



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 27 OF 2017

REUBEN SHITULI LUMISI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by B.S. Khapoya, R.M, in Kakamega CMC S.O. No. 2 of 2012 delivered on 18/1/2017)

J U D G M E N T

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal through the firm of **Shitsama & Co. Advocates**. The grounds of appeal as per the supplementary grounds of appeal dated 5th October, 2018 are:

1. That the trial magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the prosecution's case.
2. That the trial magistrate erred both in law and fact by failing to appreciate the prosecution had failed to establish their case beyond reasonable doubt.
3. That the trial magistrate erred in both law and fact by shifting the burden of proof to the appellant.
4. That the trial magistrate erred in both law and fact by making findings not based on evidence on record thereby occasioning miscarriage of justice.
5. That the trial magistrate erred in both law and fact in convicting the appellant against the weight of the evidence on record.
6. That the trial magistrate erred in law and fact by making a finding that the evidence of PW1 corroborated that of PW4 and PW5.
7. That the trial magistrate erred in both law and fact in failing to observe that a key witness, one PSS, who was mentioned severally was not called to testify.

2. There were other grounds of appeal contained in the petition of appeal filed by the appellant in person. The advocates for the appellant confined the appeal to the supplementary grounds of appeal.

3. The state opposed the appeal through the oral submissions of the prosecution counsel **Mr. Juma**.

Case for prosecution

4. The particulars of the charge against the appellant were that on the 2nd February, 2012 at about 11 am in Kakamega South District of the Western Province intentionally and unlawfully caused his penis to penetrate the vagina of PM (herein referred to as the complainant/girl) a child aged 10 years.

5. The prosecution called 7 witnesses in the case. The case for the prosecution was that the complainant (PW3) was in the year 2012, a 10 year old girl. She was living with her aunt PW1. The appellant was a fellow co- villager who was operating a phone charging business at his home. That on the material day at 11 am the husband to Pw1 (PS who did not testify in the case and who is also an uncle to the complainant) sent the complainant to pick his phone from the appellant to whom he had left the phone for charging. The complainant went to the home of the appellant. She found him all by himself at the home. She entered into his house. She asked him for her uncle's phone. He did not give her the phone. He instead grabbed her and pulled her to a bed. He forced her to lie on the bed. He covered her mouth and removed her skirt and pants. He defiled her. After he finished he locked her in the house and went out. He came back and gave her 2 mandazis. He told her not to

tell anyone about the incident. He gave her the phone and she left for home. She did not disclose the incident to anybody on that day. On the following day she started feeling pain on the pelvic area and on the head. She disclosed to her aunt PW1 what had happened.

6. That on receiving the report PW1 and some two other woman checked the private parts of the girl and saw sperms. They took her to the home of the village elder, **Josephine Olibo** PW5. Another villager **Rosemary Khayera** PW4 joined them at the home of the village elder. They went to the home of the appellant. The village elder PW 5 asked the appellant about the allegations. He denied it. PW1's husband escorted the girl to Isulu Police Patrol base. **P.c Gichuhi** PW2 investigated the case. He issued a P3 form to the complainant. He was handed over the skirt and underpant that the complainant was wearing at the time of defilement. He was also given her birth certificate. The birth certificate indicated that she was born on 16/3/2003. The girl was examined by a clinical officer Pw6 at Shibwe Sub- District Hospital. The clinical officer found her with bruises on the labia minora with the hymen absent and stains on her underpants. She formed the opinion that the girl had been defiled.

7. After investigations were complete the appellant was charged with the offence. He denied the charges. During the hearing PC Gichuhi PW2 produced the underpant and the skirt as exhibits, PEX 1 and 2 respectively. The clinical officer PW6 produced the P3 form and the Post Rape Care form as exhibits, Pex 3 and 4 respectively. **P.c. Otieno** PW7 of Isulu Police patrol base produced the birth certificate as exhibits, Pex 5.

Defence Case

8. When placed to his defence the appellant gave a sworn statement and called one witness, his wife Dw2. In his defence the appellant stated that on the 2/2/12 he was at home watching television in his house with his grandchildren. His wives were outside. One of them was washing clothes while the other one was preparing vegetables. That at 11.30 am the complainant arrived at his home with a mobile phone that she had been sent by her uncle to take it to him for charging. It was not the first time that the girl had brought the phone for charging. The girl joined them in watching television. He then left the children in the house and went out to brush his teeth. The girl's uncle P then arrived and asked for the girl. He left with her. They left the phone. P went back for it at 4 Pm. After 2 days the village elder went to his home and told him that there were rumours that he had defiled the minor.

9. He inquired from the girl but she did not say anything. On the following day he was arrested. He attributed the arrested to be a frame up by his political enemies as he had an interest in politics and wanted to stand for an elective post.

10. The appellant's wife **DW2** testified that on the 2/2/12 at 11 am she was washing clothes at her house close to the phones charging room. That the complainant brought a phone for charging and gave it to the appellant who was with his grandchildren. The complainant joined them in watching television. After about two hours the girl's uncle came and found the appellant brushing his teeth. The uncle picked the girl and left with her. The witness said that the appellant had not taken the girl to any room. She denied that he defiled the girl as she was close by. She said in cross – examination that she did not enter into the house for the two hours that the girl was there. That she was able to see inside the house from where she was washing clothes.

Judgment of the trial magistrate

11. The learned trial magistrate found that the charge against the appellant was proved beyond reasonable doubt. He found that the age of the complainant was proved by the age indicated in the birth certificate. That the evidence of penetration was corroborated by the villagers PW4 and PW5 who noted that the minor had fresh injuries. That these were also corroborated by the clinical officer who observed bruises on the labia minora and the missing hymen. Further that the appellant was a person well known to the complainant.

12. That the appellant and his witness acknowledge that the girl had taken the phone to him for charging. That as far as the appellant's defence is concerned, he did not identify the people who could have framed him because of his political ambitions. That the trial magistrate was right in dismissing the appellant's defence.

Submissions

13. The advocates for the appellant, **Mr. Shitsama and Miss Ashitsa** submitted that there were material contradictions in the evidence of the prosecution witnesses that puts doubt in the credibility of the witnesses. That there was contradiction as to the date that the complainant reported to PW1 that she had been defiled. That she said in her evidence- in-chief that the complainant told her of the incident on the following, that is on the 3/2/2012 while in cross – examination she said that she learnt of it after 2 days later, that is, on 4/2/2012. That the villagers PW4 and 5 stated that they received the report on 4/2/2012 when they proceeded to examine the complainant.

14. That PW1 stated in her evidence that the complainant had been sent to take the phone to the appellant for charging while the complainant stated that she had been sent to pick the phone from him. That PW1 stated that when the girl returned home from the appellant's home she refused to eat but when cross – examined she stated that the complainant ate and went to play with friends. That the complainant in her evidence stated that there was a bed in the appellant's shop where he charges phones. That she went and showed some people the bed. However that PW4 stated in cross – examination that she did not see a bed in the appellant's shop.

15. The advocates submitted that the medical evidence adduced in the case did not prove that the complainant was defiled. That the complainant stated that that was her first day to have a sex encounter. That when she reached home she went to play with friends. However that the clinical officer who examined her found mere bruises on the labia minora. There was no rupture of the hymen. The advocates wondered how defilement of a 10 year old girl by a grown up male person could only have left minor bruises on the genitalia. They wondered how such a young girl would have proceeded to play after such an ordeal.

16. The advocates submitted that the appellant was not subjected to a DNA test to ascertain whether he was connected with the offence. That the fact that the hymen was missing was not conclusive proof of defilement as there are other factors that can cause the disappearance of the

hymen other than defilement.

17. It was submitted that the complainant's uncle called PS was a crucial witness in the case. That failure to call him led to the inference that if called he would have given evidence adverse to the prosecution's case- **Bukenya & others Vs Uganda (1972) EA** referred to.

18. The advocates submitted that the trial court had shifted the burden of proof to the appellant. It was submitted that it is trite law that an accused person should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence – **Philip Muiruri Ndaruga Vs Republic (2006) eKLR** referred to. That the holding of the trial magistrate that the appellant did not identify his would be framers and that his defence was too general as to appear a concoction was an indication that the magistrate convicted the appellant on the weakness of his defence rather than the strength of the prosecution case.

19. The **prosecution counsel** on the other hand submitted that the charge was proved beyond reasonable doubt. That there were no contradictions in the evidence for the prosecution. That PW1 did not contradict herself on the date she learnt of the incident. That she stated that the offence occurred on the 2/2/12 and learnt of it on 3/2/12. That the P3 form indicates that the girl was taken to hospital on 4/2/12. Therefore that there was no contradiction.

20. That the complainant stated that she was defiled in the appellant's house. That PW4 talked of there being no bed in the appellant's shop. That there was therefore no contradiction.

21. It was submitted that the complainant said that she started experiencing pain on the following day. Therefore that the fact that the complainant went to play after the incident does not negate the fact that the incident took place.

22. Prosecution counsel submitted that it is irrelevant whether the complainant had gone to the home of the appellant to take the phone for charging or to pick it. That this does not go to the root of the matter as the fact is that the complainant went to the home of the appellant.

23. That there is no need for corroboration in sexual offences involving minors as provided by section 124 of the Evidence Act. That section 143 of the Evidence Act gives the prosecution discretion to call those witnesses they deem appropriate to prove their case. The uncle to the complainant was not there when the offence was committed and he was therefore not a crucial witness in the case.

24. It was further submitted that penetration can be partial or complete. Whether there was a rupture or bruises was irrelevant. That there were no spermatozoa detected. There was no need of a DNA test as there was nothing to compare with. Furthermore defilement is proved by testimony of witnesses as opposed to medical evidence.

25. It was submitted that the appellant was a person well known to the complainant. That the incident took place in broad day light and therefore there was no mistaken identity. Lastly it was submitted that the trial court never shifted the burden of proof to the appellant.

Analysis and Determination

This is a first appeal. The duty of a first appellate court was stated in **Kiilu & Another Vs Republic (2005) IKLR 174** where the Court Appeal stated that:-

“ An appellant in 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 in the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions

It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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.”

26. It is true that there were indeed some contradictions in the prosecution case. The complainant's aunt PW1 stated in her evidence – in – chief that the complainant informed her of the incident on the following day, i.e 3/2/2012. In cross-examination she said that she learnt of it on 4/2/12 on which date she checked her underpant and saw sperms. There was also contradiction as to whether the complainant had gone to the home of the appellant to deliver the phone for charging or to pick it up. There was contradiction as to whether there was a bed in the place/ shop the appellant was using for phone charging. The complaint said that there was a bed in that place/ shop while Pw4 said that when she went to the place she did not find any bed. The complainant said that she took people to the place who saw the bed.

27. The investigating officer testified in court on two occasions. On the first occasion he stated that he did not visit the scene. When he was recalled later on to clarify some issues after a duration of about 8 months, he stated that he had visited the scene after a while and had found a bed in the shop of the appellant.

28. The manner of treating contradictions in a case were stated by the Court of Appeal in **Jackson Mwanzia Musembi Vs Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

“ with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main

substance of the prosecution's case."

28. The contradictions on whether the complainant reported the commission of the offence on the 3rd or 4th February 2012 is not a crucial contradiction in the case. It is clear that the co-villagers PW4 and 5 learnt of the report on the 4/2/12. The P3 form indicates that the report was made to the police on 4/2/12. It appears that the report was made to the police on the day that the complainant reported it to her aunt PW1. The date must therefore be 4/2/12.

29. The complainant stated that she had gone to pick a phone from the appellant. Her aunt said that she was sent to take the phone to the appellant. The appellant and his wife stated that the complainant had been sent to take the phone to the appellant. The contradiction in the complainant's evidence that she had gone to pick the phone is not a material contradiction in the case. It does not go to the root of the case. The point not in contention is that the complainant at the material time visited the home of the appellant. The contradiction is not fatal to the case.

30. Whether there was a bed at the place the complainant was defiled was crucial evidence in the case as the complainant said that she was defiled on a bed. The complainant said that there was a bed at the appellant's shop. The villager who went to the home of the appellant PW4 said that she did not see any bed at the shop of the appellant. The investigating officer gave contradictory evidence on the issue.

31. It is to be noted that the complainant was not cross – examined on the details of the day she said that she took some people to the shop of the appellant and showed them the defilement bed. She was not asked who the people were and the day that she took them to the place. Since these details were not elucidated from the complainant it cannot be said that she was lying. I thereby find no contradiction on the evidence of the complainant on the issue of the bed.

32. It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence. This was the holding of the Court of Appeal in **AML Vs Republic (2012) eKLR** where it stated that:

" The fact of rape or defilement is not proved by a DNA test but by way of evidence."

This position was re- stated by the same court in **Kassim Ali Vs Republic , Mombasa Criminal Appeal No. 84 of 2005** where it stated that:

"(The)absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."

33. The advocates for the appellant submitted that the injuries indicated in the medical documents were so minor as to create doubt whether the complainant was defiled. The meaning of "penetration" as provided in section 2 of the Sexual Offences Act is the

" partial or complete insertion of the genital organs of a person into the genital organs of another person."

34. The doctor who examined the complainant found her with bruises on both labia minora and a missing hymen. In my view, the argument by the advocates for the appellants that the complainant would have received more serious injuries if she had been defiled by a person of the appellant's age (meaning mature adult) is an argument based on mere speculation. Penetration can be partial or complete. The bruises observed by the examining doctor were sufficient to prove defilement. The mere fact that the child went to play soon after the incident does not rule out the occurrence of the act. The argument is therefore dismissed.

35. In the premises it was not necessary to procure medical evidence to prove the charge of defilement. The charge could still be proved by oral or circumstantial evidence in the absence of medical evidence.

36. The uncle to the complainant PS was not called as a witness in the case. The complainant's aunt PW1 stated in her evidence that the said person is the one who took the complainant to hospital. That he is the one who had sent the girl to take the phone for charging. The Post Rape Care Form indicated that the girl had been taken to hospital by her uncle. It is then clear that the evidence of PS had he testified, was that he sent the girl to take the phone for charging and that he escorted her to hospital.

37. There is no requirement in law of a particular number of witnesses that are required to prove a particular fact. A fact may be proved by even a single witness unless the law required otherwise. Only in situations where the evidence of the witnesses called by the prosecution is not sufficient is the court entitled to make adverse conclusions on why material witnesses were not called – in **Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR** where the Court of Appeal held that :

"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case- see Bukonya & Others Vs Uganda (1972) EA 549."

38. The important evidence that PS would have testified on is that he took the complainant to hospital. There was no dispute that the complainant was taken to hospital. A p3 form was filled at Shibire Sub- County Hospital. This is sufficient proof that the complainant was taken to hospital. The evidence of PS on the same would not have added much value to the case. The other evidence of the witness is that he

sent the girl to the home of the appellant. This was also not in dispute. In the premises there is no basis in drawing the inference that the person failed to testify because if he had done so his evidence would have been adverse to the prosecution case.

39. On the question of whether the trial court convicted the appellant on the weakness of his defence rather than the strength of the prosecution case, the trial court did consider the defence and stated that the appellant did not identify his political enemies who framed him up and how they were connected to the case. The magistrate said that the defence was too general as to appear to be a concoction.

The question then was whether the appellant's defence displaced the evidence tendered by the prosecution.

40. The appellant stated in his defence that the girl had been in the house for about 3 minutes before he went out to brush his teeth. That her uncle P then arrived and took her away. The appellant's wife DW2 on the other hand stated that the girl had stayed in the house for about 2 hours before her uncle P went there to pick her. That P had found her husband brushing his teeth. There was thereby material contradiction between the evidence of the appellant and his wife. The appellant stated that the child's uncle arrived almost immediately after the girl arrived at the home which was contrary to the evidence of his wife that the said uncle arrived about 2 hours later. Who then between them was telling the truth?

41. The complainant in her evidence stated that she found the appellant alone at his house. That after the appellant defiled her he locked her in the house and went and brought her mandazi. During cross-examination she was not asked whether the appellant's wife, DW2, was at home. She was not asked whether there were grandchildren of the appellant watching television in the house. She was not asked whether her uncle went to pick her at the home of the appellant.

42. The child was cross-examined by an advocate, Mr. Anzia. It is inconceivable that an advocate would have failed to ask the witness such crucial questions if he had instructions that there were other people at the home at the alleged time of defilement and that she was picked from the home by her uncle. There was then no basis of believing that Dw2 was at home at the material time. The trial court was justified in believing the evidence of the complainant to that of the appellant.

43. The appellant made general unsubstantiated allegations that the case was a frame up by his political enemies. He did not call any evidence to support the allegations. None of the prosecution witnesses were cross-examined on whether the charges were a frame up by the appellant's political enemies. In face of the strong evidence tendered by the prosecution there was no reason to believe the appellant's defence on the issue.

45. On my own analysis and evaluation of the evidence I find that the appellant was convicted on cogent and credible evidence. The complainant's evidence that the appellant defiled her was supported by medical evidence. The fact that the appellant admitted that the complainant was at his home on the day of the commission of the offence led credence to the evidence of the complainant to that end. There was no reason to doubt the evidence of the complainant.

46. The upshot of the foregoing is that the appeal is unmeritorious. The appellant defiled a girl of less than 11 years of age. He was given the minimum sentence of life imprisonment that is provided by the law. The conviction and the sentence are thereby upheld. The appeal is accordingly dismissed.

Delivered and dated in open court at Kakamega this 21st day February, 2019.

J. NJAGI

JUDGE

In the presence of

Miss. Ashitsafor appellant

Mr. Jumafor state

Appellant:..... present

Court assistant:.....George

14 days Rights of Appeal