



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 186 OF 2013

ROBERT KIPRONO NGENO APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Ruling of the Chief Magistrate's Court at Molo Hon. H. M Nyaga –Ag. Senior Principal Magistrate delivered on the 2nd September, 2013 in CMCR Case No. 357 of 2012)

JUDGMENT

The appellant **ROBERT KIPRONO NGENO** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts. The appellant had been arraigned before the trial court on 7/2/2012 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

“On the 13th day of February 2012 [particulars withheld] in Kuresoi District of the Rift Valley Province intentionally caused his penis to penetrate the vagina of LCM a child ages 8 years”.

The appellant also face an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges. His trial commenced on 6/6/2012. The prosecution led by **CHIEF INSPECTOR MUTETI** called four (4) witnesses in support of the charge.

The complainant **LC** a child aged 8 years was taken through a ‘**Voire dire**’ examination after which she gave Unsworn Evidence. The child told the court that on the material day she was coming home from school at lunch time with her friend whose name was given as ‘**J**’. They met appellant who gave them each a ‘**ngumu**’ (doughnut). He then enticed the children to follow him into the bush. There the appellant proceeded to remove the complainant’s underpants and proceeded to defile her. After the act the two children went home.

PW3 RC was the mother of the complainant. She told the court that on the material day when she returned home she noticed that her child was not walking properly. Later the child began to scream in pain. **PW3** questioned her and the child revealed that she had been defiled. **PW3** checked her private parts and saw a substance that looked like semen. She informed her husband. The following day they took the child to a clinic in Kaptagich and later to Olenguruone Hospital where she was examined and treated.

The matter was reported to police who commenced investigations. The appellant was eventually arrested and charged.

At the close of the prosecution case the appellant was found to have case to answer. He gave an unsworn defence in which he denied having defiled the complainant. The appellant also called three (3) witnesses in his defence.

On 12/8/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this appeal. The appeal was opposed by **MR. MOTENDE** learned State Counsel who urged the court to uphold both the conviction and sentence of the lower court. The appellant relied entirely upon his written submissions which had been duly filed in court.

This being a first appeal this court is obliged to re-examine and re-evaluate the evidence adduced during the trial and to draw its own conclusions on the same. (**see AJODE Vs REPUBLIC [2004] KLR 82**). I have perused the written submissions filed by the appellant. In them he raises the following grounds for his appeal. These are

- Defective charge sheet
- Insufficiency of Evidence
- Lack of proof of age of the complainant
- Failure to call a crucial witness
- Failure to consider his defence

The appellant submitted that the charge as framed was fatally defective in that the provision cited in the charge was Section 8(1) (2) of the Sexual Offences Act. I have carefully perused the charge sheet. I note that the charge sheet cites Section 8(1) (2) of the Sexual Offences Act. It is correct that this was a mis-citation of the charge. The charge ought to have read

“Section 8(1) as read with Section 8(2) of the Sexual Offences Act”

The appellant also submitted that the particulars of the charge the word **“unlawfully”** was omitted. Thus the particulars as framed read

***“Intentionally caused his penis to*”**

Again it is true that the word **‘unlawfully’** was omitted. The question here is whether these omissions caused any prejudice to the appellant and prevented him from adequately preparing for his defence. I think not. The appellant was fully aware of the charges which he faced and he mounted a vigorous defence to the same. The omission of the word **‘unlawfully’** did not render the charge fatally defective. Any act of intercourse with a minor is in any event unlawful. These omissions in my view amount to mere technicalities. Article 159(2)(d) of the Constitution exhorts courts to administer justice.

“Without undue regard to procedural technicalities”

I find that the omissions in the charge sheet were curable and did not in any way prejudice the appellant. These omissions did not render the charges fatally defective. I therefore dismiss this ground of the appeal.

The appellant also submitted that the evidence adduced was not sufficient to prove the charge of defilement. I will now proceed to analyze the evidence presented in support of the charge.

The complainant told the court that the appellant accosted her together with her friend J as they were

returning from school. He gave them doughnuts which the child referred to as ‘*ngumu*’ to entice them to follow him. The appellant led the two children into the bush. In her own words the complainant states at page 4 line 14

“We met the accused. He gave us a ‘Ngumu’ (doughnut) each. He told us to follow him into the bush. He removed my pants. He then did ‘tabia mbaya’ to me. J stood there as he did it. He did it here (point to her crotch). He put his thing here. J was there. I felt pain. After the accused did tabia mbaya, he told us to go away ………”

The complainant has given a graphic account of what happened to her. The court takes judicial notice of the fact that young children who lack adequate vocabulary to describe the act of sexual intercourse invariably refer to the act as ‘**tabia mbaya**’. The child demonstrated by pointing to her crotch area.

PW3, and PW2 S A M the mother of the child confirms that on that day when their child returned home she was not walking properly – she had a strange gait. **PW3** stated that the child complained of feeling pain so as the mother she examined her private parts. **PW3** stated at Page 6 line 11

“I examined L’s private parts. I saw some substance that looked like semen on her”

PW3 was an adult woman. I have no doubt that she was sure of what she had seen.

The following day the parents took the complainant to hospital **PW4 JOHN RONO** a clinical officer from Olengruone sub-district hospital confirmed that he examined the child. He noted that her hymen was perforated and that she had a pus discharge coming out of her vagina. Laboratory tests were conducted which confirmed that the girl had a gonorrhoea infection. **PW4** filled and signed the P3 form which he produced as an exhibit **P exb 1**.

The fact of the perforated hymen, the gonorrhoea infection in a child so young are all proof that penetration had occurred. The evidence of mother **PW3** coupled with the medical findings from the doctor **PW4** all corroborate the evidence of the minor. I have no doubt that the complainant was indeed defiled as she had stated.

Another critical ingredient of a defilement charge is the age of the victim. In the case of **KAINGU ELIAS Vs REPUBLIC [2010]eKLR**, the Court of Appeal sitting in Malindi held that

“Age of the victim of the sexual assault under the Sexual Offenders Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim”

In her evidence the complainant gave her age as 8 years. **PW2** who was the child’s father also gave her age as 8 years. **PW3** the child’s mother also said that her daughter was 8 years old. However no document eg. Birth certificate was produced to prove the age of the child. Is this failure to produce documentation proof of age fatal to the prosecution case? In **ZABLON ONYANGO MATOKE Vs REPUBLIC [2014]eKLR** my learned sister **Hon Justice Sitati** quoted the Ugandan case of **FRANCIS OMUROMI Vs UGANDA COURT OF APPEAL [2000]** where it was held

“In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victims parents or guardian and by observation and common sense” (own emphasis)

Likewise in **RICHARD WAHOME CHEGE Vs REPUBLIC [2014]KLR**, the Court of Appeal held

“What better evidence can one get (of age) than that of the mother who gave birth?”

Therefore notwithstanding the lack of medical or documentary evidence, the parent's statement is sufficient to prove the age of the child to be 8 years.

The next crucial issue requiring determination is that of identification. Was the evidence adduced sufficient to prove that it was the appellant who defiled the minor?

In her testimony the complainant identified the accused as the one who defile her. She stated categorically in her evidence at page 4 line 11.

"I know accused. He is called Robert. He is a neighbor. He is not a good person. He did bad things to me"

The complainant has identified the appellant by his name '**Robert**'. The appellant was a neighbor a man whom she knew very well. The incident occurred in the daytime when the children were returning home from school. Visibility was good. The appellant led the child into the bushes. He was at all times in close proximity to her. The child had ample time and opportunity to see and identify him.

PW2 and **PW3** both confirm that their daughter informed them that it was '**Robert**' who had defiled her. The child remained consistent in the identification of her defiler. At no time did she waver. Both **PW2** and **PW3** confirm that the appellant was their neighbor. **PW2** stated

"Robert is a neighbor. I know him well".

Likewise PW3 stated

"Robert is a neighbor in the IDP Camp...."

In his defence the appellant did not deny the fact that he was a neighbour to the family.

From the evidence it is clear that the appellant was not a stranger to the child. He was a neighbor, a man whom she knew very well. No doubt that is why she felt comfortable enough to receive a doughnut from him and to follow him into the bushes. In ANJONONI & OTHERS Vs REPUBLIC [1980] KLR 59, the Court of Appeal held that

"..... recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

This is a case where identification was premised on recognition. In am mindful that there is only one identifying witness being the child herself. However the circumstances of the case – it was day time. The child spent ample time in close proximity to the appellant whom she knew very well, I am satisfied that this identification passes muster.

The appellant raised as a ground of appeal the fact that the prosecution failed to call as a witness the other child '**J**' whom the complainant said was with her and witnessed the defilement. Without a doubt this was a crucial witness. According to the complainant she was an eyewitness. The question is whether failure to call this second child is fatal to the prosecution case.

The prosecution in any case is required to call such witnesses as are necessary to prove their case. In this case, I find that all such essential witnesses have been called. I find that all the ingredients of the charge of defilement have been sufficiently proved by the testimony of the four (4) witnesses whom the prosecution did avail to the court. The evidence of this second child '**J**' would have merely been the '**icing on the case**'. Her failure to testify was not fatal to the prosecution case. I therefore find that notwithstanding the failure of this child '**J**' to testify in the prosecution case was proved sufficiently.

The final ground of appeal raised was the failure of the trial magistrate to consider the appellant's

defence. The appellant made a sworn defence and in addition he called three (3) witnesses. I have perused the defence of the appellant. It amounted to a bare denial. In his defence the appellant claimed that he was not at the scene. He had gone to a place called 'Koiwa' with his donkey. None of the defence witnesses confirms having met the appellant at this place called 'Koiwa'. None saw him with a donkey. **DW2 DAVID CHEPKWONY** states that he was not with the appellant on the material day. **DW4 WESLEY KITTONY** says he met the appellant at 6.00pm yet the incident allegedly occurred at lunch time. **DW3 ROSA KOECH** who is the mother of the appellant initially stated that on the material day the appellant was at home during lunch time. However under cross examination **DW3** contradicts herself and says

“The accused arrived home at 4.00pm. I was not with him at lunch time.... I don't know the date of the incident”

Lastly **DW5 CHRISTOPHER BETT** says that he met the appellant at 7.30pm but he does not recall which date it was. It is clear therefore that the four (4) defence witnesses did not have any relevant or material information to offer regarding the charge. They merely stated that at various times during the material day they were in the company of the appellant. Tellingly none of the defence witnesses is able to say where the appellant was or what he was doing at lunch time when this incident is said to have occurred.

The defence did not in any way cast doubt on or negate the prosecution evidence. The learned trial magistrate did properly analyze the defence and the evidence of all the defence witnesses. He concluded at page 20 line 24 that

“The court wonders who it will believe among all the defence witnesses. Their testimonies are not consistent and don't raise any reasonable doubt regarding the prosecution evidence.....”

The trial court rightfully dismissed his defence.

Finally I am satisfied that the evidence in this case was overwhelming. The charge of defilement was proved beyond reasonable doubt. The conviction of the appellant was sound and I do uphold that conviction. The sentence of life imprisonment is the mandatory minimum sentence provided for by Section 8(2) of the Sexual Offences Act. I do confirm that sentence. This appeal therefore fails and the same is dismissed in its entirety.

Dated and Delivered in Nakuru this 28th day of April, 2017.

Appellant in person

Mr. Chigiti for State

Maureen A. Odera

Judge