



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 172 OF 2016

JARED OTIENO ORWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. E. Kelly, Senior Resident Magistrate Nakuru dated and delivered on the 2nd day of November, 2016 convicting the appellant on the alternative charge of indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, in Nakuru CMCR No. 202 of 2010)

J U D G M E N T

1. The appellant herein Jared Otieno Orwa was charged with the offence of **Defilement Contrary to Section 8(1) Subsection (2) of the Sexual Offences Act** and in the alternative **Committing an Indecent Act with a child Contrary to Section 11(1) of the same Act**.
2. It is alleged that he committed these offences on 15th September 2014 within Nakuru by either intentionally and unlawfully inserting his male genital organ into the female genital organ, vagina of SJ a child aged eight (8) years or by unlawfully and intentionally touching the female genital organ, vagina of SJ with his penis.
3. He denied both charges.
4. After a full trial the trial court found him guilty of the alternative count and sentenced him to serve ten (10) years imprisonment.
5. The appellant was deeply aggrieved and filed this appeal. His counsel, Imbwaga Yogo and Partners filed twenty-one (21) Grounds of Appeal, but never appeared to argue the same on account of no instructions. The appellant decided to proceed without representation. He had earlier on filed Amended Grounds of Appeal together with his own submissions
6. His six Grounds of Appeal were;
 1. *The trial magistrate erred in law and fact by failing to appreciate that the evidence on record is contradictory, inconsistent, hearsay and fabrication against the accused.*
 2. *The learned trial magistrate erred in law and fact by failing to note that the doctor's medical report totally exonerated the accused from any heinous act against the complainant.*
 3. *The trial magistrate erred in law and fact by failing to note that there no credible evidence in support of the alternative charge of Indecent Act.*
 4. *The trial magistrate erred in law and fact by denying to allow the accused person's request for a recall as provided for by the law.*
 5. *The learned trial magistrate erred in law and fact by allowing another adjournment when she had already given directive for the last adjournment.*
 6. *The trial magistrate erred in law and fact by failing to note that the prosecution did not prove its case beyond reasonable doubt.*
7. He argued that the evidence on record was contradictory, inconsistent, hearsay and fabricated. To support this ground he analysed the evidence given by PW1 and what she recorded in her witness statement, that PW2 was not a truthful witness.

7.1 He also argued that the medical evidence did not support the charge because the doctor who examined the complainant found that she had had previous sexual encounter, her hymen was broken and healed and everything else was normal. He argued that looking at the evidence of PW1 in the light of the medical evidence clearly exonerated him because her testimony was that the appellant penetrated her.

7.2 That even the trial court doubted that there had been any form of sexual intercourse with the complainant.

7.3 Regarding the charge he was convicted on, he argued that there was no evidence to support the case for the prosecution as there was no evidence of any contact between the appellant's body and that of the complainant. That PW1 never testified that the appellant lay on her in an attempt to insert his penis into her vagina, nor did she testify that the accused's penis had come into contact with her vagina. In any event she testified that it was her first time to have sexual intercourse yet the doctor's testimony was that it was not.

7.4 He urged the court to find that he had not been accorded a fair trial because one, he did not have a lawyer, and when he obtained one, the trial court refused his application to have PW1 recalled for cross examination. To him this was prejudicial, as the court had the power under **Section 150** to recall any witness at any stage of the proceedings, before delivery of its judgment. That the trial court demonstrated bias because it had earlier given the prosecution a last adjournment but did not adhere to that, allowing them further adjournments yet they gave no good reasons for the same.

7.5 Finally, he argued that the prosecution had failed to prove its case beyond a reasonable doubt. That the trial magistrate failed to warn herself in accepting the unsworn testimony of the minor, he relied on **Muriuki v Republic (1993) KLR 821**. That the trial court did not consider his defence.

7.6 That PW1 alleged to have been hurt and could not walk properly yet she drove the cattle home and nobody noticed anything. That PW1 was taken to hospital in less than twenty-four (24) hours hence the injury ought to have been freshly visible.

8. In opposing the appeal, the state through Ms. Kibirui argued that the state proved the charge.

8.1 That the complainant was eight (8) years.

8.2 That the appellant lay on her. That appellant's genitalia came into contact with the complainants. That she went home and bathed. That the complainant disclosed the act to her aunty who examined her vagina and found it swollen. That the broken hymen was evidence of penetration.

8.3 That the complainant identified the appellant as it happened at day time. That appellant alibi was mere allegation and had not challenged the case for the prosecution.

9. The issue for determination is whether the prosecution proved the case against the appellant to warrant the conviction and sentence.

10. In arriving at that, we must look at the evidence and determine whether the evidence was contradictory and inconsistent, whether PW1 and PW2 were credible witnesses, whether the medical evidence exonerated the appellant, whether the appellant had persuasive defence.

11. When the matter came up for hearing the trial court conducted *voire dire* then determined that the complainant was not vulnerable, that she understood the meaning of telling the truth but did not understand the meaning of an oath so, she gave unsworn testimony.

11.1 She said she was eight (8) years old and in class two (2), and lived with her mum, A1 and aunt A2.

11.2 That on 13th June 2014 when she came from school she was sent to herd the cattle by A2. That the cattle went to Joseph's home. He called her from his house and sent her for bread. That she went, brought the bread and took it to Joseph's house where she found him with another man.

11.3 That this other man went to fetch water from outside the house. It is then that;

“Accused closed the door behind me in his house. The accused spread papers on the floor. Accused removed his trousers. He told me to lie down on the papers. I lie down. I had a skirt, T-shirt and pants. Accused removed his trousers. He had nothing on the lower part. He removed my skirt and pant. He did bad manners to me. He lay on me. He put his peeing thing into my urinating thing and he told me to take the cows home. I did. I went to bathe. He told me he could buy me a soda. Later that night when he came to our shop he found me with my aunty. He took his soda and left and asked me to take one. He was with the same man I found him with in his house. My aunt became suspicious as to why he wanted to buy me a soda. I told my aunt that night that accused had done bad manners to me. I was taken to Nakuru Provincial General Hospital, examined, given medicine. The police went to look for accused. After I identified him to the police they arrested him. I did not know the accused before but had only seen him once at Joseph (sic) where he had gone to do wiring.”

11.4 On cross examination the complainant said that she got injured when accused did bad manners to her that he covered her mouth and could not scream. That due to the injury she was not walking well. That she was scared to tell her aunt or mum.

12. PW2 her aunt testified how she sent the complainant to graze cattle on 15th September 2014 after lunch when she came from school.

12.1 About 4:00pm she came back to the shop and bought bread saying she had been sent by the accused person.

12.2 She later came home and grazed the cows near home up to around 8.00 p.m. while the others were threshing maize.

12.3 The accused came with another man and bought biscuits and soda. He asked to buy a soda for the child. The PW2 asked why. She said he told her it was a reward for good grazing; PW2 testified she observed that,

“PW1 suddenly became shy. I was suspicious. They left. I inquired from PW1 why she had behaved like that. I threatened to cane PW1. She promised she would tell me. Later, she told me the accused had invited her to, his house, gave her two (2) slices of bread, closed the doors and did bad manners to her. Accused threatened to beat her if she screamed. I examined her vagina. It was swollen unusually. The following day I took her to the police station and reported to Nakuru Provincial General Hospital. Doctor confirmed that she had been defiled... we also went to the laboratory.... P3 was filled by the doctor.”

13. **Doctor Kanyotu Njoroge PW3** testified on behalf of his colleague Dr. Matara.

13.1 He said the P3 was dated 16th September 2014 and requested the examination of SJ, who was alleged to have been defiled on 15th November 2014. He had observed that the Hymen was healed.

13.2 On cross examination he said the old broken hymen; *“may have been as a result of the complainant having sexual intercourse with other children.”* He said the accused person was never presented to hospital for examination.

13.2 That it takes spermatozoa three (3) days to clear from the vagina and subject was examined on second day.

13.3 That Pus cells meant there is Urinary Tract Infection (UTI), and the hospital did not test the kind of infection she had.

13.4 On re-examination he said the hymen was old and broken, meaning, it was more than forty-eight (48) hours old. That they hymen tears once. That penetration may have occurred on 15th but penetration must have been forty-eight (48) hours before examination. That it was possible for there not to be spermatozoa.

14. A perusal of the P3 indicated that the same was filled with information from the Post Rape Care (PRC) on 16th September 2014 although it bears the stamp of 17th September 2014. The PRC was filled on 16th September 2014 and it indicated the offence was committed on 15th September 2014 at about 4.00 pm.

14.1 It was indicated that the circumstances of the offence were that the complainant was sent for bread and when she brought it the accused lured her into his house and had penetrative sex with her.

14.2 On examination;

- Her outer genitalia was normal
- Vagina was normal
- Hymen was broken old

14.3 In the comments it was stated, *“Child not able to talk more except from recent episode though relatives (aunt) says the victim has a history of having sexual intercourse with other children prior to this.”*

Laboratory results only revealed pus cells, sign of an infection. The medical evidence established that the complainant had sexual intercourse long before the 15th September 2014 and there was no evidence of recent sexual intercourse, no discharge, no epithelial cells, and most significant no sign of any injury to her vagina as alleged by herself or PW2.

15. **PW3** no 75265 PC Pamela Rono was the investigating officer. She testified that;

15.1 Upon being assigned the case to investigate, she found that the case was reported on 16th Sept 2014 that the defilement had happened on 15th. She referred them to hospital. They brought to her the PRC and P3 on 17th September. She recorded statements and interrogated the complainant who told her that she had been sent for bread by accused and upon her return, he had closed the door, spread brown polythene paper, removed the pants and his trouser inserted his penis in her vagina.

15.2 She did not visit the scene but testified that her colleagues went and arrested the accused about 1.00 p.m. These arresting officers did not testify. She proceeded to charge the accused with the offence.

16. In his defence the accused testified he had been hired by the owner of his house one Chris Namachanja to carry out wiring and he was with his co-workers, Calvin Otieno and Geoffrey Owuori. They had been there for seven (7) days.

16.1 On that 15th September 2014 some children brought dairy cows to graze in the compound. He told the children to leave because it was a construction site.

16.2 The mother of the children who had the only shop in the area and where he would buy things from came to enquire whether he was the one who had chased the children away and he said yes.

16.3 He denied sending the child for bread. He went to buy himself. That PW2 wanted him to be buying food from her but he declined.

16.4 That on 15th September 2014 he and his colleague left the site at 3.00 p.m. and he went to Nakuru.

16.5 That he was arrested on 17th September 2014 together with his colleague Calvin who was later released at the police station.

16.6 That when he was arrested the child was not there, only PW2 was there.

17. I have re-evaluated and re-considered the evidence. I have considered the rival submissions.

18. I am satisfied that the age of the complainant was proved.

19. From the evidence of PW1 and PW2 It is noteworthy that PW1 did not report the alleged defilement herself and it was extracted from her by PW2 by threatening to cane her. This is so similar to what happened in the case of Paul Kanja Gitari v Republic [2016] eKLR where the C of A remarked:

What we find troubling about this case is that JMK did not on her own volition make a complaint that the appellant had defiled her. Her testimony was that after the "bad things", she went home whereat she met her aunt (PW2) who beat her up to reveal what had transpired. It was the appellant's contention that JM Ks' testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an idle or insubstantial contention.

20. The fact that the report of the alleged defilement was obtained by threats of beating from PW2 makes the evidence of PW1 suspect as the same could have been a creation of PW2. This is given credence by the testimony of the Doctor who produced the P3, and which was completed from the PRC. There was no evidence of any recent sexual intercourse on the part of the child. The outer genitalia was normal, the vagina was normal, the hymen was broken but not recent, not even in the last 48 hours prior to examination. There was no discharge or any evidence of recent sexual intercourse yet the child was examined within 24 hours of the alleged defilement. It was reported by the same relatives who took the child to hospital that she had a history of engaging in sex with other children. The doctor was of the view that the broken hymen may have been as a result of those acts with other children. This clearly exonerated the appellant.

21. Further the complainant's testimony was unreliable, and was not supported by any other evidence that is already on record. She testified she was injured by the tabia mbaya, and could not walk well. However, she went home, and continued grazing the cattle until 8:00pm and though she found other people outside, but nobody noticed anything, including the PW2 who only became suspicious when the appellant bought offered to buy PW1 a soda. Further, PW2's testimony was that the complainant was enticed with two slices of bread and threatened with a beating if she reported. However, that was not the complainant's version.

22. Like numerous other cases, this case was not investigated. There is no evidence that scene was visited, or any search conducted for the alleged brown paper used in the defilement. The IO stated that some officers visited the scene but it is clear that they only arrested the appellant. These arresting officers did not testify as to how the appellant was identified for arrest. The appellant's contention that it was PW2 who identified him for the arrest was not dislodged by the prosecution. Their failure to call the officers who arrested the appellant gives credence to his defence that the minor was not present when he was arrested.

23. There was no explanation why the only other person alleged to have been at the scene was not interrogated. Neither did police interrogate the persons whom the child found at home when she came from grazing the cattle.

24. The offence of indecent act with a child is clearly defined. There ought to be contact between the genital organ of the complainant and the body of the accused. In this case, it was the PW2's testimony that the minor's genitals were swollen. When the child was examined no such swelling was noted by the doctors who examined the child or evidence of injury.

25. The trial magistrate doubted that there had been any penetration of the minor by the appellant. She was persuaded that the minor may have been defiled earlier by other children. She said ***"I find no convincing evidence of having been penetration of the subject's vagina. I am however convinced that there was an indecent act with the said minor and to that extent I find her testimony corroborated with other evidence on record, credible"***

26. The trial magistrate gave no reason why she found the minor's testimony credible with regard to the offence of indecent act with a child. The evidence of PW2 that there was swelling of the child's vagina was discredited by the medical examination. The PW2's conduct of threatening the child with a beating makes her evidence unreliable. There was no evidence of penetration. No evidence of any contact between the complainant's body and that of the appellant. There was no corroboration of her story by any other evidence and it all appeared to be the creation of PW2.

27. The trial magistrate proceeded to dismiss the appellant's defence as an afterthought. The appellant clearly set out an alibi. He had no obligation to prove, but which the prosecution made no effort to dislodge.

28. It is evident therefor that the case for the prosecution was riddled with inconsistencies, rendering the evidence of PW1 and PW2 unreliable, the medical evidence did indeed exonerate the appellant and the case was not investigated. There was no evidence of any indecent act with the minor on the part of the appellant and the finding of guilt on that count by the trial magistrate was in error.

29. The appeal therefor succeeds. The conviction is quashed. The sentence is set aside. The appellant is set at liberty unless otherwise legally held

30. Right of Appeal of 14 days

Delivered, Dated and Signed at Nakuru this 12th day of June 2020.

Mumbua T. Matheka

Judge

In the presence of:-

Edna Court Assistant

For state: Ms. Wamboi

Appellant Present