



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO.66 OF 2016

BETWEEN

PETER MBUGUA MIRINGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by D. Ogal RM

in Hamisi Principal Magistrate's Court Criminal Case No.282 of 2015

delivered on 22.07.2016)

JUDGMENT

1. The appellant was facing a charge of sexual assault contrary to *section 5(1)(a)(i)(2)* of the *Sexual Offences Act No.3 of 2006* and in an alternative charge of committing an indecent act with a child contrary to *section 11(1)* of the *Sexual Offences Act No.3 of 2006*. He was found guilty of the alternative count and sentenced to a life imprisonment. He was aggrieved by both the conviction and the sentence. He filed this appeal based on the following grounds:

- 1. The learned trial magistrate erred in law and fact in convicting the appellant for an offence contrary to section 11(1) of the sexual offences Act against the weight of evidence.**
- 2. The learned trial magistrate erred in law in convicting the appellant for an offence contrary to section 11(1) of the sexual offences Act when there was no evidence linking the appellant to the offence.**
- 3. The learned trial magistrate erred in law in convicting the appellant without warning himself against the danger of convicting the appellant against uncorroborated evidence of a minor.**
- 4. The learned trial magistrate erred in law in convicting the appellant against medical evidence which could not be linked to the appellant.**
- 5. The learned trial magistrate erred in law in convicting the appellant for the offence contrary to section 11(1) of the sexual offences Act as the medical evidence produced was self-contradictory.**

6. The learned trial magistrate erred in law in delivering an oral judgment in which he unlawfully convicted the appellant.

7. The learned trial magistrate erred in law in by casually dismissing the appellant's alibi evidence.

8. The learned trial magistrate erred in law by convicting the appellant on a fatally defective charge.

2. The particulars of the alternative charge were that on the 1st March, 2015 at [particulars withheld] market in Shamakhokho location in Hamisi District within Vihiga County the appellant touched the vagina of *I. A.* (herein referred to as the complainant) with his fingers.

Prosecution Case:

3. The prosecution called 4 witnesses the complainant PW1, her mother PW2, the clinical officer PW3 and the investigating officer PW4. The complainant's evidence was that in the year 2015 she was a class 3 pupil. That she was living with her mother. The appellant was a neighbour at their place of residence. That on the material day she was outside her mother's house. The appellant called her into his house. She went there. He told her to lie on the bed. The appellant then inserted his finger into her private parts. She attempted to scream but the appellant blocked her mouth. He then told her not to tell anyone about it. She went out of the house. She started experiencing pain when urinating. After two days she informed her mother about it. She was taken to Serem Health Centre. The matter was reported to the police.

4. The complainant's mother testified that on the material day she had gone to church and left her children at home. That on the 7th March 2015 the complainant told her that she was feeling pain when urinating. She further told her that the appellant had inserted his fingers into her private parts. She took her to Serem Hospital. She was seen by a doctor. Her private parts were bruised. They reported at Serem police station. They were issued with a P3 form. It was filled by a doctor.

5. The clinical officer stated in his evidence that he was at the time stationed at Serem Hospital. That on the 7th March, 2015, the complainant was taken to the hospital where she was attended to by a colleague. She complained that on 1st March, 2015 a person known to her had touched her private parts. On the 9th March, 2015 the complainant went back to the hospital. The clinical officer, PW3, attended to her and examined her. He noted that she had bruises on her private parts with a slightly torn hymen. Her vagina was painful on touching. A laboratory examination revealed puss cells which was an indication of bacterial infection on her vagina. The clinical officer filled the P3 form on that day. During the hearing in court he produced the treatment notes and the P3 form as exhibits – Exh1 and 2 respectively.

6. The investigating officer, PW4 of Serem police station testified that she received the report from the complainant and her mother on 9th March, 2015. She recorded the statements of the complainant and that of her mother. Later she issued a P3 form which was filled by a doctor. The complainant's mother gave her the complainant's birth certificate. The appellant was arrested by administration police officers from Shamakhokho. She charged him with the offence. During the hearing, she produced the birth certificate as exhibit, PEx3.

Defence Case:

7. The appellant gave unsworn statement and called one witness. He stated in his evidence that at the time he was staying at Shamakhokho market. That he left the place on 28th February 2015 and went to Eldoret town. He stayed there upto 13th March, 2015 when he travelled back to Shamakhokho. He had left the keys to his house with the complainant's mother. He picked the keys. He went to his house and slept. At 1 am administration policemen from Shamakhokho woke him up and arrested him. He was taken to their camp. They later took him to Serem police station. He was charged. He denied that he committed the offence. He said that the complainant's mother owed him Kshs.5,000/-. He said that he believed that the complainant's mother framed up the charge when he started to demand that she pays back the money.

8. The appellant's witness, PW2, stated that the appellant is his uncle. That there was a time that he and the appellant had travelled to Eldoret to attend a funeral. That it was a day before the appellant was arrested. He could however not remember the date that they travelled to Eldoret.

Judgment of the trial court:-

9. The learned trial magistrate found the complainant to be a credible witness and believed her evidence that she was telling the truth that the appellant inserted his fingers into her vagina. He found that the evidence of the clinical officer was supportive of penetration into the complainant's vagina. He dismissed the evidence of the complainant that there was a grudge between the appellant and the complainant's mother as an after-thought as the appellant did not raise the issue during cross-examination. He said that the unsworn statement of the appellant could not be tested in cross-examination. He dismissed the alibi of the appellant that he was on the material day in Eldoret as the defence was not supported by his witness, DW2 who could not remember the date they travelled to Eldoret to attend a funeral.

10. The advocate for the appellant *Miss Oribó* submitted that there was no evidence to link the appellant with the offence. That the evidence of the complainant was not corroborated by any other witness.

11. The advocate submitted that medical evidence indicated that the complainant had bacterial infection but the appellant was not found with such kind of infection.

The advocate submitted that the conviction was unsafe in that the appellant was convicted of the alternative charge without an amendment to indicate that the alternative charge was the main charge.

12. The advocate further submitted that the trial court dismissed the appellant's alibi on the ground that his witness could not remember the date he and the appellant travelled to Eldoret to attend a funeral but nevertheless that the witness could remember that he had accompanied the appellant to Eldoret.

13. The advocate submitted that the issue of there having been a grudge was not considered by the court.

The advocate cited the case of *R. vs Jipkening Arap Kosgey* and *DPP vs Kilborne* 1973 ER 440.

Submissions by State:-

14. The prosecution counsel Mr Ng'etich opposed the appeal. He submitted that a trial court can in a case involving a sexual offence on a minor convict on the evidence of the minor if the court is convinced that the minor is telling the truth.

15. He submitted that the appellant was found guilty of the alternative charge of committing indecent act on a child. That there was no necessity of medical evidence to prove such kind of offence. That infection in the vagina can be caused by many factors.

16. The prosecution further submitted that there was no defect in the charge. That the court can legally convict on an alternative charge.

The prosecution counsel submitted that the date when the appellant and his witness travelled to Eldoret was material to the case. That the trial court was right to dismiss the alibi as the appellant's witness could not remember the date that they went to attend a funeral at Eldoret.

17. The prosecution counsel further submitted that the issue of there being a grudge was not raised when the defence cross-examined the complainant's mother but was raised in the defence. Therefore that the issue was an afterthought.

18. It was further submitted that the appellant was well known to the complainant as they were neighbours. That the appeal is unmerited and should be dismissed.

Duty of trial court:

19. This is a first appeal. It is the duty of a first appellate court to analyse and re-examine the evidence on record and draw its own

conclusions while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses – see *Kiilu & Another vs Republic (2005) 1 KLR 174*.

20. The grounds raised by the appellant in his appeal are that:-

- 1. There was no evidence to sustain a conviction.**
- 2. He was convicted on uncorroborated evidence of a minor.**
- 3. There was no medical evidence to prove the charge.**
- 4. His alibi was not considered.**
- 5. He was convicted on a defective charge.**

21. A birth certificate was produced in court in proof of the age of the complainant. The birth certificate indicated that the complainant was born on 18th June, 2006. That would put her age at 9 years in the year 2015. The complainant was therefore a child under the age of 18 years vide the provisions of the Sexual Offences Act, 2006.

22. The appellant was convicted of an alternative charge of committing an indecent act with a child contrary to *section 11(1)* of the Sexual Offences Act No.8 of 2006. The main charge was sexual assault contrary to *section 5(1)(a)(i)(2)* of Sexual Offences Act. The appellant could be convicted of the alternative charge if there was no evidence to prove the main charge. No medical evidence was required to prove the alternative charge whose particulars was touching the vagina of the complainant with his fingers. The submission that the appellant was convicted on a defective charge is not tenable.

23. There is no necessity of corroboration of the evidence of a child who is under the age of 18 years where the charge is an offence involving a sexual offence. The court can in such a case convict on the evidence of a child if the court is satisfied that the child is telling the truth – Section 124 of the Evidence Act.

24. The complainant in this case testified on oath and stated that the incident occurred on 1st March, 2015 and that she told her mother of the incident after two days. Her mother PW2 on her part stated that the complainant informed her of the incident on 7th March, 2015 though that it had taken place on the 1st March 2017. That on receiving the report she took her daughter to hospital and they reported to the police.

25. The investigating officer stated that the incident was reported to her on 9th March, 2015. The complainant informed her that the incident had taken place on 1st March, 2015 but that she had not informed her mother until after 2 when she had gotten ill and that informed her mother about it.

26. The conviction on the appellant was based on the finding of credibility of witnesses – the complainant and her mother. The complainant stated that the incident occurred on 1st March, 2015 and that she informed her mother about it after 2 days. Her mother on the other hand says that she did not become aware of the incident until 7th March, 2017 which was after 6 days. The investigating officer PW4 stated that the complainant told her that the incident occurred on 1st March, 2017 and that she told her mother about it after two days.

27. If the court were to take it that the complainant informed her mother about the incident after 2 days, why did her mother wait until 7th March, 2015 to take the complainant to hospital and until 9th March, 2017 to report to the police" Is there anything that the two witnesses, mother and daughter were trying to hide or is it that they have fabricated the evidence"

28. If on the other hand the court were to believe that the complainant told her mother about the incident on the 7th March, 2017 as stated in the evidence of the mother and that the incident had taken place two days earlier, that would mean that the incident had taken place around 5th March, 2017. Was the appellant that time at Shamakhokho or was he at Eldoret" The net effect of the evidence is that it is not clear as to when the incident took place. It is not known whether the appellant was at the time at

Shamakhokho or he had travelled to Eldoret. The alibi of the appellant has thereby not been displaced. The burden of proving the falsity of an accused's alibi lies on the prosecution – see *Karanja vs Republic* (1983) KLR 501. The alibi offered by the appellant could be true as there was no certainty the date when the alleged offence was committed.

28. A court of law should not rely on the evidence of a witness who appears untrustworthy to convict an accused person. In the case of *Ndungu Kimani vs Republic* (1979) KLR 282 at page 284 the Court of Appeal held that:-

“The witness upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise 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. Looking at both the evidence of the complainant and her mother in this case, the court cannot say that their evidence was safe and credible to found a conviction on the appellant. In the premises there were no strong reasons to believe the evidence of the complainant and her mother that the appellant had indecently assaulted the complainant as there was no certainty as to the day when such assault had taken place. The appellant was entitled to the benefit of doubt. The trial magistrate did not consider the uncertainties that were there in regard to the day when the alleged incident took place. It may well happen that on the alleged date the appellant was in Eldoret.

30. In the foregoing the prosecution had not proved the charge against the appellant beyond all reasonable doubt. The appellant was convicted on shaky evidence. The appeal on both conviction and sentence thereby succeeds. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 20th day of December, 2017.

J. NJAGI

JUDGE

In the presence of:-

..... for appellant

Mr Ng'etich for State

George court assistant

Accused present

Right of appeal 14 days.



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