



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 99 OF 2019

TYBERIUS NYATOGO ONGORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon R.M OANDA, PM dated 15th November 2019 at the Magistrate's Court at Kilgoris Criminal Case No. 44 of 2017)

JUDGMENT

1. The appellant, TYBERIUS NYATOGO ONGORO, was convicted by Hon. R.M Oanda, Principal Magistrate, of defilement contrary to **section 8(1), as read with section 8(3), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya**, and was accordingly sentenced to 15 years imprisonment. The particulars of the charge against the appellant were that on 22nd November 2017 at Kilgoris area in Transmara West District of the Narok County, he intentionally caused his penis to penetrate the vagina of EM, a child aged fourteen years.
2. He had also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act**. The particulars of the alternative charge were that on 22nd November 2017 at Kilgoris area in Transmara West District of the Narok County, he had intentionally and unlawfully committed an indecent act with the same child.
3. The appellant pleaded not guilty to the charges before the trial court and a full trial was conducted. The prosecution in support of its case called 4 witnesses.
4. The complainant, EM testified as Pw1. She recalled that on the material day she was at home with her sister EN when the appellant got ahold of her from behind and had sex with her causing her to bleed. She testified that she felt pain and began screaming. The appellant then left. Upon her mother's return, Pw1 told her what had transpired.
5. Pw2 testified that when she arrived home she found her daughter bleeding from her private parts and before she could examine her, Pw1 lost consciousness. When she regained consciousness Pw1 explained to her the ordeal and she rushed Pw1 to hospital.
6. The clinical officer DC (Pw4) testified that he examined Pw1 20 hours after the incident. According to his findings Pw1 was not under the influence of drugs or alcohol. He testified that there were no physical laceration noted and nor any tears. Both the labia minora and majora were normal but the hymen was broken. He attributed the blood observed to Pw1's menses. He also noted a darkish discharge. Lab tested revealed absence of spermatozoa and high vaginal swab showed red blood cells in the vaginal walls. The urinalysis showed blood cells in the urine while the pregnancy as well as the HIV test results were both negative. He concluded that Pw1 had been defiled.
7. PC No 88095 WO (Pw3) testified that on 22nd November 2017 at 19:30 hours a defilement case was reported by the Pw1's parents. He testified that at the time the child had been treated and appropriate measures taken. According to his investigations the appellant led the child to the house, told her not to raise an alarm and defiled her. He testified that the incident took place during the day and that the appellant was a person well known to the complainant.
8. The appellant when put on his defence gave sworn testimony and denied committing the offence.
9. The appellant in his submission argued that a torn or broken hymen alone is not conclusive proof of penetration in defilement cases. They cited the cases of **David Mwingirwa v Republic [2017] eKLR** and **Kavoo Kimonyi v Republic [2018] eKLR**. They submitted that Pw4 did not observe any tears or laceration on the complainant's vaginal region and that the hymen tear was not fresh.
10. It was also submitted that the prosecution failed to establish positive identity of the appellant. They also faulted the prosecution for not

calling the complainant's sister who witnessed the incident.

11. The appellant in his submissions contend that the due to adverse medical findings and lack of testimony from the complaint's sister rendered Pw1's evidence uncorroborated. Consequently the trial court erred by relying on the uncorroborated evidence without furnishing the reason for such reliance.

12. Mr Otieno for the state conceded the appeal on ground that the conviction of the appellant was not safe. He urges that at page 6 of the record, the appellant sought to have Pw1 recalled for cross examination. At page 10 it is indicated that Pw1 and Pw2 were to be recalled. The trial proceeded without their recall. At page 17, the record indicates that the witness could not be availed.

13. It was further submitted that the evidence of Pw1 was contradicted by that of Pw4, the clinical officer who examined the complainant. Pw4 explained the bleeding by Pw1 as a result of her menses while Pw1 attributed the same to as a result of the sexual assault. It is urged that the witness who was with the complainant was not called to testify.

14. Despite the State conceding the appeal, this court still has a duty to ensure that it re-evaluates the evidence afresh and makes its own findings. This obligation was set out in the case of **Odhiambo vs Republic [2008]KLR565** thus:

"The court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence."

ANALYSIS AND DETERMINATION

15. This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (see: **Okeno v Republic [1972] EA 32**).

16. In this present appeal, the issue for determination is whether the prosecution established the charge of defilement brought against the Appellant to the required standard, beyond any reasonable doubt. The prosecution was therefore required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator.

17. **Section 2 of the Sexual Offences Act** defines penetration as 'partial or complete insertion of the genital organs of a person into the genital organs of another person'. The only direct witness was Pw1 who testified as follows;

"...I was walking when the accused herein got hold of me from behind, had sex with me and bleed. I felt pain and I screamed. My sister was there. She is young at nursery. He had sex with me and left.

.....

He threw me on the ground. He removed my skirt and inner wear."

18. The appellant in this case submitted that the evidence by Pw1 was uncorroborated and also faulted the trial court for failing to state the demeanor of the child or the reasons why the court believed that the child was telling the truth. They urge the court to consider such an omission fatal.

19. It has been held in several decisions that where the trial court fails to record reasons for believing the child is telling the truth, that such an omission is not fatal. However, it is important to first set out the provisions of **section 19 of the Oaths and Statutory Declaration Act** that deals with evidence of children of tender age and **proviso to section 124 of the Evidence Act**;

"19. Evidence of children of tender years

(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section. [Act No. 42 of 1954, s. 2, Act No. 46 of 1963, Second Sch.]

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

20. **Section 124 of the Evidence Act** provides as follows;

"124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

21. The Court of Appeal in **Johnson Muiruri v R [1983] KLR 445** while addressing itself to the matter of evidence of a child of tender years held as follows:

“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which (case) his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.”

22. In **Sahali Omar vs. Republic [2017] eKLR** the Court of Appeal held that:

“On the first issue, the appellant took issue with lack of corroboration of the complainants’ evidence, which he said ran afoul of section 124 of the Evidence Act...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the *voire dire* examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. *Patrick Kathurima v. R (supra)* and *Johnson Muiruri v. Republic, (1983) KLR 445* and also *John Otieno Oloo v. Republic [2009] eKLR*)...In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

“...The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4.”

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail.”

23. However, “it is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.” (See **Mohamed v Republic [2006] 2 KLR 138**).

24. It therefore follows that the trial court could rely on evidence of Pw1 after complying with the proviso under **section 124 of the Evidence Act**. In this instant case the trial magistrate conducted *voire dire* examination and directed that the child give unsworn testimony. Although the trial court relied on the evidence by Pw1 it failed to give any reasons why it was of the opinion that the child was telling the truth.

25. Pw1 testified that the appellant had sex with her and she bled as a result. Pw4 on the other hand after examining the complainant observed there were no physical laceration or any tears to Pw1 genitalia. Pw4 testified that the blood observed was the complainant’s menstrual blood.

26. Obviously the evidence by Pw1 and Pw4 were contradictory and I find that such contradictions cast doubts to the prosecution case. The court in **MW v Republic [2019] eKLR** defined contradiction as follows;

“It is also important at this point to examine the nature and meaning of the word contradiction. I’m persuaded by the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA)*, *Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA*. Where the court stated as follows:-

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.””

27. If the trial magistrate had taken into account the glaring contradictions in the prosecution evidence, he would have arrived at a different verdict.

28. Further, this court notes that the prosecution failed to call the only independent eye witness, Pw1’s sister, EN, to shed light in what transpired on the material day. Although EN was a child of tender age, the **Oath and Statutory Declaration Act** has elaborate provisions on

how such evidence should be taken. The prosecution's failure to call EN who was a crucial witness caused a major blow to their case.

29. For these reasons, I am satisfied that the appellant's appeal is merited and I hereby allow it. His conviction is quashed and sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. As the issue of the conviction has been established in the appellant's favour, a determination on the issue of sentence now becomes moot.

DATED and DELIVERED at KISII this 25th day of February, 2021

A. K. NDUNG'U

JUDGE