REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 9 OF 2016

GERALD RITHO WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Original appeal against conviction and sentence in the Karatina Principal Magistrates' Court Criminal Case No. 11 of 2013 (Hon. F.W. Macharia, Principal Magistrate) on 27th January, 2016)

JUDGMENT

At the heart of offences against the person, for instance the offence of assault, is the proof of injury. In most, if not all cases of assault, medical evidence is necessary for proof of not only the assault but also the degree of injury if any has been sustained as a result of the assault. This is why whenever a complaint of physical assault is made, the state will always refer the complainant to a medical doctor for, among other things, examination of the extent of the assault and for ascertainment of the degree of the injury. The results of the examination which include the details of the injuries sustained; their approximate age; the probable type of weapon used; if any treatment has been administered; and the degree of the injuries sustained are filled by the examining doctor in a prescribed medical examination form, commonly referred to as the 'P3' form, issued by the police officer requesting the examination.

Where the alleged assault is sexual, and the victim is female, there is a provision in the medical form for description of such details as the state of and any injuries to genitalia with specific reference to the labia majora, labia minora, the vagina and the cervix. The examining doctor is required to make note of the presence of discharge, blood or venereal infection from the genitalia or from the external body. If, on the other hand, the complainant is male, the examining doctor is required to provide details of the physical state of and any injuries to the genitalia, the anus and also make notes of any discharge around such places as the anus, thighs and age of such discharge.

This medical examination report was central to the appellant's trial since the case against him was that of sexual assault. It was alleged that on 12th day, 2013 at around 19 hours at [particulars withheld] village in Mathira East District within Nyeri County, he intentionally caused his penis to penetrate the vagina of L N M, a child who was then aged 9. In light of these particulars, he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. In the alternative, he was charged with the offence of indecent assault contrary to section 11 (1) of the Sexual Offences Act. He was convicted of the principal count and it is this conviction that concerns this appeal.

As far as I understand the trial record, the allegations of the complainant's sexual assault can be traced to her mother, M M M (PW2). She testified that on the night of 12th July, 2013 she noticed that her (daughter's) pant, which she recovered from under the mattress, was 'full of blood'. When she sought to know from her daughter the source of this blood, the complainant initially told her that one M, who is described by the proceedings as a child aged 3, and the complainant's brother, had pinched her on her vagina. However, after she caned her, the complainant changed her story to say that the appellant had defiled her that particular evening after enticing her with a cake. Apart from the bloody pant, the complainant's mother also noticed the presence of blood and what she described as a 'white substance' on her private parts.

Despite her age, the complainant herself testified under oath to say that the appellant slept on her but more importantly, *'he removed his thing and inserted (sic) in my vagina'*. She, however, could not tell how her mother learnt of this because she never informed her. Incidentally, she never made any reference to the caning or the presence of blood either on her pant which she identified in court or in her genitals.

The complainant was examined and treated by one Evelyne Muthoni Maina (PW6) who described herself as a medical officer intern attached to Karatina District Hospital. She nevertheless filled the post rape care form in which, among other things, she noted that the complainant's pant was stained with blood and sperms. The hymen was stated to be 'not intact'. Although the offence was committed on 12th July, 2013, the intern testified and indeed the out-patient record shows that the complainant was attended to on 11th July, 2013.

The P3 form was, however, filled by Dr Geoffrey Mungai. According to his evidence, the complainant was reported to have been defiled on 13th July,2013 but was examined on 15th July, 2013. The findings were that the complainant's pant was stained with blood and what *'looked*

like sperms'. Her genitals were found to be normal and the hymen was intact. No discharge was noted from the genitalia. The laboratory results showed that there were no spermatozoa.

Later in his testimony, the doctor reiterated that genital was intact but not so with the hymen. In what appears to be a contradiction of his earlier statement, he stated that the hymen was 'not intact'. He also noted that there were traces of pus cells and bacteria but since the appellant was not examined, the cells and bacteria could not be attributed to him. He admitted that if the hymen had been broken blood would ensue but he could not tell whether it was broken on the same day that the offence is alleged to have been committed or on any other day. In any event, he admitted that the blood was not analysed to establish whether it was from the complainant.

My assessment of the medical evidence is that there were obvious inconsistencies upon which a safe conviction could not be founded. In the first place it is simply not clear from the evidence of the intern and the doctor whether the hymen was broken or not. It must be noted that the basis of the complaint against the appellant was the complainant's mother's allegations that the complainant's pant was 'full of blood' and that the same blood together with what I understood to be spermatozoa could also be traced in the plaintiff's vagina. However, though the complainant was examined almost immediately after the alleged offence, no blood or spermatozoa were traced in her genitals. More importantly, there was no evidence of any form of injury on either labia minora or labia majora or on any other part of the complainant's genitalia or body.

I note from the record that although the pant was exhibited in evidence, there is no indication whether it was blood stained or not; however, assuming that it was blood stained, or drenched in blood as the complainant's mother wanted the court to believe, what was the source of that blood in light of the fact that there was no evidence of fresh injury or any injury whatsoever in the complainant's vaginal or anal areas or on any other part of the body for that matter?

Again, although the perforation of the hymen is not always necessary to prove penetration, the question that one is bound to ask is this; if the prosecution case, as I understand it, was that the complainant's hymen was broken as a result of the alleged defilement, it should not have been difficult for the doctor to point out without any ambiguity that there were fresh wounds on the complainant's genitalia. Instead he testified that he could not tell whether the hymen was broken the same day or on any other day. To compound matters even further, he admitted that the alleged blood was no analysed to confirm its source.

Looking at the learned trial magistrate's judgment, it is apparent that the she appreciated the inconsistency in the medical evidence; this is how the learned magistrate captured it:

> ***The medical intern (PW6) who examined the child said that the complainant's pant had blood and sperm stains. The hymen was absent. Even though Dr Muigai (PW7) on cross examination said that the absence of the hymen is not a conclusive evidence of penetration. However, based on the evidence of the complainant, her mother, aunt and the doctor who first examined her, I find that it is a fact that there was penetration in the complainant's genitalia.***
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> ***Further, the post rape care form which was filled only hours after the alleged offence indicated that there were sperms and blood stains noted in the pants the complainant was wearing. The P3 form was filled 3 days later. I take the evidence of the PRC form over the P3 form which is not conclusive.***

With due respect to the learned magistrate, she misdirected herself on the evidence and therefore reached the wrong conclusion. First, the evidence presented before court must be considered and evaluated in its entirety and not isolation; it is not the duty of the trial court to isolate what, in its view, is evidence favourable to prosecution case and discard that which it finds doubtful. Second, the primary medical evidence was the medical report or the duly filled P3 form; once the learned magistrate came to the conclusion, as she did, that the information in that form was inconclusive as to whether the complainant had been assaulted as alleged, that finding alone should have created a reasonable doubt in her mind whether the offence had been committed. In other words, it would have been easier for the learned magistrate to conclude the fact of assault had not been proved beyond reasonable doubt.

It is curious that the trial court chose to rely on the information contained in the post rape care form rather than the medical examination report. The post care rape form cannot be used as a substitute for the medical report form. On its face, it is indicated to provide rape management guidelines; it is described to be *'a documentation form for survivors of rape/sexual assault (to be used as clinical notes to guide filling of the P3 form).'* It is therefore clear that even the form itself contemplates that a P3 form shall be filled and is therefore necessary evidence in cases of assault. At any rate, the learned magistrate could not ignore the P3 form on the basis it was filled after the PRC form because the clinical notes on the PRC form guide the filling of the P3 form.

It must also be recalled that the PRC form was filled by a medical intern and who for that reason alone was strictly speaking not a qualified professional in the field in which she purported to work. By opting to adopt her evidence rather than that contained in the P3 form, the learned trial magistrate effectively disregarded an expert's opinion for that of a non-qualified person.

In the final analysis I must agree with the appellant as stated in his first ground of appeal that the learned magistrate erred in law and in fact in convicting him based on insufficient evidence. For this reason, it is not necessary for me to consider the rest of the grounds of appeal. I hereby allow the appeal; accordingly, the appellant's conviction is quashed and sentence set aside; he shall therefore be set free unless he is lawfully held.

Signed, dated and delivered in open court this 21st day of September, 2018

NGAAH JAIRUS

JUDGE