



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 27 OF 2017**  
**BETWEEN**  
**CMO.....APPELLANT**  
**AND**  
**REPUBLIC.....RESPONDENT**

**(Being an appeal against original conviction and sentence dated 15.11.2016 By Hon. M. I. Shimenga RM in Butere SPMCC No. 585 of 2015 (SO))**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein is the accused in Kapenguria PMC Cr (SO) Case no. 11 of 2019 in which he is charged with **defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, no. 3 of 2006**. The particulars of the offence are that on 20<sup>th</sup> July 2018 within North Pokot Sub-County [in Pokot County] [he] intentionally [and unlawfully] caused his penis to penetrate the vagina of IC a child aged 14 years.
2. The appellant is also charged in the alternative with the offence of committing an **indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006**, where it is alleged that on the 20th day of July 2018 within North Pokot sub-county in Wet Pokot County, [he] intentionally [and unlawfully] touched the vagina of IC, a child aged 14 years with his penis.
3. The appellant pleaded not guilty and the case was set down for hearing during which the prosecution called five witnesses in support of its case.
4. At the close of the prosecution case, the appellant was put on his defence. He gave unsworn evidence and called no witnesses. After conclusion of the hearing the learned trial magistrate found the appellant guilty on the alternative count of committing an indecent act with a child and sentenced him to life imprisonment.

**The Appeal**

5. Being aggrieved by the whole judgment of the learned trial court, the appellant filed this appeal which is premised on eleven grounds of appeal. Substantively, the appellant contends that it was wrong for the learned trial magistrate to base his conviction on the strength of a single witness. That the evidence adduced by the prosecution was uncorroborated, discredited, malicious, far fetched and unconvincing. The appellant further contended that the evidence on record did not connect him to the offence. He also contended that he did not have the services of an advocate as a result of which he did not have a fair trial.
6. Finally, the appellant contended that the sentence passed by the learned trial magistrate was harsh and excessive in the circumstances.
7. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. In discharging this duty however, the court ought to bear in mind the fact that it does not have the opportunity of

seeing and hearing the witnesses who testified and to make an allowance for the same. See *Peters versus Sunday Post [1957]EA 424*.

### **The Prosecution Case**

8. The complainant herein, MA testified as PW1 and told the court how on the material day she was all alone at home with the appellant who is her grandfather. While she was taking a bath the appellant went to where she was and beat her up then carried her and placed her on his bed, naked. The appellant lay on top of her while touching her on her private parts. He touched her with his penis as he also scratched her back. He went further and put his penis in her vagina before he went away. MA also testified that the appellant had done this thing to her four other times in the past. She was later taken to hospital by her mother who also reported the incident to 'Omwami'. MA was not cross examined for reasons that her evidence was by way of an 'unsworn statement'.

9. PW2, Jemimah Okaalo, a member of community policing told the court that on 17.11.2015 at about 9.00am, she was at the chief's office when the complainant was taken there by another member of the community policing PW2 took the complainant to hospital where it was established that she (complainant) had scratches on her back and chest and wetness on her private parts. Thereafter the matter was reported at Khwisero Police Station.

10. PW3 was Florence Afune, Assistant chief of Mundala sub-location. By the time of her testimony, she had occupied that office for 10 years. She testified that on 17.11.2015 at about 9.00am, while she was in her office, she received a report that the appellant had been defiling the complainant. PW3 immediately dispatched two members of the community policing team to the appellant's home to fetch the complainant. The two people returned to the office with the complainant who had scratch marks on her neck and back. The complainant was also in pain. PW3 instructed PW2 to take the complainant to hospital before she went to record her statement with the police.

11. Juma Vince, a clinician at Eshirusa Model Health Centre testified as PW4. He examined the complainant on 17.11.2015 after allegations that the complainant had been defiled by her grandfather. PW4 confirmed that the complainant was 5 years old. On examination, PW4 found the complainant looking frightened and scared and was wearing dirty clothes. She had scratch marks on the neck and back. She had no hymen, no lacerations and no bleeding, indicating that there was no penetration on that particular day. PW4 however testified that the complainant had contracted a urinary track infection (UTI). PW4 stated that on further examination of the complainant, he concluded that the complainant had been defiled before, though penetration had not occurred on the 17.11.2015. PW4 produced the complainant's treatment notes PRC form and the P3 form as well as age assessment form as Pexhibits 1, 2, 3 and 4 respectively.

12. Number 66442 Corporal Isaiah Kirui, the Investigation Officer was PW5. HE recalled that on 17.11.2015 at around 4.00pm, he was at Khwisero Police Station when he received a telephone call from PW2 that the complainant had been defiled by the appellant. Not long after receiving the report, the complainant and the appellant were escorted to the police station. By then, the complainant had already been taken to Eshirusa Health Centre for initial treatment as per P exhibit 1.

13. PW5 also testified that the complainant told him she had been defiled by the appellant; not once but many times; whereupon PW5 issued the complainant with a P3 form which was filled together with the PRC form. After recording witness statements, PW5 preferred the charges against the appellant.

### **The Defence Case**

14. In his unsworn statement, the appellant denied committing the offence and alleged that the case against him was started by his neighbours, and especially by one Injiri who accused him of defiling the complainant so that he could take his land.

### **Submissions**

15. The appellant filed written submissions which are on record and on which he fully relied. The appellant also submitted during the oral highlights that the case against him is a fabrication by his neighbour who is after taking the appellant's land. The appellant also submitted that there was no sufficient evidence to connect him to the offence. He also wondered why the person who reported the incident to the sub chief was never called to testify.

16. The appeal was opposed. Prosecution counsel, Mr. P. O. Juma submitted that there was sufficient evidence on record to prove the case against the appellant.

### **Issues for Determination**

17. Upon careful reconsideration and re-evaluation of the evidence, and upon consideration of the law and the submissions, the following issues arise for determination:-

- 1. whether the complainant's age was proved to the required standard.**
- 2. Whether there was proof of an indecent act and**
- 3. whether the appellant was positively identified as the perpetrator**
- 4. whether the appellant's trial was fair or not**
- 5. whether the sentence was harsh and excessive in the circumstances**

## Analysis and Determination

18. The alleged offence took place around 9.00am on the material day. During her testimony, the complainant did not give her age, but when the clinical officer, PW4 testified he produced the P3 form and the age assessment form both of which gave the complainant's age as 6 years. The courts have held that the age of a sexual assault victim is critical because the punishments prescribed under the **Sexual Offences Act, No.3 of 2006** vary with the age of the victim. It has also been held that the age of a victim may be proved through documentary evidence or through the evidence of a parent or guardian. It is also in order for a trial court to observe the victim and assess the age if no other evidence on the issue is available. I am satisfied in this case that the evidence adduced by PW4 confirmed beyond any reasonable doubt that the complainant herein was a child aged 6 years old.

19. The next issue for determination is whether the prosecution proved that the appellant committed an indecent act with the 6 year old complainant who is his grand daughter. The complainant's testimony is that on the material day she was taking a bath when the appellant went to where she was, beat her up before carrying her and putting her on his bed. As she lay there naked, the appellant also got into the bed, removed his clothes and lay on top of her as he also touched her vagina with his penis. She also said he put his penis into her vagina and that caused her pain.

20. Under **Section 2(1) of the Sexual Offences Act**, an 'indecent act' is defined as

“an unlawful intentional act which causes:-

**1. any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include an act that causes penetration.**

**2. Exposure or display of any pornographic material to any person against his or her will.**

21. In the present case, the prosecution proved that the appellant touched the complainant's vagina with his penis. The complainant also said that the appellant scratched her neck and back as he touched her private parts with his penis, something he had done over and over again in the past. PW4 confirmed the fact of repeated child sexual abuse when he stated that the complainant's vagina had been defiled before.

22. I am aware that the only eye witness evidence on the commission of the offence is that of the complainant, a child aged 6 years. This position notwithstanding, the **proviso to section 124 of the Evidence Act** is to the effect 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.”

23. In this present case, the learned trial magistrate stated thus in part of her judgment, “**it is for this reason that I believe the testimony of the complainant and that of the prosecution witness which are well corroborated.**” The learned trial court saw and heard the complainant and had no reason to doubt her testimony. I would myself have no reason to doubt the testimony given by the complainant.

24. The only hitch with the complainant's testimony is that she was not cross-examined. Under **section 302 of the Criminal Procedure Code**, all witnesses are subject to cross-examination by the party, against whom such a witness gives evidence. In each and every case therefore, the trial court is under a duty to ask an accused person to put questions to the prosecution witness especially if the accused person is not represented. The answers given by witnesses in cross-examination form part of the evidence, and they must therefore be recorded by the trial court. In the absence of cross examination, the efficacy of any evidence given against an accused person cannot be ascertained and in the absence of such cross examination, the trial cannot be said to be fair and would be contrary to the provisions of **Article 50(2)(k) of the Constitution**.

25. Having confirmed the complainant was not taken through cross examination in this case, was the trial vitiated by that fact? In the case of **Ezekiel Nyaga & 3 others versus Republic Court of Appeal Criminal Appeal no. 9 of 1985**, the court held lack of cross-examination vitiated any resultant conviction. This was also the position of the court of Appeal in the case of **Godhana versus Republic [1991]KLR 417** where it was held that the court's failure to allow the appellant to cross-examine his co-accused was fatal failure on the part of the trial magistrate which resulted in, a miscarriage of justice.

26. In the instant case, the appellant had no chance of eliciting useful information from the complainant concerning her allegations against him, nor did he have any opportunity to poke holes into the accuracy of the evidence she had given in evidence in chief.

27. For the above reasons, I hold and find that the appellant's conviction cannot be supported because as it were, the complainant's evidence was no evidence at all.

## Conclusion

28. In the result, and for the reason that the appellant's trial was not fair, I find there is merit in the appeal. I accordingly allow the same, quash the conviction and set aside the sentence of life imprisonment. Because of the long period of time from the commission of the offence to date, I find that it would not serve the interests of justice to order a retrial.

29. Unless there is any other lawful reason for holding the appellant in prison custody, he shall be released therefrom forthwith.

30. Orders accordingly

Judgment written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Kakamega on this 20<sup>th</sup> day of December, 2019**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

Appellant in person

Mr. Muturi for Respondent

Erick – Court Assistant