REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 49 OF 2014

(Being an appeal arising from the judgment of Kitale Resident Magistrate C.N. Mugo delivered on 2/5/2014 in Criminal Case No. 1679 of 2012)

ATHANAS KIBOR TOROITICH.....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No 3 of 2006.** The particulars of the offence were that on the **7th day of July 2012 at [particulars withheld] Elgeyo Marakwet County intentionally caused his penis to penetrate the vagina of M J K a child aged 15 years.**

The alternative count was **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence was that on the **7th July 2012 at [particulars withheld] within Elgeyo Marakwet County intentionally caused his penis to come into contact with the vagina of M J K a child aged 15 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. Before going into the analysis of the same and the grounds as raised by the appellant in his petition it is worthwhile to summarise the facts as presented by the parties during trial.

PW1 told the court that she was a pupil at **[particulars withheld]**school and was in standard 8. That on the 7th July 2012 at around 8.30 pm she was unhanging clothes from the line when the appellant grabbed her and took her to his place at **[particulars withheld]** so that he could give her a book. He then proceeded to defile her before screaming and neighbours came to her rescue. Her parents equally came as well as the area chief. They were booked in the cells at the Chief's Camp. Later they were taken to Kapcherop police station. On 9th July 2012 she was released and the appellant detained. She was equally taken to **[particulars withheld]** health centre where medical examination was undertaken and P3 form filled.

PW2 S K the complainant's father testified that on 7/7/12 when he arrived home he was informed by his wife PW3 that PW1 was missing. They then mounted a search and found her in the appellants house at **[particulars withheld]**. He said that he used to see the appellant selling paraffin at **[particulars withheld]**. The two were taken to Kapcherop police station.

PW3 J R is the complainant's mother. She said that on 7/7/12 at 8 pm her daughter disappeared with her clothes. They conducted a search and found her at the appellant's house at **[particulars withheld]**. They were taken to **[particulars withheld]**dispensary and the following day to **[particulars withheld]**.

PW5 PC W M testified that the complainant and the appellant were escorted to the station by one Corporal Mengich. They were then issued with P3 form and the minor taken to the hospital and later released to her parents. The appellant was subsequently charged. The said witness later produced the minor's birth certificate.

PW6 Kirwa Labatt produced the P3 form on behalf of his colleague one Komen who had filled the same. It was signed on 11/7/12 and it showed that the victim had injuries consistent with Sexual defilement. He also found that there was spermatozoa present.

When put on his defence the appellant gave unsworn evidence. He said that on 7/7/12 he was from **[particulars withheld]** and went to buy food at **[particulars withheld]** at 5 pm. When he arrived home he saw PW1 as well as his father and other villagers. They then asked him whether he knew the complainant and before he could answer he was assaulted and it took the intervention of the chief to stop the beatings. He was assaulted and taken to a private clinic for treatment. Later he was taken to Kapcherop police station and subsequently charged.

<u>Analysis and Determination</u>

I have perused the written submissions herein by both the appellant and the state. This being an appeal the court is enjoined to reevaluate the evidence afresh and come up with an independent finding. The appellant has raised several grounds of appeal and the notable ones are the fact that the trial court convicted him based on inconsistent evidence by the prosecution.

The offence of defilement is proved by three factors namely, the age of the minor, that there was penetration and the positive identification of the perpetrator. In this case the minor as from the birth certificate was born on 20/6/1997 thus at the time of the incident she was a minor. Although she said she was 13 years the birth certificate was not contested.

The Primary attack by the appellant was on the evidence as presented by the prosecution witnesses. It must be noted that PW2 and PW3 were the minors parents. There were other independent witness including Kipchumba, James Rotich and the chief who were not called. The key witness therefore were immediate family members. It is worth thus comparing their evidence viz a viz that of the minor .

She stated that the appellant took her to his house with a promise of giving her some book. However in the house he proceeded to defile her and then locked her in the room and left. On the other hand she said that it was her screaming that attracted the attention of the neighbours in particular K and his wife who came and found the door locked.

PW2 on the other hand stated as follows

> **"We searched several houses and we heard M and Athanas talking inside the house. We called the chief and other members of the public. They opened the door and we got in."**

This materially contradicts the evidence of PW1. According to her she was locked in by the appellant and then he left. According to PW2 and PW3 they arrested both of them in the house. Further according to PW1 it was her screams that attracted the neighbours K and his wife who came to her rescue but found the door locked.

It would have been important to get the other independent witness to verity this. This inconsistency is further compounded by the fact that the minor was not subjected to a voire dire examination before she was allowed to testify. My finding is based on the fact that she was not even sure of her age as she said she was 13 years but the birth certificate showed otherwise.

At the same time what was so difficult in her saying that she was found with the appellant inside the house? This issue is critical as the other prime witnesses were her father and mother.

As stated above the complainant was a minor and as to whether she appreciated the fact that she ought to speak the truth ought to have been tested vide voire dire process.

The court in ***Julius Kiunga Mrithia Vs Republic (2011) eKLR*** on this issue stated as follows;-

> ***"..... the procedure for conducting voire dire examination was properly enunciated in Francisco Matore Vs Regina (1961) E.A. 260 and emphasised in subsequent decision of the Court of Appeal. The Trial magistrate should question the child to ascertain whether the child understands the nature of the oath and (2) if the court does not allow the child to be sworn, it should record whether or not in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth. Applying that procedure, the record of the trial shows that the magistrate clearly recorded the voire dire examination of the child."***

What is intriging in this matter is the fact that both the minor and the appellant were locked in the cells till 9th July 2012. If indeed there was a rescue as stated by the parents why lock her at the Chief's Camp overnight? This brings me to the question that there were crucial witnesses who were not called.

In ***Bukenya Vs Uganda (1972) E.A. 549***, the Court of Appeal held that a failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution whose doubt ought too be given in favour of the appellant.

On the question of whether there was penetration I do not find the evidence of PW6 totally conclusive for the reason that the examination was done after 72 hours which was way beyond the required period as per his own admission.

The sum total of my finding is that this appeal ought to succeed because of the inconsistency of the witnesses evidence especially those of the victims parents.

In ***Philip Nzaka Watu Vs Republic (2016) eKLR*** the court of appeal stated as follows;

> ***" The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cant be gainsad that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trusthworthy. Evidence that is obviously self contradicting in material particular or which is a mere amalgamation of inconsistent version of the same event, differing fundamentally from one purported eye witness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."***

Further in ***Dickson Elia Nsamba Shapwata & Another Vs the Republic CR APP. No 92 of 2007*** the Court of Appeal of Tanzania addressed this issue of inconsistencies and stated as follows;

> ***" In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentence and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradiction are minor or whether they go to the root of the matter."***

I concluded that the inconsistencies go to the root of the ,matter. There was even an allegation of the appellant being assaulted a fact confessed by the investigating officer. Perhaps had an independent witness been called to testify he/she would have corroborated what the complaint parents stated.

Consequently and in view of the above findings it was improper for the trial court not to have tested the ability of the minor to testify as expected under Section 19 of the Oath and Statutory Act Chapter 15 Laws of Kenya.

The nature of the charge is weighty and it was imperative that the same ought to have been proved beyond a shadow of doubt.

The appeal is allowed. The trial court judgment is set aside. The appellant freed unless lawfully held.

Delivered this 25th day of January 2017.

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H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant