



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 42 OF 2015

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 545 of 2013 in the Resident Magistrate's Court, Engineer, (G.N.Opakasi - RM)

DANIEL NJUGUNA MUTHONI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant was convicted with defilement contrary to **section 8(1)** read with **section 8(2)** of the **Sexual Offences Act, 2006**, and was sentenced to life imprisonment. In his amended appeal, the appellant lists four grounds upon which he relies in the appeal. They are:

- a. that the trial court erred in relying on the evidence of PW1 and failed to consider that he was subjected to a medical test to connect him to the crime;*
- b. that the medical report did not prove that he had committed the crime;*
- c. that the crime was fabricated due to a debt owed to him by PW3 and PW5;*
- d. that the complainant's stained underwear was produced as an afterthought by the prosecution.*

2. Briefly, the evidence was that on 14th September 2013, GN (PW1), a five-year-old child who was the complainant in this case, was taken by her mother (PW2) to her grandmother's house. On the same day, her grandmother (PW3) went with N to her shamba where they found the Appellant who apparently was an employee in the home of PW3, where he lived. After a while, PW3, left N with the appellant in the shamba.

3. When they were alone, the appellant removed the complainant's underwear and had sexual intercourse with her. The evidence of PW1 is fairly graphic:

“PW1: Njuguna (appellant) touched me

Prosecution: Njuguna touched touched where

PW1: Here (touching her genitals)-private parts

Prosecution: before touching your private parts what did Njuguna do

PW1: he lay me down

Prosecution: when he put you down what did he do

PW1: he removed his client

Prosecution: then what did he do

PW1: he removed his thing for urinating and touched my private parts with it (pointing her genitals)

Prosecution: did she just touch your private parts with his thing for urinating or he penetrated (pushed it in (aliingiza)

PW1:Aliingiza (put it in)

Prosecution: Aliingiza wapi (where did he put it)

PW1:Aliingiza hapa (he put it here) pointing and touching her genitals)

Prosecution: how did you feel (ulihisi nini)

PW1:Nilisikia vibaya – Nilisikia Uchungu (I felt pain)

Prosecution: before putting it in, did he remove your pant

PW1: Yes alitoa (he removed)”

4. The evidence is that after PW 1 went home she did not tell her mother of the incident. Later that evening, when her mother was bathing her, PW1 complained of pain in her private parts. On checking her, PW 2 found blood clots and asked her who had touched her. N replied that it was “*Njuguna wa shosho*” (Njuguna who works/lives with grandmother). According to PW2 N told her that Njuguna did *tabia mbaya* (bad manners) to her. It was after this discovery that N was taken to see a doctor.

5. I pause there to deal with the issues that arise in the appeal.

Evidence of five year old minor

6. The appellant seeks to impugn the learned trial magistrate’s reliance on the evidence of the minor GN (PW1).

7. When the trial court commenced hearing the evidence from the child, it noted that it was necessary that she be given adequate time considering her age and the fact that she needed to open up. Accordingly, the trial court held a *voir dire* examination of the minor. During that examination the court asked the child the large number of questions to assess the understanding of the child. The child was able to tell her age, the school she attended, class, even the position she achieved in class. Further on religious issues the child was able to explain where would people go, where bad people go, what happens to liars, and said she was really tell the truth

8. After the *voire dire* examination, the learned magistrate recorded as follows:

“Having examined the witness (PW1) I am satisfied the that she understands the meaning of telling the truth. The witness will give unsworn testimony since she does not seem to understand the meaning of taking an oath”

9. Evidence of such children under the age of 14 may be received even if it is not an oath, provided that the court is satisfied, after conducting a *voir dire* examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. The present case child was five years old, and is defined in **Section 2** of the **Children’s Act** as a child of tender years, that is, a child under the age of ten years. In **Oloo v R (2009) KLR**, it was held that the unsworn evidence of a child of tender years must be corroborated by other material evidence implicating the accused person before a conviction can be entered. In **Oloo** the court of Appeal stated:

“In our view, corroboration of evidence of a child of delay years is only necessary where such a child unsworn evidence. (See Johnson Muiruri v Republic (1983) KLR).....

....in law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”.

10. Clearly, there was need for corroboration of the child’s evidence as she was tender years. The question is whether there was such corroborative evidence.

11. The evidence of PW 2, N’s mother, corroborates the fact that she took N to her grandmother’s home. PW 3, H N, N’s grandmother, testified that N was brought to her home on the material day, and that she took N to the shamba where she left her with her employee Njuguna, the appellant. This corroborates evidence of opportunity to commit the crime, and places the appellant in the same space, alone, with the victim.

12. The evidence of N’s mother, that she took N to hospital, the evidence of PW4 Dr. Muchiri of Engineer hospital that N was examined and was found to have tenderness of labia and a broken hymen, bleeding, a whitish discharge, and a vaginal swab test disclosed spermatozoa. The P3 form produced as Exhibit 1 by PW4. All these are corroborative of the child’s evidence.

13. The evidence of PW6, the police officer who received N, her mother, her grandmother, her grandfather and a group of others at the police station, and recorded their statements corroborates the evidence of N where she stated:

“Prosecution: where did your mum take you after washing

PW1: she took me to the police then we went to hospital”

14. All in all, the evidence of N, PW 1, the minor, was corroborated on multiple occasions by various prosecution witnesses. Accordingly, that evidence ought to stand the test of veracity, and I find that the learned Magistrate properly relied on it.

Medical Test

15. The appellant claims that he was subjected to a medical test to determine whether he was connected to the crime, and that the trial Magistrate erred in finding that the tests implicated him.

16. The first thing to point out here, is that there is no evidence that the appellant underwent a medical test. I think, however, that his real concern is how the court connected him to the crime without his being taken through a medical test and under circumstances where he was not seen in the act by anyone.

17. The learned magistrate in his judgment stated as follows:

“... the complainant seemed sure what she was talking about and she did not mix up issues to suggest that she was truthful and hence was not falsely accusing the accused person....

And later:

“PW1, PW2 and PW4’s testimonies the popular new ones testimony that indeed EW one was defiled and it is not in doubt that she was defiled by the accused despite the fact that no one else will the accused to defiled PW1 it is not in doubt she was defiled by the accused. The accused was a shamba boy at PW5’s home PW5 is a grandfather to P W1. PW1 therefore new the accused person very well”

18. The simple answer as to how the court connected the appellant to the crime without doing a medical test, is that the evidence taken together, led to the inevitable conclusion that it was the accused who had defiled their victim. Simply put, PW1 was left alone with the appellant; in the evening she was found with blood clots and in pain in her vaginal area. When questioned, she told her mother it was Njuguna wa shosho who had touched her in that area. The medical tests disclosed the nature of the incident. This was supplemental and complementary evidence to N’s own very clear and graphic evidence. It is evidence that begs belief. I accept it.

Whether crime and the stained underwear was a fabrication

19. The appellant alleges that the crime was fabricated in that he alleges that he was owed Kenya shilling 6000/-by N’s grandfather. As a result of these salary arrears, he says, the case was fabricated against him so that he does not demand the arrears and make him look bad stop

20. In his unsworn statement, the accused stated that he was arrested on 10 September 2013; that he did not know why he was arrested; that he was arrested by his employers who beat him; that his employer had not paid his salary; and that it was when he asked for his salary that he was told that he would see what would happen to him.

21. The alleged arrest date is four days before the incident occurred. PW 6 Corporal Lekada of the Crime Branch at Kinangop Police station testified that he was in the report office on 14th September, 2013 when the appellant was brought there by a group of about fifteen people. The group included N, (PW1) her mother (PW2), her grandmother, and grandfather. He received a report of defilement, arrested the Appellant and completed a P3 form. He also received an underwear belonging to N. The mother, grandmother and grandfather all corroborated this evidence. The P3 form bears a date of 15th September, 2013. After investigations, PW 6 charged the appellant in court.

22. The unsworn statement of the appellant lends itself to no credibility, even in the absence of cross examination. There is nothing in it that suggests that the case was a fabrication. There is no story that appears weaved and incredible except the appellant’s story. Accordingly I am unable to find that the case is based on a fabrication.

23. Finally, the appellant alleged that the underwear produced at the hearing as Exhibit 3 by PW 5, the policeman, was a fabrication.

24. The evidence of PW5, was that the underwear in question was brought to him at the police station by the complainant’s parents when the complainant also reported at the police station. PW5 stated that the underwear had bloodstains.

25. I have carefully perused to the proceedings, and cannot find any evidence which shows that either the child, or her mother, availed the underwear to the police. Further, the child was not at any stage asked to identify the said underwear. Accordingly, I am unable to find that the underwear belonged to the victim. However, I also note that in his judgment, the learned Magistrate did not rely on the evidence of the underwear to come to any conclusion in his judgment.

26. Accordingly, the evidence of the underwear is neither here nor there, as it was not used in arriving at the conclusion. The underwear could as well be disregarded and is of no consequence this matter.

27. Finally, the appellant impugned the failure by the magistrate to give more weight to his defence. As earlier pointed out, the appellant gave an unsworn statement whose content hardly relates to the facts of the offence for which he was charged.

Disposition

28. In conclusion, having considered the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, there is nothing that suggests that the learned magistrate was in error in convicting the appellant on the evidence available. Indeed, the evidence of the prosecution relative to the charges was very weighty.

29. In light of all the foregoing, I am satisfied that the learned Magistrate properly, reached the correct decision on good evidence. Accordingly, this appeal is hereby dismissed.

30. Orders accordingly.

Dated and Delivered at Naivasha this 18th Day of October, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Daniel Njuguna Muthoni the Appellant
2. Mr. Koima for the State
3. Court Clerk – Quinter Ogutu