



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 50 OF 2016

LAWRENCE AREBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case number 1270 of 2012

in the Chief magistrate's court at Thika)

JUDGMENT

1. The Appellant Lawrence Arepa was charged with the offence of defilement of a three (3) years old female child on the 12th February 2012 at [particulars withheld] area Kiambu County and an alternative charge of Indecent Act with the said child namely MA who for purposes of this judgment will be referred to as the victim.

The trial court found the appellant guilty, convicted and sentenced him to serve life imprisonment as prescribed under **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**.

2. In his Petition of Appeal filed on the 15th August 2018, the appellant raises numerous grounds of appeal, but may be summarized into four that

- (1) The conviction was against the weight of the uncorroborated evidence*
- (2) That there was no proper identification*
- (3) Penetration was not proved*
- (4) Right of fair trial were infringed.*

3. On first appeal the appellant's expectation of the court is that the whole of the evidence shall be submitted to a fresh and exhaustive examination so as to come to own findings and decision – **Ajode -vs- Republic (2004) e KLR, and Okero -vs- Republic (1972) EA 32**.

4. In a charge of defilement the prosecution must adduce sufficient evidence to prove beyond reasonable doubt the ingredients being

- a) Age of the child
- b) Proof of penetration
- c) Positive identification of the assailant

Age of the victims is a very vital component and must be proved by credible evidence as the sentence upon conviction is dependant on the age of the victim – **Court of Appeal in Alfayo Gombe Okello -vs- Republic (2010) e KLR**.

5. **Section 8(1) of the Sexual Offences Act No. 3 of 2006** provides that

8(1) "A person who commits an Act which causes penetration with a child is guilty of an offence termed defilement.

A child under the **Childrens Act No. 8 of 2001** is described as

"Any human being under the age of eighteen years

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

The victim's age in this instant was proved by production of the Hospital clinic card by her mother (PW1) that showed her age as 3 years having been born on 7th May 2008. That settles the issue of age.

6. The right to fair trial is enshrined under **Article 50 of the Constitution**. This includes being given the prosecution witness statements and exhibits.

The appellant's complaint is that he was not given the statements despite the trial court's order on the 4th February 2012. The court record thereafter does not show that the appellant was not provided with the statements. The appellant participated in the proceedings by cross examination of all the witnesses. Prior to his unsworn defence, the appellant did not state or bring it to the court's attention that he was not provided with the statements. Looking at his cross examination of the prosecution witnesses it would not have been possible without the witness statements.

I find no merit in that allegation. He was accorded a fair trial and the proceedings speak to that effect.

7. I have considered the sufficiency and adequacy of the evidence on record.

The victim of the offence was a three(3) years old child. **PW1** mother of the victim noticed that the child's vagina had blood stains when she removed her trousers on the material date in the afternoon and upon asking her what had happened, she stated that

"the man of the blue door had done bad manners to me."

8. Upon the mother and another woman going to the blue door house with the child and enquiring about the incident the appellant and occupant of the said house which was within the compound, denied having defiled the child.

9. The trial Magistrate did not take the child through *a voire dire* examination due to her tender age but the mother testified as her intermediary. There is no record that the trial magistrate tried to find out whether the victim could testify on her own. This is one of the grounds of Appeal that the victim's evidence was vital and she should have testified and that trial courts finding that the victim was innocent and too young to think of accusing the accused falsely was baseless.

10. The Court of Appeal in **M.M. -vs- Republic (2014) e KLR** dealing with the issue of an intermediary under **Article 50(7) of the Constitution** rendered that

"(7) in the interest of justice the court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

11. A court is empowered to declare any witness other than the accused as vulnerable witness. If in its opinion he or she is likely to be vulnerable on account of age, intellectual, psychological or physical impairment and trauma, cultural differences, possibility of intimidation, race, religion or language, relationship of the victim to the accused, nature of the subject matter among others.

12. I therefore find that the trial magistrate in her opinion and who saw the victim was in order to have deemed the victim as a vulnerable witness by virtue of her age of three(3) years old and four (4) at time of trial.

13. It was the evidence of the mother of the victim (**PW1**) that upon persistent questioning the victim positively identified the assailant as the appellant, the man of the *blue door house*.

14. **PW3** was the investigating officer. To find out the truth testified to have taken the victim alone in the absence of her mother to show her who had defiled her. The victim took the police officer to the *blue door house* and insisted that it is the man of that *blue door house* who defiled her. This was positive identification by recognition of the assailant which is very vital in any criminal charge.

In **Kauli Beja Lewa -vs- Republic (2018) e KLR**, the court while dealing with the evidence of identification by a minor victim in a sexual offence deemed it positive recognition as opposed to identification of a stranger.

15. In this instant appeal the victim identified her assailant by recognition of the house he lived in, and pointed not once but twice, *the man of the blue door house* as the assailant. As noted by the trial magistrate, the victim due to her young age could not possibly have a grudge with the appellant hence no reason could be made out for her to falsely accuse him.

16. Proviso to **Section 124** of the Evidence Act provides that

where a criminal case involving a sexual offence the only evidence is that of the alleged victim the court may 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.

17. The child victim testified by her mother as an intermediary. Her evidence was corroborated by that of **PW3** the investigating officer as well as **PW2** the doctor who examined the child on the same day of the offence. I have looked at the P3 form and treatment card PExt 11(a) and (b). It states the victim's hymen was missing, had white discharge and the vagina was red and had tears.

18. The above is consistent with the definition of "penetration" described in **Section 3** of the Act – cited under Paragraph 5 above.

I therefore decline to accept the appellant's submission that there was no penile penetration. The victim's hymen was missing, and no other probable cause was adduced either by the doctor or any other person.

19. In a defilement case medical evidence is paramount in proving the ingredients of penetration. The P3 was explicit that the victim's vagina had white discharge, was red and had tears and her hymen was missing. There being no other explanation, it is safe to hold that there was penetration of the victim's vagina by no other than the appellant.

20. The appellant's unsworn defence that the mother of the victim framed him for his refusal to have sex with her holds no ground.

In its totality, I find the trial magistrate's judgment to have been based on the evidence on record. I find the evidence to have been credible, sufficient and adequate to sustain a conviction. There was no miscarriage of justice in any manner to the appellant. The conviction is upheld.

21. **Section 8(2) of the Sexual Offences Act No. 3 of 2006** provides for a mandatory minimum life imprisonment where the victim of defilement is eleven (11) years or below. That sentence is lawful and being a minimum statutory sentence, this court's hands are tied. It cannot be reduced at the moment until such time that the legislature shall untie courts hands to give it discretion on sentencing under the Sexual Offences Act.

Consequently I uphold both the conviction and the sentence. The appeal is dismissed.

Dated and signed at Nakuru this 27th day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th day of April 2019

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C. MEOLI

JUDGE