



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO 9 OF 2019

JEREMIAH ERENG ESEKON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Criminal case no 18 of 2017 of the Resident Magistrates court at lodwar)

JUDGEMENT

1. The appellant was charged with the offense of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences Act no 3 of 2006 and an alternative charge of committing an indecent act with a child. He was tried, convicted and sentenced to life imprisonment on the main count.

2. Being aggrieved by the said conviction and sentence ,he filed this appeal and raised the following grounds therein:

(i) That the learned trial magistrate erred both in law and facts by relying on contradicting evidence of the prosecution

(ii) That the learned trial magistrate erred in both law and facts in convicting him without proper identification by the witnesses

(iii) His request for witness statements was not honored by the prosecution and therefore the trial was not free and fair

(iv) That the learned trial magistrate erred in law and fact in convicting him without credible witnesses not availed in court and his defense was not considered.

3. He therefore sought that the appeal be allowed, conviction quashed and the sentence set aside.

SUBMISSIONS.

4. When the appeal came up for hearing, the appellant filed written submissions which he relied upon, while Mr. Mongare for the ODPP opposed the appeal by way of oral submissions. It was submitted by the appellant ,that the prosecution case was full of contradicting evidence as regards the place where and time when the incident took place as regards the testimony of the complaint PW3 and PW2. He submitted that pw3 stated that they were sleeping inside the house while pw2 stated that it was outside. He submitted that PW2 was not a truthful witness.

5. He submitted that failure on the part of the trial court to undertake inquiry of the correct testimony was an error in law and the

said evidence could not support a conviction, in support of which the case of MAITANYI vs. REP. (1978) KLR 198 was tendered. The appellant further submitted that there was contradiction as regards the scene between pw2, pw3 and pw4 as to whether it was a river bed or the hills of Lodwar High School. He submitted that the testimony was contradictory, uncorroborated and not credible.

6. It was submitted that the case was full of fabricated facts. It was pw1's evidence that the offense was defilement but stated that no weapon was used, he stated that there was a doubt as to what caused the actual injuries to the complainant and therefore penetration was not proved. He contended that there was no evidence on what caused the obvious tear on the complainant's external genitalia which could either be a stone or a stick. He further stated that as per the evidence of PW4, the initial report made was that the complainant had been assaulted by her mother and it was only when taken to the hospital when it was discovered that she had been defiled. He submitted that the actual person who assaulted the complainant was the mother as he was not mentioned by any witness.

7. He submitted that he was not properly identified, as there was contradictory evidence between pw2 and pw3 on how they knew him. He submitted that the only description given by PW3 was that he was tall neither was he brown, which did not fit him. He stated that in finding that the evidence was that he was neither tall nor brown the trial court fell into error. He submitted that whereas pw2 stated that he was their neighbor and that PW3's mother was his lover, PW3 stated that she did not know where he was living

8. It was stated that very crucial witnesses were not called to testify, including the brother of the complainant who was the first person she reported to and who took her to the hospital, the missionary of St Paul and the Aunt who took her to the police. He submitted that he was not accorded fair trial as provided for under article 50(4) of the constitution. It was contended that there was contradiction as regards dates on the p3 form and that there was a grudge between him and the mother of the complainant over some money and that she was his wife.

9. On behalf of the prosecution, it was submitted that there was no contradictory evidence and that the appellant was properly identified by both pw2 and pw3 as there was adequate moonlight which aided in identification, which was by recognition. It was stated that pw2 corroborated the evidence of pw3 and that the appellant's defense was considered and dismissed. On the issue of crucial witnesses it was submitted that the same was not raised during the trial and the nature of the said evidence which would have been favorable to the appellant was not shown. It was stated that all credible witnesses were called.

PROCEEDINGS.

10. This being a first appeal the court is under a duty to reevaluate the evidence tendered before the lower court and to come to its own conclusions as stated in the case of OKENO v. R. [1972] E.A. 33 where the Court set out *the duties of a first appellate court thus:-*

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, See Peters V. Sunday Post, (1958) E.A. 434”

11. I will therefore proceed to reevaluate the case as follows; on 29th January 2017 the complainant who testified as pw3 was sleeping with PW2 when the appellant who was known to them came and took her away. It was pw3's evidence that her mother was in another house, she came out of the house when thereafter the appellant carried her to the dry river bed where in her words “he did something bad to me and blood started coming out of my private parts” the appellant then left her there for his house. She then went and reported to her brother and mother who chased her away. In the morning she informed one Emuria that blood was coming out of her private part and was then taken to the hospital through the police station. It was her evidence that the appellant told her to follow him to the river bed where he forced her to lie down, removed their clothes and defiled her in her words “something like a snake was inserted inside my vagina, the snake was coming from the man's private parts”. In cross examination she stated that she did not have any relationship with the accused and that he even beat her up with stones.

12. PW2 corroborated this account and stated that she knew the appellant as their neighbor who used to stay at the next plot. When he took the complainant she followed then closely then retreated back and went and informed her mother, who informed the village

elders. In the morning when she looked at the complainant she had bruises on her face, hands and limbs. It was her evidence that the complainant was aged 6 years at that time and that the appellant carried her away and raped her. In cross examination she stated that she knew the appellant as a lover of the complainant mother, who used to pick the child and take her to his house before returning her back. On the material day the appellant came from work while drunk. She confirmed that the complainant was beaten by her mother when she discovered that she had left home. The trial court found the witness truthful and credible.

13. **PW1 BEN KEMBOI** a clinical officer examined the complainant and confirmed that she had bruises on the face, the neck, head and abdomen and on examination he discovered that she had been defiled. Her external genitalia had obvious tear extending to the anal opening, with the labia tempered with. He concluded that she sustained injuries which led to recto physical illness following defilement. In cross examination he stated that the complainant had to undergo surgery as she was emitting pus accompanied by faecal matter from her private parts.

14. **PW4 APCW BEATRICE EBEI** received the child at the station having been brought by her aunt on allegation of assault having been beaten by her mother. She was then taken to the hospital where it was discovered that she had been defiled. She then visited the scene and recorded statements from witnesses including PW2, whose statement was that while sleeping together with the complainant, the appellant came to the place at 2.00 am and carried her away. The age assessment was carried out which confirmed that she was 6 years. The child was later on treated at Nairobi Women's Hospital for almost one year. In cross examination she confirmed that the appellant was known to both PW2 and PW3 as he was having a love affair with the complainant's mother. She confirmed that the complainant's mother was a habitual drunkard.

15. When put on his defense the appellant stated that on 25th June 2017 he had left lokitaung to go visit friend whom he did not find. He decided to sleep there and the following day when he left while on the way he met a crowd of people who told him that there was a person who had committed a sexual offence, when he approached them, they apprehended him. And took him to the police station before being charged in court.

JUDGMENT OF THE TRIAL COURT.

16. In convicting the appellant the trial court found that the age of the appellant was proved at 6 years through the age assessment report which at 23/8/ 2018 showed that she was 8 years. She further found as a fact that penetration was proved and that the identification of the appellant was by way of recognition. On lack of crucial witnesses she stated that the mother of the complainant would not have been a material witness based on her conduct towards the complainant when she made a report to her and further held that on the authority of **CALED OWEARE MAENDE V. R [2010] e KLR** it is not that a witness who has not been called to testify would have given adverse evidence.

ANALYSIS AND DETERMINATION.

17. Having analyzed the evidence tendered before the trial court and taking into account the submissions on record, it is clear that the only issue before the court is as to whether the appellant was positively identified; as pointed by the trial court the identification of the appellant was that of recognition, both Pw2 and Pw3 knew him as a neighbor and lover of the complainant's mother. The two witnesses were very consistent in their evidence placing the appellant at the scene. The appellant in his defense corroborated their account when he testified that he had spent the night at the place. At their ages, I see no reason why they should frame up the appellant.

18. There was adequate moon light which enabled them to recognize the appellant with pw3 describing even the color of his clothes. I am satisfied that the recognition of the appellant was safe and free from error as the account of the complainant was corroborated in material particulars as was stated in the case of **NZARO V. REPUBLIC (1991)KAR**. I therefore find no merit on this ground of appeal.

19. Whereas it was the appellant's contention that penetration was not proved, from the proceeding it is clear that the same was proved through the evidence of the doctor who examined the complainant and whereas the same suffered other injuries cause by her mother, I find and hold that penetration was proved. It was the complainant account that the appellant used a snake from his private part into her private part. As was stated in the case of **MUGANGA CHILEJO SAHA VS. REPUBLIC [2017] eKLR** children who are victims of sexual abuse are likely to be devastated by the experience and feel shy and embarrassed and expected to use words like snake to describe the penis.

20. on the issue of failure to call crucial witnesses I do not find fault with the trial courts assessment , that the evidence of the complainant's mother would not have been relevant taking into account her action of not seeking medical intervention for the complainant and instead resorting to punish her for not being at home . Further taking into account the alleged relationship with the appellant there is a doubt whether she would have been a competent witness.

21. On the appellant's allegation of an existing grudge with the complainant's mother, it is clear that the same was not raised at the trial during cross examination and or in his evidence in chief. On the contrary the relationship between the two seems to had been very cordial which explains the complainant's mother's reluctance to report the matter which action was left to her Aunt through the assistance of St. Paul missionaries. If there was any grudge the same would have been the reportee.

22. On sentence , whereas the appellant was given the maximum sentence provided for in statute ,with the trial court holding that her hands are tied , which is now not the case in view of the Supreme Court's decision **MURUATETU** case as interpreted by the Superior courts , I have taken into account the age of the victim who was 6 years at the time of the defilement, the injuries she sustained which resulted into her admission to Nairobi Women's Hospital for a period of over one year and the alleged romantic relationship with the victim's mother and find that the sentence was appropriate and lawful and will not interfere with the same.

23. The upshot of this is that I find no merit on the appeal herein both on conviction and sentence and accordingly dismiss the same and affirm the trial court's decision thereon. The appellant is entitled to right of appeal.

Dated, signed and Delivered at Lodwar through Skype this day 12th of May, 2020

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Applicant - present

Court Assistant: Maureen/Lotim



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