



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HCCRA NO.70 OF 2017

BETWEEN:

RAMA SHARO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. E. Nderitu SPM at SPM's Court Voi. CR. Case No.697 of 2016 delivered on 14th July 2017)

J U D G M E N T

Background

1. The Court has before it an Appeal against conviction and sentence from a Judgment delivered by Hon E Nderitu SPM in the Principal Magistrates' Court in Voi on 14th July 2017. The Appellant was charged and convicted of the offence of Defilement of a Child contrary to Section 8(1) read together with Section 8(4) of the Sexual Offences Act No 3 of 2006.
 2. The Appeal process was not commenced until 8th September 2017 when the Appellant filed an application by notice of motion for leave to appeal out of time. That application was granted by Hon J. Kamau J and subsequently on 18th December 2017 the Learned Judge admitted the Appeal for hearing.
 3. The Grounds of Appeal were filed on 21st February 2018. They are said to be all the grounds consolidated and comprise vast tranches copied out of the proceedings. They can be distilled to three main grounds. Firstly, that the Prosecution did not discharge the burden of proof. Secondly, the age of the complainant and fact of penetration were not proved and thirdly that the evidence of the Complainant had not been corroborated by producing medical records from the doctor at Kajire where she first sought medical assistance.
 4. The Appellant takes issue with the fact that the Investigating Officer sought confirmation of the age of the Complainant both from the school she attended and from a medical assessment. From the proceedings it is clear that the Complainant suffered from some mental disability. The Hon Trial Magistrate recorded it as apparent and sufficiently so to require the intervention of an intermediary to assist her to give evidence. In the circumstances any pre-charge confirmation of the correct particulars to include in the Charge Sheet cannot be unfair to the Appellant nor deny him a fair trial. In fact the contrary is true.
 5. On the issue of penetration, the Complainant gave her evidence through an intermediary. It is clear from the record that the intermediary assisted her to bring out the facts of what she said happened. Her evidence was corroborated by the evidence of PW2 and also the medical evidence and the P3 Form. The Appellant now raises a complaint, not raised at trial that there was not additional evidence presented by seeking the medical reports from the first doctor the Complainant visited. Again, the Learned Trial Magistrate made a finding based on three separate sources. The Appellant did not ask for the evidence from the first medical centre to be produced at trial. In the circumstances, he cannot complain that it was not produced. There is nothing to say that it was deliberately withheld. In any event, if the Appellant is seeking to say that the Complainant was an untrue and unreliable witness, that is a matter he should have raised at the trial. He did not.
- The Respondent's Written Submissions were filed on 5th June 2018. The Submissions remind the Court that the evidence of the Complainant set out very clearly (in language she understood) that the Appellant had penetrated her vagina with his penis. In addition, the Court found by its own observation and the assessments made, that the Complainant was a child within the meaning of the Act.
6. The Appellant also points to the fact of the absence of bruising and bleeding. The Respondent's Submissions rely on the case of **Twehange Alfred v Uganda Crim App No 139 of 2001 (2003) UGCA** for the proposition that the slightest penetration is sufficient. That authority can only be persuasive. However, it must be obvious that an accused cannot rely on the fact that the injuries of the victim were not

more excessive than alleged to avoid responsibility.

7. The Appellant has not put forward any facts or issues that would justify this Court interfering with the decision of the Court below. Further, the timing and content of the Appeal is such that it is clear that it was made as an after-thought with little belief in its weight or justification.

8. In relation to the sentence the Appellant was treated as a first offender. The Act provides a minimum sentence which was applied. Based on the facts of the findings made the Hon Trial Magistrate, she would have been justified in considering the Appellant's enticement of an impoverished family with food in order to lure a child into his home as grooming and therefore an aggravating feature. The Learned Trial Magistrate did not.

9. Appeal dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 26th day of September 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: Rama Sharo in person

Respondent: Ms Anyumba