1 said at page 4 line 6-7 of the proceedings, that:

“There was no grudge except when he had wanted to have sex with her earlier”.

On page 5 at line 8 -11 of the proceedings, Pw2 said:

“You got injured on the hand when you were beaten by Hassan my son. You had differed. That

was long time before the case. I have not sued you over land. The land is mine and my co-wife.....you caused the difference. I do not plan to destroy you.”

On page 10 line 3-4 of the proceedings, pw5 stated

“it is true the family has differences but are we are here for the complainant’s case.”

The complainant was said to have sustained an injury on the mouth which was confirmed by the evidence of Pw6 and exhibit P4. In his defence, the appellant and Dw4 said that the appellant beat the compliant although they gave different reasons for this.

I also note that the evidence of the complainant was that of a single identifying witness and it outlined what the appellant submitted, Section 36 (1) of the Sexual offences Act was complied with when he too was subjected to medical examination by pw6 and he prepared a report which gave results that did not connect him to the offence. He stated on page 11 line 14-16 of the proceedings.

“I also examined you. Your test was ok. And safe from bacterial infection.....”

The complainant had also been examined and nothing significant noted to this extend.

In view of the foregoing analysis, I find the prosecution evidence adduced before the trial court raised doubts whose benefit ought to have been granted to the appellant.

I therefore proceed to find that this appeal has and merit and his conviction unsafe.

I allow the appeal, quash the conviction and set aside the sentence. The appellant is hereby set free, unless lawfully held.

Judgment delivered, signed and dated 30th December 2015.

D. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Appellate in person

C/assistance - Kiarie



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