



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO.15 OF 2018

JOHN NJAGI KAIBIRU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No.30 of 2012 delivered by Hon. P.M Kiama (Principal Magistrate (P.M) on 24th September, 2012).

J U D G M E N T

1. **JOHN NJAGI KAIBIRU**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)(3) of Sexual Offences Act** No. 3 of 2006 vide **Marimanti Principal Magistrate's Court Criminal Case No. 30 of 2012**. The particulars as per the charge sheet presented at the trial court were that on the 23rd December, 2011 at (name withheld) village, Tharaka South the Appellant intentionally defiled (name withheld) a child aged 10years. The Appellant denied the offence but after trial, he was found guilty, convicted and sentenced to life imprisonment. The Appellant was aggrieved by that conviction and sentence and preferred this appeal raising six grounds. I will shortly consider the grounds after looking at the brief summary of the evidence adduced by the prosecution against him at the trial court.
2. The prosecution called a total of 5 witnesses to prove their case against the Appellant. The prosecution's case was mainly hinged on the evidence victim, a minor aged 10 years at the time, the doctor and witness who first came into contact with the victim.
3. The minor/victim (PW1) gave evidence and told the trial court after voire dire examination that she was 10 years old and in class 4. According to her the Appellant waylaid her as she was going to the shamba and dragged her into a sorghum farm and defiled her. She gave vivid details on what happened to her including the threats she received and how she bled after the ordeal. It was her evidence that she went to K's place and told her what had happened to her.
4. The minor's evidence was corroborated by E K (PW2) who told the trial court that upon receiving the report, she took the child to Marimanti police station to report and later to Marimanti District Hospital for treatment.
5. Dr. Karanja (PW3) the doctor who examined and treated the minor, testified and further corroborated the evidence of the minor that she had been defiled. He tendered a P3 (P Exhibit 1) which he had filled as an exhibit that confirmed that the child was defiled and the state of her inner clothing when she was examined upon arrival at the Hospital.
6. When placed on his defence, the Appellant pleaded *alibi* stating that at the material time, he was at a circumcision ceremony drinking palm wine. He further stated that he was arrested for another case involving one M K but charged with another case. He further stated that no exhibit had been tendered to show that he was involved and that he was never subjected to any tests to establish his involvement with the crime. He blamed PW2 (K) stating that she had a grudge against him stemming from the fact that he used to pass by her compound when going to his home, a fact that allegedly displeased the witness (PW2).
7. The learned trial court upon evaluation and assessment of evidence tendered during trial found that the child had been defiled on the material date and found the Appellant guilty of the offence of defilement. The trial court mainly relied on the complainant's evidence and medical evidence tendered by Dr. Karanja (PW3) which confirmed that the minor had been defiled. The trial court further found that the defence of *alibi* was unsupported as the alleged witness who was to support the Appellant never turned up in the court despite several adjournment. The Appellant was then convicted and sentenced to serve life imprisonment as provided under **Section 8 (2) of Sexual Offences Act**.
8. The Appellant felt aggrieved and brought this appeal raising the following grounds namely:
 - i. *That the learned trial magistrate erred in law and fact by relying on complainant's evidence and relying on Section 124 of Evidence Act without noticing that the complainant's evidence was contradicted by the grandmother on where the incident took place.*

- ii. *That the evidence of doctor was doubtful since it did not include the age of the broken hymen whether it was fresh or old.*
- iii. *That the learned magistrate erred by failing to take note on the manner he was arrested which in his view created doubts.*
- iv. *That the learned trial magistrate rejected his defence without cogent reasons.*
- v. *That the age of the complainant was not proved.*
- vi. *That there was no independent witness to clear doubts.*

9. In his written submissions the Appellant contended that the prosecution did not prove the case against him beyond reasonable doubt. He contends that though the incident was reported on 23rd December, 2011 no action was taken to arrest him until much later on 11th February, 2012 and that if he was the one who had committed the offence he could have been arrested within 48 hours. He contends that his arrest was an afterthought and wondered why the victim's mother was not called as a witness.

10. The appellant has contended that it is the mother of the victim who could ascertain the age and that the PW2 could not be trusted to know the age of the victim even if she was her teacher. He has cited the decision in the case of *Hillary Nyongeza -vs- Republic (Eldoret HCRA NO. 123/2009)* where he alleges the court held that the age of victim is crucial as it determines the sentence to be meted out. He has faulted the prosecution for failing to avail the victim's mother who to him was crucial to ascertain the age of the victim.

11. The Appellant has further submitted that the evidence against him was that of a single witness as PW2 evidence was all but hearsay. In his view it was not safe for the trial court to convict him based on uncorroborated evidence of a single witness.

12. He has further contended that the prosecution's case was not proved beyond doubt because no DNA tests results were tendered to prove that he had committed the offence.

13. On the other hand the Respondent through the Director of Public Prosecution has opposed this appeal through written submissions by Eric Momanyi, the learned prosecuting counsel from Office of the Director of the Public Prosecution.

14. The Respondents submits that the prosecution proved all the essential elements of the offence against the Appellant. In their view penetration which is a crucial element was proved by the evidence tendered and that the age of the victim was proved by the doctor (PW3) who examined the victim and filled the P3 form indicating the age thereof. It is submitted that it was not mandatory to tender a birth certificate to ascertain the age and on this score, the Respondent relied on the decision of *Dominic Mwaliria -vs- Republic [2018] eKLR, and Musyoki Mwakavi -vs- Republic [2014] eKLR* where court held that age of a victim is not proved only a birth certificate and that the same can be ascertained through any other evidence. The State has also contended that a question of age cannot impugne conviction as held in *Hashon Bundi Gitonga -vs- Republic [2016] eKLR*.

15. The court has considered this appeal and the response made. The issues for determination in my view can be framed as follows:-

- i. **Whether the prosecution's case required corroboration and whether there was corroboration.**
- ii. **Whether the age of the victim was proved**
- iii. **Whether the defence was considered.**
- iv. **Whether the prosecution's case was proved to the required standard in law.**

16. (i) Whether corroboration was needed.

The Appellant was charged with a Sexual Offence which was defilement contrary to **Section 8(1) (3) of Sexual Offences Act**. In that sort of offences corroboration is not a necessary legal requirement. The provisions of **Section 124 of Evidence Act** removed the necessity of corroboration in Sexual Offences because in essence such offences normally take place in secrecy and it would have been practically impossible to prove such cases if there was a legal requirement that corroboration was a necessity. The law therefore came to address the mischief and provided that evidence of the victim alone, will suffice if the trial court has reasons to believe and to be recorded that the victim is telling the truth. Having said that, I have looked at the evidence tendered by the victim or the complainant and I find that her evidence was clearly corroborated by PW2 (E K) and PW3 (Dr. Karanja Mwangi) .The doctor who examined her noted the state of her clothing in the P3 (blood stained dusty pants with whitish discharge) and confirmed that she had been defiled. The evidence of the complainant (PW1) was well corroborated though there is no legal requirement to that effect.

17. (ii) Whether the age of the victim was established:

The Appellant has contended that the age of the victim was not established because the victim's mother was not availed to give evidence. There are no reasons recorded why the victim's mother was not called but I agree with the Respondent that the age of a victim of defilement is not provable only with a birth certificate and that a P3 form duly filled is sufficient to establish the age of the victim. I have noted from the proceedings that the victim was subjected to *viore dire* examination which is indicative that the trial court was convinced that the victim was of such a tender age to require *viore dire* examination to determine if she was going to give evidence on oath. The doctor (PW3) who examined the minor and filled the P3 form indicating the age of the victim testified and the Appellant had the opportunity to challenge his findings regarding the age but he did not. The child herself stated in evidence that she was 10 years old and in class 4 at the

time and this age is consistent most children in that class and so when there is medical evidence in form of a P3 (P Exhibit 1) that the child was 10 years, the assessment of age is beyond doubt and the trial court was right to find that the age of the victim had been ascertained to be 10 years. Having re-evaluated the evidence tendered I find that the conclusion made by the trial court was correct and as supported by the authorities in the cases of **Dominic Mwilaria** (Supra) and **Musoki Mwakari** (Supra) that held that the age of a victim in cases of defilement are not necessarily provable only by birth certificates. The age of a victim is ascertainable through any other reliable evidence and I find the evidence tendered by Dr. Karanja (PW3) regarding the age of the victim to be reliable.

18. (iii) **Whether the defence was considered by the trial court.**

I have re-evaluated the evidence tendered by the Appellant and I have looked at the Judgment by the learned trial magistrate and find that the defence contrary to his assertion, was indeed considered. His defence of *alibi* was not corroborated. He did express an intention to call a witness known as Simon Mwandika who allegedly was with him at a circumcision ceremony at the material time, but when he was given a chance to avail the witness, he stated;

" I do not think I will be able to bring my witness..... I do close my case."

In the absence of a witness a defence of *alibi* cannot be established. Furthermore though the Appellant stated that PW1 and PW2 did not tender any exhibit, it was not necessary for them to tender exhibits. It was sufficient for them to testify on what transpired and when PW3 (doctor) testified, he tendered evidence and produced a P3 (P. Exhibit 1) which proved that the evidence of PW1 and PW2 was well founded.

19. The Appellant in his evidence conceded that the victim was known to him and therefore when the victim identified him as the culprit, there was no doubt because the Appellant lived next to PW2 where the victim resided with her mother. The Appellant's defence therefore did not create any doubt on the prosecution's case and the trial court correctly found so.

20 (iv) **Whether the prosecution's case was proved beyond reasonable doubt**

The Appellant has contended that the prosecution failed to prove the case against him. He has further submitted that PW2 had a grudge against him. I have however considered the evidence tendered and I do not find any evidence to support the Appellant's contention that EK (PW2) harboured any ill motive to frame him. I have looked at the evidence of the minor at the trial. She told the trial court that the Appellant waylaid her on her way to a farm and dragged her to sorghum farm where he threatened her with a knife before defiling her. She was cut on the finger in the process. PW3 confirmed that the child had a cut on her finger when she reported the incident. The doctor (PW3) who examined her a few hours after the incident, told the trial court that he noted a bruise on the left thumb and that the hymen was **"torn and bleeding"** He further noted lacerations on the *labia minora* and **"whitish discharge mixed with blood."** The vaginal swab taken for laboratory tests indicated presence of spermatozoa. All the findings were noted by the said doctor on the P3 (P Exhibit 1) and that in my view proved beyond any shadow of doubt that the minor had been defiled. The Appellant has contended that the doctor did not indicate the age of the injuries but the doctor stated that he carried examination at around 8 pm the same day and the incident had occurred at around 4 pm. The hymen was still bleeding when the doctor examined the victim and that certainly does not indicate that the wound was old even if the age of the injuries are not indicated on the P3. It is obvious given the overwhelming evidence tendered by the prosecution that the appellant in this appeal was just trying to find anything to hang on in this appeal. However, the evidence tendered by the prosecution was watertight there was no loophole left. I have re assessed and re-evaluated the evidence on the record of proceedings and find that, contrary to the appellant's contention, the prosecution's case was proved beyond reasonable doubt. The trial court was correct to reach the conclusion it did that the Appellant was guilty as charged.

In the end I find that this appeal lacks in merit. The evidence tendered supported the conviction and upon conviction, the sentence provided given the tender age of the victim is only one. Life imprisonment. Harsh as it may look, it is the minimum sentence provided by law and I believe it was deliberately made harsh to protect young children against sexual predators considering the impact such ordeals exposes children to.

This appeal for the reasons advanced is disallowed. I uphold both conviction and sentence.

Dated, signed and delivered at Chuka this 29th day of May, 2019.

R. K. LIMO

JUDGE

29/5/2019

Judgment signed, delivered in the open court in the presence of Appellant in person and Momanyi for State/Respondents.

R.K. LIMO

JUDGE

29/5/2019