



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 57 OF 2016

WESLEY KORIRI KIPNGETICH.....APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Ruling of the Chief Magistrate’s Court at Molo Hon. A Towett –Ag. Senior Resident Magistrate delivered on the 31st March, 2015 in CMCR Case No. 852 of 2014)

JUDGMENT

The appellant **WESLEY KORIRO KIPNGETICH** has filed the appeal challenging his conviction and sentence by the learned Ag. Senior Resident Magistrate sitting at Molo Law Courts.

The appellant had been arraigned before the trial court on 3/4/2014 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

“On the 27th day of March, 2014 at Kiptagich town Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of M C a child ages six years”

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

The appellant pleaded ‘**Not Guilty**’ and his trial commenced on 4/8/2014. The prosecution led by **INSPECTOR TANUI** called a total of four (4) witnesses in support of their case.

The complainant **M C** who was a minor testified as **PW2**. She told the court that on the material day her mother had gone out to work and left her playing with ‘**K**’ and ‘**C**’. The appellant came and bought the child two *madazis*. He then told the minor to accompany him back to the plot. **PW2** complied. The appellant instead led her to a thicket where he proceeded to undress her and then lay on top of the child and defiled her. After the act the appellant threatened that he would kill the child if she dared to reveal what had transpired.

PW1 B C was the complainant’s mother. She told the court that on 27/3/2014 she went out to do casual work. She left her daughter with a neighbor called ‘**Sharon**’. At 2.00pm **PW2** was going back home when she met her child sleeping in a field. The child appeared weak and was walking with difficulty. **PW2** questioned the child who informed her that she had been defiled.

The matter was reported to the police. The child was taken to Olenguone Hospital for examination and treatment. The appellant was then charged with this offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied the charge. On 31/3/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this appeal.

MR. TERER Advocate argued the appeal on behalf of the appellant. **MR MOTENDE** learned State Counsel opposed the appeal. I have carefully considered the submissions of learned counsel for the appellant. The following were the main grounds urged in support of the appeal.

1. Failure of the trial court to adhere to the provisions of Section 124 and Section 125 of the Evidence Act, 2006
2. Failure to prove the fact of penetration beyond reasonable doubt.
3. Failure by the prosecution to call crucial witnesses in the case
4. Lack of proper identification
5. Failure to consider the appellant's defence
6. Defective P3 form

This being a first appeal this court is obliged to re-examine and re-evaluate the entire prosecution case and must draw its own conclusions on that evidence (see AJODE Vs REPUBLIC [2004] 2004 KLR 81). Similarly in the case of MWANGI Vs REPUBLIC 2004 2 KLR, the Court of Appeal held that

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weight the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness”.

In his submissions counsel stated that the trial court failed to record its findings after the ‘Voire dire’ examination. With respect this was not the position. In the record at Page 7 line 17 the learned trial magistrate observes

“Court – PW2 is a child of tender years. Am minded, to conduct a Voire dire examination”

The court proceeded to conduct the Voire dire and recorded **both** the questions put to the child as well as the answers given by the child. On page 8 line 16 the learned trial magistrate concluded as follows

“Court – After the Voire dire examination. It's my considered view that PW2 is too young to comprehend the meaning and interpretation of taking an oath. She will give unsworn testimony”.

If this is not a finding then I cannot say what is – the trial court in my view properly complied with

Section 19 of **The Oaths and Statutory Declaration Act Cap 20**, Laws of Kenya. The child was examined and found not to be able to comprehend the nature of an oath. She proceeded to give Unsworn Evidence. Thereafter the appellant was allowed an opportunity to cross-examine the child and proceeded to do so. I dismiss this ground of appeal.

Counsel for the appellant has submitted that the evidence was not sufficient to prove the act of penetration. Section 2 (1) of the Sexual Offences Act defines penetration as follows

“‘Penetration’ means the partial or complete insertion of the genital organ of a person into genital organs of another person”

Thus it is not necessary that the sexual act be complete in order to prove the fact of penetration. A mere partial insertion of the genital organ will suffice.

In this case **PW2** described in court what happened to her at Page 7 line 7 as follows

“Inside the thicket accused asked me to undress (sic). I hesitated, accused then proceeded to undress me. He removed my underpants and then slept on top of me. Before he slept on top of me, he asked me to lie down on my back. I lied down on my back. He then lied on top of me after removing his trousers. He then inserted his penis inside my private parts. I felt very painful I felt painful while walking home” (own emphasis)

The complainant here has clearly described in the Limited Vocabulary of a child, the act of sexual intercourse. She has given a clear and graphic account of what transpired. The child remained unshaken under cross-examination by the accused. She has stated in no uncertain terms that the appellant **inserted his penis** into her private parts. That is a clear reference to the act of penetration.

PW1 the child’s mother confirms that she met the complainant shortly after the incident and noted that she was walking with difficulty. Upon receiving the report **PW1** examined her child. She observed bruises on the child’s private parts which were bleeding. This is evidence that there had been recent interference of a sexual nature on the child. This indicates that the child was experiencing some pain and/or discomfort.

PW3 DOMINIC KOTUT was a clinical officer attached to Olengurone District Hospital. He testified that he examined the child and noted that **“on the genitalia she had a broken hymen, she had a discharge from the labia majora and labia minora”** **PW3** further noted a foul smelling discharge from a high vaginal swab and existence of pus cells as well bloody urine. In a child so young this is clear evidence of penetration. Indeed **PW3** concluded that the complainant had been defiled. He filled and signed her P3 form which was produced in court as an exhibit **P. exb 1**.

Mr. Terer sought to challenge the credibility of the P3 form. He submitted that the name of the complainant’s mother was given ‘S C’ instead of ‘B C’. In my view this is not a material defect. This may have been an inadvertent error. The crucial person in the medical examination was the complainant herself and not the person who escorted her to the clinic. The child’s name was correctly captured in the P3 form as ‘M C’. Even if it was actually a lady called ‘S C’ who escorted **PW2** to the hospital, this would in no way affect the validity of the P3 form nor does it render the P3 form defective in any way. It is not a must that the child be escorted to hospital by her mother. In any event the issue for determination by this court is **not** the identity of the complainant’s mother. The charge sheet correctly names the complainant as ‘M C’. The name of her mother is not material to the charge. I therefore dismiss this ground of the appeal.

From the evidence on record I am satisfied that the fact of penetration has been proved by the testimony of the complainant and is duly corroborated by the medical evidence adduced by **PW3** as well as the P3 form.

The next crucial issue requiring proof is the question of identification. Has there been a clear and positive

identification of the appellant as the man who defiled the complainant.

In her testimony the complainant identified the appellant as the man who defiled her. The appellant never wavered in this identification of the appellant when questioned by her mother after the incident the child still maintained that it was the appellant who had defiled her. She even stated that the appellant had also defiled her on previous occasions.

On the material day the incident occurred in the day time. **PW2** stated that she returned home at 2.00pm to find that the incident had already occurred. The complainant was playing outside with other children. Visibility was good. The appellant called the child and gave her two *mandazis*. He then led her to thicket. All this time the child was in the company of the appellant. She saw him face to face and they spoke. Not to mention that during the act of defilement the man lay on top of the child. She was in very close proximity to him and had ample time and opportunity to see and identify him.

Aside from visual identification **PW2** was able to recognize the appellant as he was a man whom she knew very well. The complainant stated in her evidence at page 9 line 19

“When my mum asked me who had defiled me I told her it was the cobbler. I took my mum to where accused repairs shoes and I identified him”

PW1 the child’s mother confirms at Page 6 line 25

“I asked my daughter to take us to the defiler. She told us that it was cobbler who repairs shoes at Kiptagich Centre. She positively identified him at his place of work whilst repairing shoes”

The complainant therefore knew the appellant well and even knew where and what work he did. The appellant did not challenge this aspect of the evidence.

Further by the appellants own admission he previously used to cohabit with the mother of the complainant. Having lived in their home there can be no doubt that the appellant was a person the child saw very often and she would have no difficulty in recognizing him. No doubt this is why she willingly followed him when he led her away to the thicket. In the case of **ANJONONI & OTHERS Vs REPUBLIC [1980] KLR 59** the court 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 assailants in some form or other”**. I am satisfied that the appellant was a man well known to the complainant she saw him in broad day light and was able to recognize him. I find no possibility of mistaken identity and I find that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant.

Counsel for the appellant also raised as a ground of appeal the fact that certain witnesses were not called to testify. These included ‘**Sharon**’ whom the child’s mother mentioned as a lady in whose care she left her child when she went to work. Others were ‘**Abraham**’ whom **PW1** said was a neighbor whom she called to inform him that her child had been defiled. There was also ‘**K**’ and ‘**C**’ the two children the complainant said she was paying with when the appellant called her. The prosecution is not under an obligation to call to witness stand every single witness named in the proceedings. The only duty the prosecution has is to call such witnesses as are necessary to prove their case. Not every witness named is a crucial witness. Some may have seen nothing and thus would have nothing of value to tell the court whilst others may only serve to duplicate evidence already on record.

Sexual offences are often committed in secret. There is not likely to be any eye-witness. Indeed in this case there is no allegation of any witness to the act of defilement. In my view whilst these other witnesses may have provided the ‘**icing on the case**’ they were neither crucial nor essential towards the proof of the prosecution case. Failure to call them was not in any way fatal to the prosecution case. No adverse inference can be drawn by this court from the failure to call those witnesses as I find that the prosecution did call all such witnesses as were necessary to prove their case.

The question of the age of the complainant is a pertinent issue in any defilement case and is a matter that requires proof beyond reasonable doubt. In ALFAYO GOMBE OKELLO Vs REPUBLIC U/C [2010]eKLR the Court of Appeal commented thus on this aspect of age of the victim in a sexual assault case

“In its wisdom parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt.....”

Counsel submitted that in the absence of a birth certificate age cannot be said to have been proved. I respectfully disagree with this submission. In the case of FRANCIS AMUROM Vs UGANDA [2006] EALR 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)

Similarly in MANGUNYU Vs REPUBLIC Hon Justice Ouko (as he then was) observed that

“Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person (who was) present at the birth”

Therefore age may be sufficiently proved by means of other than a birth certificate.

In this case the complainant herself told the court that she was six (6) years old. PW1 the child’s mother stated that her daughter was born in November, 2007. In the case of RICHARD WAHOME CHEGE Vs REPUBLIC [2014]eKLR the Court of Appeal held

“what better evidence can one get [of age] than that of the mother who gave birth”

Therefore the statement by PW1 that she bore the complainant in November, 2007 is sufficient proof of her age being 6 years old. Further proof of age was provided by the complainant’s Health and Immunization Card P. exb 2 which indicated that she was born on 19th November, 2007. This means that at time of this incident in March 2014 the child was about 6½ years old. This card is a government documents and provides adequate proof of the age of the child. I am therefore satisfied that the age of the complainant has been proved beyond reasonable doubt.

In his defence the appellant denied having defiled the complainant and claimed that the charge had been fabricated by the mother of the child because he owed her Ksh 5,000/=. Firstly the appellant did not raise this issue of a vendetta against him when he was cross-examining PW1. It is clear that this allegation is nothing but an afterthought. Secondly the complainant was a mere child who would have had nothing to do with any disagreements her mother had with other people. She herself had no reason or motive to implicate the appellant. The learned trial magistrate did consider the appellant’s defence and in his judgment at Page 21 line 16 he stated as follows

“The defence given by the accused is considered but it did not poke any holes in the prosecution case”

In so doing the trial magistrate (correctly in my view) dismissed the appellant’s defence.

Finally counsel for the appellant claimed that the learned trial magistrate failed to adhere to the provisions of Section 124 of the Evidence Act, Cap 80, Laws of Kenya Section 124 provides

“124 Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act,

where the evidence of alleged victim 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

In this case the complainant a minor gave unsworn evidence. However her testimony was adequately corroborated by other ‘**material evidence**’ being the evidence of her mother, **PW1**, the testimony of the doctor **PW3** as well as the P3 form. Thus the appellant cannot be said to have been convicted based on the uncorroborated testimony of the victim.

Further Section 124 Evidence Act contains a proviso as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of 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”

In this case the learned trial magistrate in his judgment at page 20 line 15 observed that

“Complainant gave a detailed account of how the act took place and how she felt when she was being defiled. Though she gave unsworn testimony, she was very consistent and indeed told the court that she knew the accused as she normally saw him at the centre mending torn shoes.....”

The trial magistrate has clearly explained his observations regarding the child’s demeanour and the reasons why he believed her testimony. These are the observations of the magistrate who heard and saw the child testify. I would have no reason to dispute those findings. I find that Section 124 of the Evidence Act was duly complied with.

Based on the foregoing I am satisfied that the prosecution proved their case beyond reasonable doubt. The appellant’s conviction was sound and I do uphold that conviction. Since the child was proved to have been 6 years old at the time of the incident the sentence of life imprisonment is the mandatory minimum sentence as provided for by Section 8(2) of the Sexual Offence Act. I do confirm that sentence. Finally this appeal fails and is hereby dismissed in its entirety.

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

Mr. Terer for accused

Mr. Chigiti for DPP

Maureen A. Odero

Judge