REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO 48 OF 2015

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 474 of 2013

in the Senior Resident Magistrat*es Court, Engineer, G.Opakasi, - RM)*

JOSEPH MWANGI KIBE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The Appellant was charged with defilement of a four year old girl contrary to **section 8(2**) of the **Sexual Offences Act, No 3 of 2006**. The alternative charge was that he engaged in an indecent act with a child contrary to **section 11(A)** of the said Act. The particulars of the offence were that on the 21st day of August, 2013 within Nyandarua County, he intentionally and unlawfully caused his genital organ namely penis, to penetrate the vagina of DW, a girl aged four years. On being found guilty on the main count, he was sentenced to life imprisonment.

2. He appealed against the judgment of the trial court, through grounds of appeal and supplementary grounds and was represented by counsel in the appeal. The appellant seeks that the conviction should be quashed and sentence set aside.

3. This being a first appeal, this court has the duty to engage in a complete and comprehensive appreciation of the evidence and all substantial aspects of the case; to analyse the recorded evidence and carefully and cautiously to ensure that justice is administered appropriately and fairly in accordance with legal standards. After weighing all the material, the court has a duty to consider the same objectively and dispassionately to arrive at its own conclusions, taking cognisance of the fact that it did not itself see the demeanour of witnesses. See **Pandya v Republic [1957] EA 336**.

4. The brief facts of the case are as follows. PW1, the complainant, gave unsworn testimony after being examined by way of *voire dire* examination, in which the trial magistrate found that she was intelligent and understood what it means to be truthful. However, she was found to be too young to understand what it means to take an oath.

5. PW1 testified that on 21st August 2013, she was sent by her mother to Joseph, the appellant, to take a sickle to him. She gave it to him and then

> **"Joseph took his Kanyunyui (to mean penis in kikuyu) word referred by children) (interpreted by Njeru court clerk) and inserted it here (pointing at her genital part). This happened in the maize plantation. ….When Joseph finished he told me to go home. At home I found my mum and I told her what happened".**

The prosecution then produced a green dress stained with mud and it was marked as MFI 1.

6. In answer to the prosecutions questions, PW1 said she was afraid of Joseph, because he is the one who told her to go home. Asked whether Joseph was in court, she said he was the one standing there and pointed to the appellant who was in the dock.

7. In cross examination, PW1 said that her mum sent her with a match box, then again she was sent for a sickle. It was then that the appellant

took her into the maize plantation. This was the totality of the complainant's evidence.

8. The complainant's mother, L W K gave evidence as PW2. She said that on 21/8/13 at around 4.00pm, she came home and sent PW1 to her brother in law for a match box, which she went and brought. She said the appellant was working at her brother in law's house as a herds-boy. Whilst there, the appellant sent PW1for a sickle. When PW1 took long in returning, PW2 went out behind her house and called out for PW, who answered emerging from a maize plantation. PW2 then heard appellant tell the child ***"Don't tell mum"*** in Kikuyu. When the child reached, PW2 asked her what she was doing, and PW1 told her the appellant had put his penis inside her vagina. On checking the child's vagina, she found sperms but no bleeding. PW2 then looked for a phone and called the child's father.

9. On the arrival of P K N, the child's father, they went out to look for the appellant who they did not find until 11.00pm, when they, with neighbours, arrested the appellant. In the meantime they took PW1 to Ol Kalau District Hospital where she was treated and given medicine. Present in this group was PW3, P K N, a neighbour who had heard PW2 screaming, then received a call from PW1's father, to come and help them search for the appellant.

10. PW2 also testified that she was issued with a P3 form at Rironi Police station where they reported the incident, and it was filled in by a doctor at Ol Kalau hospital.

11. PW4, Peter Nginyo was the clinical officer attached to Nyandarua County Hospital who examined PW1 on 22nd August at around 6.00pm. He examined PW1 and filled in the P3 Medical report, finding that her hymen was freshly perforated, but no spermatozoa were seen. His report (Exbh 1) was similar to the Outpatient report from Ol Kalau Hospital (Exbh 2) of 21st August, 2013 when PW1 was first taken to hospital. PW4 explained the difficulty in taking a high vaginal swab from PW1 due to pain, hence the failure to find spermatozoa.

12. PW5, Corporal Boniface Kipkoech was the investigating officer from Kipipiri Police station. He stated that on 22nd August he was at the police station when officers from Rironi AP post brought the appellant to the station. He questioned the child, and her parents. They brought the child's birth certificate indicating the child was born on 19th April, 2009 and it was produced as Exhibit 3. He also produced a jean dress earlier marked as MFI1 as Exbh 5. He charged the appellant with the offence.

13. The issues framed by the appellant's counsel are summarised as follows:

> 1. Whether the complainant was defiled according to the dictates of the law, and if yes who did it;
>
> 2. Whether the prosecution was able to prove its case beyond reasonable doubt;
>
> 3. Whether the prosecution evidence was free from any doubt and if any existed in whose favour the same should be resolved;
>
> 4. Whether the learned trial magistrate erred in both law and fact by convicting the appellant on the basis of assumptions, presumptuous matters, unsettled facts and rejecting the appellants defence;
>
> 5. Whether the learned trial magistrate erred in both law and fact by misapprehending the application of **section 124** of the **Evidence Act.**

14. Issues 2, 3 and 4 appear to me to coalesce, and I have combined them in the analysis. Ms Mureithi appeared for the appellant and Mr Koima appeared for the DPP. The DPP opposed the appeal.

Whether complainant was defiled

15. The Appellant argues that it was not enough for PW1 to state that the appellant took his penis and inserted it into her vagina; that this was shallow evidence. He suggests that there should have been evidence as to whether the appellant: dragged PW1; removed her or his clothes; whether he forced her to lie down; whether there was mere genital contact or use of force; whether she bled or screamed or cried in distress and whether there were any threats to PW1; and whether she had difficulty in walking. Counsel asserted that the evidence of penetration was very core to the commission of the offence, and that this appeared to be lacking.

16. Counsel referred to the definition of ***"penetration"*** in **section 2** of the **Sexual Offences Act** as meaning:

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

Counsel cited the case of **John Mutua Munywoki v R [2017] eKLR** in which it was restated that suspicion and speculation can never be the basis of a conviction, and held that the main elements of the offence of defilement are that:

> **"1. The victim must be a minor, and**
>
> **2. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.**
>
> **Therefore in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt"**

17. In the present case, PW4 produced Exb 2, the Ol Kalau Hospital outpatient record where PW1 was treated on the same date as the incident (21st August, 2013) which shows that:

> **"she was not bathed by the time of examination…**
>
> **Child not calm… No bleeding… <u>lacerations seen</u>…..Vaginal exam- <u>hymen broken fresh</u>…."** (emphasis supplied)

And the P3 Exb 1, also produced by PW4 and filled on 22nd August, 2013 by him shows that:

> **"hymen perforated (fresh)"**

PW4 stated that when he examined PW1 on 22nd August, he did not see any injuries to the external genitalia, but both reports produced in court show that there was breaking or fresh perforation of the hymen.

18. Counsel submitted that perforation of the hymen is not conclusive evidence of defilement and can be caused by other factors, and not necessarily penetration. He relied on **Karisa Kilongo v Republic** where it was stated as follows:

> **"Perforation could occur due to engagement in other physical activities such as games considering the age of the girl if there was penetration, the hymen would be more perforated i.e it would be torn."**

In **Karisa's case,** however, the court did find that there was evidence that the appellant therein had testified that he had engaged in sexual intercourse with the complainant four times and thus her hymen would be expected to be torn. Consequently, such evidence as to the hymen does not corroborate the complainant's evidence.

19. In the present case, it was not suggested that the child's hymen had been perforated due to other reasons, and they do not come into play because of the surrounding circumstances and the freshness of the perforation.

20. The Clinical Officer further stated that an attempt to do a high vaginal swab to check for sperm was not possible because:

> **"This is a very young girl with a freshly perforated hymen and therefore taking a swab was difficult because of the pain. It was therefore not possible to get the high vaginal swab we would have wished to get. Failure to get spermatozoa will be attributed to difficulty in getting the specimen"**

21. Despite the absence of a swab to prove existence of sperm, and the absence of infections, the clinical officer concluded as follows:

> **"In my conclusion the freshly perforated hymen is a clear evidence that <u>there was penetration</u>"** (emphasis supplied).

22. In addition PW1 herself said the appellant inserted his penis in her private parts, when she testified as follows:

> **"Joseph took his Kanyunyui (to mean penis in kikuyu) word referred by children) (interpreted by Njeru court clerk) and <u>inserted it here</u> (pointing at her genital part)"** (emphasis supplied)

23. There was no suggestion that the child was coached, or that there was a gap in time between the alleged commission of the offence and the time when the child reported it to her mother, and the time the mother confronted the appellant about the incident. There is also no suggestion of ill-motive or revenge on the part of the child or the mother. In other words there is no reasonable suggestion put forward to doubt the veracity of the evidence by the child. Thus only corroboration remains, and that is dealt with hereafter when dealing with section 124 of the Evidence Act.

24. So the totality of evidence, although not voluminous is clear and direct: this four year old victim says the appellant inserted his penis in her private parts; in hospital, the doctor sees lacerations, loosely translated as cut(s) or tear(s) in skin or flesh, and also notes that the victim's hymen is freshly broken or perforated. The child's testimony of insertion or violation is thereby given credence by the medical evidence.

25. On the issue of age, Exb 3, the Birth Notification Certificate was produced by PW5 after being availed by the mother. It shows that PW1 wa born on 19April, 2009, and was therefore just under 4 years and five months old.

26. The evidence discussed above leads to the undoubted conclusion that there was rough contact with the vaginal area and breaking therein to perforate the hymen of PW1. It also shows that PW1 was a minor. This satisfies the legal requirements of defilement as defined, and amounts to proof of defilement in terms of the definition in section 2 of the Act and also in terms of the **John Mutua Case** (supra).

Whether there was proof beyond reasonable doubt, and whether the trial magistrate relied on presumptions and assumptions

27. This issue is covered, overall, by the findings made under the preceding head. Despite the appellant's voluminous and forceful arguments on this point, there is no need to rehash the parties' arguments in light of my finding under that head.

29. There is however need to state as follows: the appellant suggests that there was missing evidence, witnesses who were not called. These

include PW1's father who escorted her to Ol Kalau hospital, the

29. The only question left for determination here is whether indeed it was the appellant who defiled PW1, or whether she may have been violated elsewhere. The appellant's unsworn statement may assist here. He said:

> **"At around 2.00pm I went to eat lunch and I went back to the shamba to cut grass.**
>
> **At around 4.00pm the complainant's mother sent the complainant to me for a match box so that she could light a fire and cook. I then told the complainant to bring me a sickle from her mother. She went with the match box and she came with the sickle as I had requested. She then went back home. When the child went back home, I saw her mother (Complainant's mother) come to where I was hauling abuses saying I had defiled her daughter…She then told me to wait where I was so she could call some people to come so that we could sought (sic) the issue. I did not stay there, I went home because I saw that she was very angry and she wanted members of the public to hurt me"**

30. This evidence corroborates both the child's evidence as to the events surrounding the defilement incident, and the evidence of PW2, the mother. The time was around 4.00pm. PW2 had just come back home. She sent PW1 to get a matchbox. PW1 brought it, and PW2 says PW1 was sent for a sickle by Appellant, and she took it. On returning home after the ordeal, PW1 told her mother what had happened, and PW2 immediately went to confront the appellant. The evidence of PW2 was that after she confronted the appellant she went to call her husband and, with PW3 they spent some time looking for the appellant, who had disappeared. Not finding the appellant, they went to the Ol Kalau hospital for PW1 to be treated. The Ol Kalau treatment record Exb 2 states that:

> **"The patient was attended on 21/8/13 at 6,30 pm."**

31. All the facts presented by the appellant, PW1 and PW2 surrounding the incident fit together like a jigsaw puzzle: the sending for a matchbox; the sending for a sickle; the return of PW1 home and immediately reporting the incident to her mother who instantly confronted the appellant; the disappearance of the appellant; the travel and attendance of PW1 at Ol Kalau hospital the same evening; all these facts corroborate one another and prove the consistency and cogency of the entire story. There is no dispute that PW1 and appellant had been together, or that opportunity for the incident to occur did not present itself.

32. The appellant submitted that the evidence of the prosecution alone should have been sufficient to prove the offence, because the burden never shifts to the accused. Counsel questioned whether on the evidence of the prosecution alone and if the accused had opted to remain silent, the trial court would have convicted the appellant. Counsel cited **Sekitole v Uganda [1967]EA 531** where it was stated:

> **"It is trite law that an accused person should only be convicted on the prosecution case and not on the weakness of his defence"**

As shown above, I have reviewed the evidence of the prosecution and it satisfactorily shows the string of events leading to the opportunity, time and space for the offence. The accused's evidence merely sews up the garment of defilement by providing corroboration of the prosecution evidence.

33. The appellant also submitted that the clothes of the complainant which were produced at trial were not the same as those that had been marked. I agree, but find that inconsistency to be immaterial to the critical factors that need to be proved in the offence of defilement

34. In light of all the above, I am not persuaded that the learned trial magistrate relied on uncorroborated assumptions, as suggested by the appellant.

Whether the learned trial magistrate erred in both law and fact by misapprehending the application of section 124 of the Evidence Act.

35. The final issue concerns the application by the trial magistrate of **section 124** of the **Evidence Act**. The section concerns corroboration of evidence in criminal cases, and provides:

> **"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where 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"** (emphasis supplied).

36. To understand the object of the proviso, the explanation given by the Court of Appeal in **Dennis Osoro Obiri v Republic [2014] eKLR** suffices where it stated:

> **"That proviso was introduced by the Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003). It was further amended into its present wording by the Sexual Offences Act, No 3 of 2006. The effect of the proviso, as we have already noted, is to enable the court to convict, in cases of sexual offences, on the evidence of the victim alone, if for reasons to be recorded, it believes**

that the victim is telling the truth. It is also important to bear in mind that prior to the above amendments, this Court in MUKUNGU VS REPUBLIC (2002) EA 482, had expressed the opinion that the requirement for corroboration in sexual offences affecting adult women and girls was unconstitutional to the extent that the requirement was against them qua women or girls"

37. In the **Obiri case,** which the trial Magistrate relied upon, the Court of Appeal held that:

The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In JACOB ODHIAMBO OMUMBO v REPUBLIC, Cr. App. No 80 of 2008 (Kisumu), this Court made the same point as follows:

"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, as amended by Act No. 5 of 2003."

Earlier in MOHAMED VS REPUBLIC (2006) 2 KLR 138, this Court asserted:

> **"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

In the present appeal, the trial magistrate conducted a voire dire examination and directed that PW1 should give unsworn evidence."

38. The appellant submitted that the said section was misapplied by the trial court in that the learned magistrate did not warn herself of the dangers of convicting the appellant by relying on uncorroborated evidence; did not state the reasons why she believed the evidence of the complainant, and only mentioned in passing that he complainant had no reasons to accuse the appellant. Appellant relied on the **John Mutua case** (supra) where the Court of Appeal stated:

"The trial court felt that the complainant was a truthful witness worth of believing. But given what we have stated regarding her credibility we doubt whether this assessment is correct. In reaching this conclusion which was also adopted by the High Court, the trial court was trying to rely on the proviso to section 124 of the Evidence Act. However we think that the trial court went about it the wrong way. What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?

It appears to us that the appellant was convicted on mere suspicion..…"

39. It may be noted, however, that in **John Mutua's case**, the Court of Appeal assessed the evidence on record and concluded that the credibility of the witness was in doubt and thus the assessment of the lower court on the truthfulness of the witness was rendered doubtful. The Court stated that **section 124 Evidence Act** is properly applied if two conditions are met: First, that the trial court is satisfied that the victim is telling the truth, and second, that it records the reasons for such belief.

40. In **J.W.A v Republic [2014] eKLR** the Court of Appeal was satisfied with the following application of section 124 by the trial magistrate:

"13….the trial court stated as follows:

> **"The complainant impressed me as a truthful witness. I discredit the defence as a mere denial lacking in credibility. His defence that his mother-in-law implicated him with the offence for failing to give him Ksh. 40,000/= to buy a piece of land has no basis. He never established an existing grudge between them. The complainant positively identified him as the man who defiled her. He was not a stranger to her…**
>
> **……..**
>
> **15. The appellant contends that the evidence of the complainant was not corroborated. We note that the appellant was charged with a sexual offence and the proviso to Section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a voir dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error of law on the part of the High Court in concurring with the findings of the trial magistrate."**

41. Unlike in **John Mutua's case**, in the present case there is nothing suggested to cast doubt on the credibility of the child, PW1. Did the trial magistrate comply with the two conditions required in **section 124 Evidence Act**? He had found at the commencement of the testimony of the child that she was intelligent and understood the duty of telling the truth. Then just before applying section 124, the trial magistrate stated as follows:

Therefore, despite the fact that no one saw the accused defile the complainant, (PW1) I find that PW1 was truthful and she had no reason to falsely accuse the accused. The accused is a person well known to PW1. Further, PW2 testified that when

PW1 told her that the accused had defiled her, she checked PW1 and she saw sperms in PW1's vagina.

PW4 the Clinical Officer who examined PW1 testified that the alleged incident happened at 4.00pm and the child was examined at 6.30pm. From his examination he testified that PW1's hymen was freshly perforated."

42. In my view the trial magistrate found the child to be truthful, and so satisfied the first requirement of section 124. He also gave several reasons for his finding, but some may not be valid. It was a valid reason that he found the child had no reason to falsely accuse the accused.

43. It was a valid reason to deduce that the child knew the accused despite her not testifying so, for several reasons: Firstly, in her testimony she called him by his first name, Joseph, thrice suggesting familiarity. What would have been surprising would be if she referred to a total stranger by his first name; Secondly, she testified that she was sent "by my mother to take a sickle to Joseph". If she didn't know him at all she would not have been able to deliver the sickle. Third, the evidence of PW2 was that the appellant was a herds-boy working in the nearby house of PW2's brother in law. That was why the the mother was able to readily send the child. Third, the finding by the Clinical Officer that the child had a freshly torn hymen lent to the truthfulness of the child's evidence that the appellant had inserted his "kanyunyui" into her private parts.

44. Some of the other reasons given by the trial Magistrate may not have tended to show truthfulness on the part of the child. However, from the above analysis, I am persuaded that the trial magistrate fully complied with section 24, also taking into account the age of the child was only four years.

45. I would say, as was said by Meoli J in **John Njoroge Mwangi v Republic HCCRA 158 of 2015, Naivasha:**

"…the testimony of the minor is valid on its own and was properly accepted by the court. Further it was corroborated by other equally solid evidence. The appellant was convicted by sound evidence"

46. In light of all the foregoing, I am satisfied that the learned Magistrate properly, reached the correct decision and properly convicted the appellant. Accordingly, the appeal is hereby dismissed.

47. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of November, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Muriithi for the Appellant

2. Koima For the State

3. Court Clerk Quinter