REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 125 OF 2016

THOMAS BIWOTT LOUGEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal against conviction and sentence in Iten Senior Principal

Magistrate's Court Criminal Case No. 1360 of 2013

by Hon. N. C. ADALO Resident Magistrate

delivered on 3rd November, 2016]

JUDGEMENT

1. THOMAS BIWOTT LOUGEN (the appellant) was convicted on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, and sentenced to life imprisonment.

The particulars of the charge were that on 12th December 2013 at about 1700 hours in **MARAKWET EAST** district within **ELGEYO MARAKWET** county, he caused his penis to penetrate the vagina of **DC***, a child aged 9 years.

2. At the time of testifying DC (PW1) was aged 10 years. She told the court that on 12.12.13, she went to the river to wash clothes with her friend **J** at about 4.00pm. The two girls were alone at the river but the appellant and one **TAULUS** arrived where they were and sat down.

At about 5.00 pm as the two girls were leaving **for J'S** home, the appellant followed them. **J** got into the house, and started preparing vegetables while **DC** played with one **J** outside. The appellant was inside the house while **TAULUS** remained outside. At different intervals both **J** and the appellant got out of the house briefly then returned into the house.

3. After **J** had finished preparing the food, PW1 heard **J** telling the appellant to give her Ksh.300/- and give PW1 Ksh.100/-. PW1 did not know what the money was for, but **J** came out and gave her the money and pushed her into the house and locked her there.

4. The appellant who was inside the house locked the door from inside, and took PW1 to **J'S** bed. She stated;

> ***"He carried me to the bed. He removed my panty and put it in his pocket. He opened his trouser and pulled it down and then did bad things to me. He put saliva on his penis and then put it into my vagina. When I felt pain, I cried. Thomas covered my mouth with his hands. He did bad things to me for a long time. He removed my skirt and panty. He then heard J open the door from outside and Thomas opened from inside. When I got outside I told J to tell Thomas to give me my panty but he refused... when Thomas*** **finished doing bad things to me, I saw some whitish things…**

PW1 then left to go home but upon seeing her mother she fled to her uncle's home and then to her aunt's home although she did not disclose what had happened. She remained away from home for two days before her mother went to fetch her. Even when her mother asked her what the problem was, she did not disclose. However she stated;

> ***"My mother asked me if Thomas had defiled me and I answered in the affirmative.***

5. The matter was then reported to police. Eleven year old **J** (PW2) told the trial court that while at the river with PW1, the appellant (whom she knew as her neighbour) arrived in the company of Taulus – both of them were drunk. She confirmed that the appellant followed them to her parent's home and into the house where he offered her Ksh. 300/- so as to do bad things (meaning have sex) with her but she declined. Nonetheless the appellant gave her the money which she took and went outside. PW1 then got into the house and they locked the door, with the appellant inside the house. They remained in there for a very long time – about an hour, before opening the door and PW1 came out. PW1 then went behind the house and told her that if she did not do bad things with the appellant, he would tell her mother. Later when PW2 got into the house to light the fire, PW1 locked her inside with the appellant, but she climbed where the firewood was kept and Taugla opened the door. PW1 then told her to help in searching for her panty and Taugla (also referred to as Douglas) told the appellant to give PW1 her panty otherwise he would get jailed, but the appellant refused. Later that night PW1's mother went to look for her at PW2's home and asked what had happened to PW1. PW2 then disclosed what she had witnessed i.e that the appellant and PW1 had locked themselves inside the house for a long time.

PW2 stated;

> ***"J did not tell me what had happened between her and Thomas. Thomas is the accused seated in the dock"***

6. F J (PW3) the mother to PW1 told the trial court the appellant was her neighbour. On the material date, she had gone to Kaboror with other neighbour's to condole another neighbour who had been involved in an accident. She saw the appellant at Kaboror. In the evening, on her way home, she stopped by a neighbours place and called out PW1's name intending to ask her why she had allowed a young child to collect fire. There was no response.

A neighbour's young child aged 5 years old told her PW1 had locked herself inside the house with the appellant. Eventually she got to inquire from PW2 and learnt that the appellant had indeed locked himself and PW1 inside the house and "did bad things to her."

PW3 looked for **DC** in vain before locating her at her aunt's home.

7. Upon questioning PW1, she confirmed that the appellant had defiled her, so she was taken to hospital for examination. PW3 also produced her birth certificate showing that PW1 was born in the year 2003.

8. ESTHER CHEPTOO (PW4) the Clinical Officer who examined PW1 at **CHEPKORIO** health centre on 14.12.13 found that the injuries were 1 day and 6 hours old. There were tears on the vaginal wall bilaterally and a high vaginal swab disclosed the presence of spermatozoa – there was evidence of penile penetration as the finding indicated the probable object was a penis and there was evidence of penetration.

On cross examination PW4 explained that spermatozoa can be detected within 72 hours.

9. Upon confirmation of the medical findings. **PC PETER MWANGI MWAURA** (PW5) also issued the appellant with a P3 form and PW4 who examined him found no abnormality on his genitalia. On cross examination as regards the appellant's state, she responded;

> **"You could not have had any injuries on your genitalia."**

10. The appellant in his sworn defence confirmed that he knew **DC a**s a neighbour and says that he spent the better part of 12.12.2013 with friends, partaking alcohol at three different spots because it was a public holiday. He was totally drunk and after the drinking spree he went to his home. He found himself in bed and regained consciousness on the morning of 13.12.2013.

He stated;

> ***"I know J. They are friends with D and they school together … The last time I remember seeing them when I was crossing a river on my way home…"***
>
> ***He was arrested on the night of 14th December 2015 and taken to hospital on the morning of 15th December 2015. He lamented that no samples either on urine, stool or spermatozoa were taken from him."***

He denied taking off PW1's under pant, saying such claims were untrue.

11. On cross examination he confirmed sitting down along the river where the two girls were washing and that he later went to PW2's home, where he remained for 20 minutes and according to him PW2 served him a drink but insisted he remains outside. Further that although he had a lot of money, the money he gave out was to pay for alcohol he consumed.

He did not know how he got home but confirmed that when leaving PW2'S home, one Douglas half carried him. He speculated that the only reason the girls may have framed him was because he had a lot of money, having just recently come from United Arab Emirates where he worked as a salesman for an American Company, and suggested that the girl probably wanted part of the money.

12. The trial magistrate in his judgment found that the victim's age was proved by virtue of the birth certificate which was produced as exhibit.

Further, that the appellant was properly identified through recognition by PW1 and PW2 who knew him very well as their neighbor – a fact

he too did not deny.

13. The trial magistrate pointed out that penetration was proved, not just by PW1's detailed description of what she underwent at the hands of the appellant, but also the medical examination which confirmed what **DC** described. The trial court took into account the provisions of section 124 of the Evidence Act which provides that despite the requirement for corroboration in criminal offences an exception is found that;

> **"Provided that 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."**

14. The trial magistrate pointed out that upon observing the demeanour of PW1,

> "Though a young girl, she was composed and consistent in her evidence" and found her a credible witness, who compared with the evidence of PW2 that she and the appellant locked themselves inside the house for a long time although she could not tell what they were up to.

15. The appellant's defence was considered and dismissed on grounds that intoxication is not a defence to an offence of defilement.

16. The decision is contested on grounds that;

> a) Defilement was not proved as there was no conclusive evidence,
>
> b) The trial magistrate adopted a lower standard of proof,
>
> c) The trial magistrate erred by believing the prosecution witnesses in the face of glaring contradictions and inconsistences which ought to have been resolved in favour of the appellant,
>
> d) The trial magistrate erred in not following her order to have PW2 and PW3 recalled,
>
> e) The sentence of life imprisonment violated Art 28 and 29 of the Constitution.

17. At the hearing of the appeal, **MR MBUGUA NGIGI** appeared for the appellant while Miss **ODUOR** was for the State.

Mr Ngigi pointed out that the trial initially begun without the appellant being represented, but after the victim, playmate and mother of the victim had testified, counsel was engaged to take over. Counsel then applied under Sec. 150 Criminal Procedure Code to have all the witnesses who had testified, recalled for cross examination and the trial court allowed this. However the prosecution never availed PW1 - 3.

18. Counsel also argued that whereas the Clinical Officer claimed that spermatozoa was detected, upon physical examination a high vaginal swab done did not detect anything, and that the trial magistrate ignored this. Counsel contends that PW4 upon cross examination had said the high vaginal swab showed presence of spermatozoa which can be detected within 72 hours then she concluded that;

> ***"I did not find any injuries on the physical. May be it was a soft affair."***

AGE

It was submitted that although a birth certificate was used to prove age, yet the same was obtained in the course of the proceedings suggesting that it may well have been doctored. Counsel argues that no independent age assessment was conducted and had the defence been allowed to have PW1 back to court for cross examination they would have sought scientific assessment.

19. In response Miss Oduor on behalf of the State maintained that the minor's age was proved;

> (i) By the evidence of her mother
>
> (ii) The birth certificate (an official document) which confirmed the year of birth as 2003, and there was no reason to doubt its authenticity
>
> (iii) The P3 form reiterated the age of the complainant which as at the time of examination was recorded as 10 years. Further, that when in doubt, the evidence of the mother carries the day.

20. On this limb, I take cognisance of the fact that there are a host of judicial pronouncements on the issue regarding proof of age – that medical age assessment is not the only credible manner of proving age – indeed even that is not with precision – it is an assessment based on dentition.

Courts have now pointed out that age can be proved by the evidence of one who was present during birth (who is better placed than a mother?), or even by common sense observation – see the case of FRANCIS OMURONI Vs UGANDA CC NO. 2 of 2000 (unreported)

which held that age may be proved by the victim's parent or guardian.

I am alive to the fact that age is a cardinal factor in determining the nature of the sentence to be meted out, and I have paid due attention to the past decisions cited but nothing has been presented to suggest;

a) that the birth certificate was doctored to assist the prosecution

b) that the mother is so ignorant of factors affecting time and space, that she would not be able to tell when she gave birth to the victim

c) When an application was made for recall of witnesses for cross examination there was no indication whatsoever that part of the reason for that request was to subject PW1 to an age assessment.

I therefore cannot fault the trial magistrate finding that the minor's age was proved.

IDENTIFICATION

The appellant's counsel submitted that even if there was evidence of defilement, there was nothing to link it to the appellant who had been on a merry making spree during a public holiday, and the evidence that he locked himself inside the house with PW1 for a long time was doubtful, because if indeed PW1 had screamed, then other persons nearby could have heard.

21. Further that when the victim emerged from the house, she did not go home, but spent the night at her uncle's place before proceeding the next day to her aunt's place, and her mother only caught up with her on the 4th day. Counsel seems to suggest that a third party other than the appellant, could have defiled PW1, and it was necessary to take samples from the appellant for analysis.

22. Miss Oduor's response on this is that identification was proved by recognition and even the appellant confirmed that he knew PW1 as a neighbour.

23. From the evidence, there was no dispute that;

a) the appellant and PW1 and PW2 were known to each other very well as they were all neighbours,

b) the appellant and his friend Douglas went to the river and sat down for a while – the girls were present at the river then,

c) Eventually the girls went to PW2's home and the appellant and his friend Douglas (also recorded as Taugla) went to PW2's home, where PW2 was inside the house while PW1 played outside with another child.

24. Therefore the opportunity for interaction was not disputed and the question regarding identification could not have been mistaken. The only issue was whether the girls made up the incident. The trial magistrate was persuaded that what they described happened, having had advantage to observe the demeanour of PW1, coupled with PW2 was honest enough to say she could not tell what took place behind the closed/locked door once the appellant and PW1 were inside the house. There was nothing to suggest that PW1 had a separate rendezvous with anyone else, and she explained to the court that fearing to face her mother she fled to her uncle's home but did not disclose what had happened. She thereafter left for her aunt's place. My perception is this would be a normal reaction for a young girl who has been traumatized by a sexual encounter which the ordinary Kenyan society frowns upon and is almost taboo to indulge in outside marriage and below a certain acceptable age. Further I take judicial notice that a large section of the Kenyan population still consider it taboo to talk about sex especially a conversation between a child and a parent. There was nothing sinister or malicious about that.

Identification and opportunity were properly established.

PENETRATION

25. The appellant's counsel reiterated that the trial magistrate placed a lot of reliance on the contested evidence of PW1 – 3 who were not recalled for cross examination, and the only witness recalled was the medical personnel who confirmed that there were no visible physical injuries on the victim. He argued that the trial magistrate ignored this issue in eagerness to convict and sentence the appellant.

26. Miss Oduor in response to this issue submitted that penetration was proved through the narrative given by PW1 which was very detailed and specific and confirmed by the medical findings;

I pose three issues under this limb;

(i) Does there have to be injuries on the genitalia for penetration to be proved. This is because, penetration need not be forceful, infact it may even be consensual, but creates an offence if the "receiving" party lacks capacity to consent. Counsel has not presented any medical evidence or text to support his position that since there were no physical injuries then penetration was not proved. What about the answer by PW4 that "it may have been a soft affair?"

(ii) the physical injuries – I think would be in relation to the outer genitalia, but that would ignore the findings at paragraph 2, section C of the P3 form which stated "…Tear on the vaginal wall bilaterally."

Isn't that an injury and evidence of the physical state of the vagina? Can the court ignore that finding simply on account of an ambiguous question put on cross examination about whether the medical personnel observed physical injuries (without being specific of what physical in that instance entailed). I think not, and I am persuaded that there was evidence of penetration.

> (iii) Does spermatozoa have to be detected for penetration to be established. I think Section 2 of the Sexual Offences Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

That in my view means what is required to be proved is the insertion of an object into the genitalia of another. In this instance PW1 was very graphic as to what the appellant used to cause the penetration, saying;

> "He removed my panty and put it in his pocket. He put saliva on his penis and then put into my vagina. When I felt pain, I cried, and Thomas covered my mouth."

27. The failure to carry out a sperm analysis did not weaken the evidence regarding penetration and who had the opportunity to penetrate.

Under Sec. 150 of the CPC;

> **A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case:**
>
> **Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.**

28. The appellant's counsel made the application to recall witnesses almost 2 years after they had testified. PW1 -3 testified on 02.07.2014, and **MR NGIGI** sought a recall on 19.05.2016 saying the request was being made in good faith. The prosecution sought time to confirm availability of witnesses and on 25.05.2016 the prosecution opposed the application saying;

> **"From the information I got from the OCPD Liter, the witnesses moved from where they were residing to an unknown place. They come from an area boundary (SIC) East Pokot and Baringo. It will be difficult to get the witnesses and we do not know how long it will take for the inter clan fighting between Marakwet and Pokot ... I request that trial magistrate case proceeds from where it had reached."**

29. The trial magistrate over-ruled the prosecution citing provisions of Article 50 of the Constitution and allowed the recall. True to the prosecution's indication, only PW4 (the Clinical Officer) could be found and recalled and 4 months later on 30.09.2016, the trial magistrate revisited his decision and allowed the prosecution to close its case because witnesses could not be traced.

30. Miss Oduor acknowledges that the three witnesses were to be recalled but prosecution made every possible effort to get all those who had testified to come back in vain.

31. It would be pretentious of the court not to take judicial notice of the fact that inter clan fighting along the Pokot – Baringo border where PW1 – PW3 hailed from has been a perennial occurrence. Moreover it would be illogical to disregard the sentiments express by prosecution before the trial magistrate that due to the fighting, families had moved away from their homes – I think the only blunder the trial magistrate made was to revise his own order – he ought to have presented the file to the High Court for Revision.

Did that result in prejudice – I do not think so, because were the order to be presented before me for revision I would have come to the conclusion that the trial magistrate direction for re-call was made without due consideration being given of the challenges and hardship prosecution had alluded to, and I would have set aside the order, so no prejudice was occasioned.

32. Consequently I hold and find that the conviction was safe and is upheld. The sentence was as is properly provided by law and I confirm it.

The appeal is dismissed for want of merit.

DELIVERED and DATED this 31st day of July 2018 at ELDORET.

H. A. OMONDI

JUDGE