REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCRA NO. 9 OF 2016

(*From original conviction and sentence in Criminal Case No. S/O 1 of 2014*

in the Principal Magistrate's Court at Chuka on 20/11/2014

by L. A. MUMASSABBA - (Resident Magistrate)

JUSTINE MUREITHI NDONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Justine Mureithi Ndondi, the appellant herein was charged with the offence of defilement of a child contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that on the 2nd day of January 2014 at around 13 hrs at [partriculars withheld] within Tharaka Nithi County he defiled a minor (name withheld) aged 10 years, He also faced an alternative charge of indecent Act with a child contrary to **Section 11 (i)** of the **Sexual Offences Act**. He was convicted on the main charge upon trial and sentenced to serve life imprisonment vide ***Chuka Principal Magistrate's Court Criminal Case No. 24 of 2014.***

2. He felt aggrieved by the decision of the lower court and filed this appeal and listed 5 grounds but before I consider the grounds of appeal I will consider brief summary of the case against the appellant at the lower court.

3. The appellant denied committing the offence when he was charged at the lower court and the prosecution called 5 witnesses in support of their case. Briefly, the evidence presented to the trial court indicated that the victim was a girl aged 11 years and suffered mental impairment or disability and hence the reason why she was not going to school like other children of her age. The trial court declared her vulnerable witness pursuant to the provisions of **Section 31** of **Sexual Offence Act** and allowed her mother to be her intermediary. Her evidence to the trial court was that the appellant whom she referred to as ***"Kipchoge"*** defiled her and gave vivid explanation on how she was defiled. According to her the appellant applied saliva on her vagina before proceeding to defile her in a bush where she was herding goats with her sibling who was also a witness in that trial as PW3. PW3 (name withheld) was aged 8 years old at the time she testified and corroborated the evidence of the victim. According to PW3 they were looking after goats with the victim when the appellant tricked her by sending her to buy some biscuits before dragging the victim to the grass and defiling her. She told the trial court that she ran home for help but did not get anyone at home and on coming back she found the appellant whom she also referred to as ***"Kipchoge"*** walking away.

4. The medical evidence tendered by Joseph Mwenda Mwiraba (PW4) through the P3 he tendered as P. Exhibit 3 apart from showing that the hymen of the victim was not intact did not reveal anything tangible to the prosecution's case. On the other hand the evidence tendered by Corporal Rose Angoi, the investigating officer particularly the treatment chit from Kanjuki Dispensary (P. Exhibit1) and PRC Form from the Ministry of Health (P Exhibit 4) indicated positive evidence to the prosecution's case. However the evidence was not tendered by an expert witness in accordance with the provisions of **Section 48** of the **Evidence Act** (Cap 80 Laws of Kenya) but I will come back to that issue shortly in this judgment.

5. When placed on his defence the appellant simply denied committing the offence stating that on the material date he was grazing cattle belonging to his employer and after grazing, at around 2 pm he went back home and was surprised the following day when he was confronted by complainant's mother in the company of three other people accusing him for defiling her daughter.

6. In her judgment the learned trial magistrate found that the complainant had been defiled and found her evidence well corroborated by the evidence of PW2 and PW3. She further found that the P3 filled seven months after the incident could have missed crucial evidence like bruises in the victim's genital part and some discharge because of effluxion of time because the incident took place on 2nd January 2014, P3 was issued by the police on 6th January 2014 but the same was filled on 29th August, 2014. The medical officer did not tell the trial court

when if at all he examined the patient. The trial court concluded that the bruises could have healed by the time the doctor examined her and found that she had been defiled notwithstanding the deficiency of the P3 form. The trial court further found that the appellant committed the act beyond reasonable doubt as there was no evidence to suggest that the prosecution witnesses had fabricated the evidence to implicate him.

7. In his petition of appeal herein the appellant listed the following grounds namely:

(i) That the learned magistrate erred both in law and fact by failing to establish that the presentation case was marred with inconsistent, uncollaborating and conflicting evidence.

(ii) That the trial magistrate erred in both law and fact by failing to note that the medical report tendered in court did not sustain such conviction and sentence.

(iii) That the trail magistrate erred in law and fact to note that there was no cogent evidence to proving the age of the complainant.

(iv) That his defence was not considered.

(v) That the trial was marred with procedural technicalities.

8. In his written submissions filed in this court on 28th May 2018, the appellant has contended that the medical evidence tendered did not prove that there was penetration and that the prosecution's case was characterised by contradictions against which conviction could not stand.

9. The appellant has contended that the complainant and witnesses referred to a person known as **"Kipchoge"** and according to him the prosecution failed to connect him with that name as the charge sheet does not state that he had an alias name.

10. He has further pointed out that while PW1 stated that she was defiled in a bush, PW3 stated that the incident took place in a shamba and in his view this showed that the witnesses had been coached on how to testify.

11. The appellant has argued that though the doctor found out that the hymen was not intact prove of defilement was not possible in the absence of corroborating evidence. His contention is that the hymen can be broken through other activities and not necessarily through defilement. He has pointed out that the evidence by the doctor showed no other evidence to prove that defilement had taken place as there were no bruises, lacerations or blood stains noticed on the victims genitalia.

12. The appellant have also faulted the prosecution for not availing to the trial court two witnesses to wit the victim's father and the area chief who were said to have gotten the report about the defilement. The appellant has urged this court to draw an inference that failure by the prosecution to call whose witnesses meant that those two witnesses were going to give adverse evidence to the prosecution's case.

13. The appellant has also faulted the trial court for failing to note that there was grudge between him and the victim's mother. He contends that the learned trial magistrate never considered factors that would have helped him in his defence. He further contends that his defence was not considered.

14. The prosecution/Respondent has opposed this appeal through written submissions by James Machirah, the learned prosecuting counsel for the Respondent. The Respondent contends that the evidence they presented at the trial court proved the necessary ingredients of the offence of defilement which is an offence created under **Section 8(1)** as read with **Section 8(2)** of **Sexual Offences Act**. Mr. Machirah has submitted the following ingredients in his view were proved beyond reasonable doubt namely:-

(i) Penetration

(ii) That the penetration was caused by the appellant

(iii) Age of the appellant.

The Respondent has pointed out that the evidence tendered by PW1 (complainant) show that defilement took place as the details of the act was clearly explained by the victim who stated that she was herding goats at the material time in the company of her sibling (PW3).

15. The prosecution/respondent has also submitted that the evidence of the clinical officer (PW4) who tendered P3 form as an exhibit proved beyond reasonable doubt that penetration had taken place. The prosecution has also pointed out at the treatment chit (P. Exhibit 10) as evidence that supported the conviction of the appellant. It is the prosecution contention that the both certificate tendered as (P. Exhibit 2) proved that the victim was a minor aged 10 years at the material time and this justified the sentence that the appellant got (life imprisonment). The respondent has therefore contended that the appellant has no basis to fault the trial magistrate for meting harsh sentence against him

16. On the ground that the defence was not considered the respondent has submitted that the appellant was taken through the provisions of **Section 211 Criminal Procedure Code** upon being out on his defence and that apart from denying the offence, the appellant did not call the witnesses he alleged he was with during the material time. The prosecution has contended that defence did not offer tangible defence.

17. This court has considered this appeal the grounds upon which it has been brought and the written submissions of both the appellant and the respondent. The main issue in this appeal in my view is whether the prosecution was able to prove their case against the appellant to the required standard. The offence under which the appellant was charged with and

convicted upon is defilement. The respondent's counsel has clearly and correctly submitted that the key ingredients in the offence of defilement under **Section 8(1) and (2)** of the **Sexual Offences Act** are as follows:-

a) penetration

b) Evidence connecting penetration with the accused/appellant

c) Age of the victim.

18. Penetration is defined under **Section 2 (1**) of the **Sexual Offences Act** as.

> ***"..... partial or complete insertion of the genital organ of a person into the genital organs of another person."***

The big question is this appeal is whether the prosecution was able to prove through the evidence tendered that penetration was established and proved beyond reasonable doubt. The appellant contends that this was not proved while the respondent's submissions are on the contrary. Looking at the evidence tendered at the trial court below, it is evident that the complainant (PW1) was a child with mental inadequacy. The proceedings show that the trial court was alerted by the prosecutor of that fact and upon ***voire dire*** examination, the court declared the complainant a vulnerable witness in accordance with **Section 31** of **Sexual Offence Act** and was assisted by her mother to testify. The legal implication of such declaration meant that the evidence of the witness (mother) required corroboration to sustain a conviction. The provisions of **Section 31(1**) of **Sexual Offences Act** provides as follows:-

> ***" A court shall not convict an accused person charged with offence under this act solely on the uncorroborated evidence of an intermediary."***

The proceedings from the trial court shows that the complainant gave evidence with the assistance of an intermediary who was her mother and PW3 during trial. The evidence by the complainant and intermediary therefore required corroboration to sustain conviction.

19. The prosecution's case against the appellant was based on the evidence of PW1(complainant), PW2 (a minor aged 8 years), PW3, mother of complainant PW4 (clinical officer) named Joseph Mwenda Mwiraba and Corporal Rose Angoi (PW5) the investigating officer.

To begin with the evidence of P M (PW2) is that the probative value of her evidence being that of a minor aged 8 years is such that it required corroboration in itself and the evidence that require corroboration to sustain a conviction cannot be corroborated with evidence that require other corroborative evidence to sustain a conviction. It is true that in Sexual Offences a court does not require corroboration of evidence tendered to convict a sexual offender because of the provisions of **Section 124** of the **Evidence Act Cap 80 Laws of Kenya**. Conviction can be sustained if the court is satisfied with reasons to be recorded that the alleged victim is telling the truth. The trial court in this instance did not state, leave alone giving reasons, in the proceedings that it was satisfied that PW1 was saying the truth notwithstanding her disability. The same applies to the evidence of PW2 because she was also a minor. The evidence of the mother (PW3) being an intermediary was not enough or sufficient on its own to corroborate the evidence of the complainant. It was not safe to convict the appellant based solely on the evidence of such witnesses.

20. The above evaluation shows that the only evidence that could corroborate the complainant's evidence was doctor's evidence because the trial magistrate failed or omitted to indicate whether upon observing the demeanor of the minors as they testified, she was able to tell that they were speaking the truth. Looking at the evidence tendered by Joseph Mwenda Mwiraba (PW2) the clinical officer who authored and tendered the P3 form as P. Exhibit 3, it is unclear from his evidence whether he actually examined the victim. He did not state when he filled the P3 Form. He simply indicated that he signed the P3 Form on 29th August 2014 which was seven months after the incident. The trial court far good measure made good observation in its judgment that the patient may have been examined 7 months later but in my view the trial court feel into error when it made the assumption that the physical examination was done on 29th August 2014 when the ***"bruises on the private part of the victim would have healed."*** There was no evidence placed before the trial court to enable it make a basis for the presumption that the negative findings noted by doctor in respect to defilement was affected by effluxion of time between when the defilement took place and when physical examination was conducted. The negative findings by the medical officer were noted as follows:-

> ***" On genital examination she did not appear to have any bruises, no discharge/blood visible. A routine medical test was carried out HIV was negative, urine had few pus cells and the vaginal swab examination revealed no spermatozoa. Sperms were not detected on vaginal swab."***

The above evidence in my view was negative and based on the same it is erroneous to find that penetration was established notwithstanding the finding by the same witness that ***"hymen was absent".*** This is because I agree with the appellant that the absence of hymen ***per se*** is not sufficient to make a presumption that there was penetration. There must be other additional evidence to prove this because the hymen may have broken perhaps from a past encounter or through other means like sport or the like. This court finds that the evidence tendered by PW4 is inconclusive in so far as defilement is concern. The witness himself as an expert did not positively opine that defilement had taken place. Looking at his evidence one really would be right to assume that he was simply relying on some other records and that he himself did not either actually physically examine the victim himself soon after the incident, or examined

her 7 months after the act by which time evidence of defilement was not possible to trace. Either way I find that the evidence is inconclusive.

21. The Respondent has referred this court to the initial medical chit from Kanjuki Dispensary (P.Exhibit 10) and Post Rape Care Form (exhibit 4) which exhibits could have really assisted the prosecution's case because they are at least corroborative but the exhibits were tendered by the investigating officer who was not an expert in the contents of those reports. Under **Section 48** of the **Evidence Act** such evidence are only admissible and reliable if tendered by an expert on that field. Failure by the prosecution to secure attendance of an expert to tender the evidence negated the probative value of the exhibits and the trial court could not have relied in such inadmissible evidence to found a conviction. The prosecution in my view bungled up the investigations and prosecuting and in the process left a loophole that cannot be overlooked.

22. The appellant has submitted that the charge sheet was defective and not in tandem with evidence tendered on account that his name does not contain an alias when evidence tendered showed that the offender was a person known as ***"Kipchoge."*** That in my view is an omission which a seasoned prosecutor could have noticed when going through the statements and preparing a charge sheet but the omission in my view is one of those omissions curable under **Section 380** of the **Criminal Procedure Code** as the appellant did not suffer any prejudice as a result of that omission by the prosecution.

23. Having made the above observation in obiter, it is the finding of this court that on the whole on the basis of the evidence tendered and given the seriousness of the charges facing the appellant, it was not safe to convict the appellant. In such cases a trial court must really satisfy itself that the evidence tendered proves beyond reasonable doubt about the guilt of an accused person. In this instance the evidence tendered was simply insufficient to sustain a conviction. The prosecution left many loopholes in their case that cast doubts about whether;

(i) the offence was committed

(ii) And if so by the appellant herein.

The court finds merit in this appeal. The same is allowed. The conviction and sentence against the appellant is reversed and the appellant shall be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Chuka this 26th day of June, 2018.

R.K. LIMO

JUDGE

26/6/2018

Judgment signed, dated and delivered in the open court in the presence of appellant in person and Mr. Machirah for state/Respondent.

R.K. LIMO

JUDGE

26/6/2018