REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.167 OF 2014

RAMADHAN AMUKOYA KENYATTA …… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(An appeal arising from the judgment of the SPMS Court at Mumias (Hon.S.K. Ngetich – SRM) delivered on 30th October, 2014 from Criminal Case No. 766 of 2013)

JUDGMENT

1. The appellant herein was convicted of the offence of defilement contrary to ***section 8(1)(2)*** of the Sexual Offences Act No.3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the judgment of the lower court and has appealed against both conviction and sentence.

2. The particulars of the charge against the appellant were that on the 30th August 2013 at about 4.00 pm at [particulars withheld] village in Matungu District of Kakamega County, he intentionally caused his penis to penetrate the vagina of K.S. (herein referred to as the complainant), a child aged 6 years.

The appeal:

3. The grounds of appeal are:

1. That the trial magistrate convicted the appellant without considering that he was not medically tested to confirm if indeed it was him who committed the alleged act.

2. That the evidence on record was uncorroborated, fabricated, inconsistent and lacked probative values.

3. That the trial court did not prove the charge beyond reasonable doubt.

4. That the trial court did not consider that this was an afterthought on the part of the prosecution witnesses.

5. That there was malice on the part of some of the prosecution witnesses and a systematic plan to implicate the appellant with the crime.

6. That the trial court rejected the appellant's sworn defense which was cogent enough and reflected a true picture of what transpired prior to being implicated with the crime.

Prosecution case:

4. The case for the prosecution was that the complainant herein was in the year 2013 aged 6 years. That on the 30th August, 2013, the complainant's mother PW2 left the complainant and her younger sibling at home and went to work. That during the day the appellant went to complainant's home and found the complainant and her younger brother outside their house. The appellant told the complainant to enter into their house. She did so. The appellant followed her into the house and did "bad manners" to her on the bed. He inserted his penis into her vagina. As he did so he covered her mouth with his hands. After that the appellant went and fetched water for them. He went away.

5. That the complainant's mother went back home in the evening. The complainant's sibling told their mother that "***Waru***" had slept in bed with the complainant. "***Waru***" referred to the appellant who was their neighbour. The mother, PW2, tried to enquire from the complainant what had happened but the complainant did not disclose. On the following day the complainant told her mother that the appellant had placed her on the bed and inserted his penis into her vagina. She checked the girl and found some discharge. On the 3rd September, 2013 she took the girl to Matungu Health Centre where she was examined by a clinical officer, Michael Barasa PW5. The clinical officer found her with a recently ruptured hymen, a tear on the perineum (the area between the vagina and the anus), mucoid discharge and tenderness inside the cervical region. The clinical officer made a conclusion that the girl had been defiled. On the same day, the mother to the girl reported the incident at Mumias Police Station. The report was taken by Corporal Morris Otieno PW4. He issued the girl with a P3 form. It was completed by a clinical officer at Matungu sub-county Hospital, George Atala PW3 on the 6th September, 2013. He examined the girl and also came to the same conclusion that the girl had been defiled. On the 7th September, 2017, the appellant was arrested and taken to Mumias police station. Corporal Otieno, PW4, investigated the case. He was shown the girl's health card that indicated that she was born on 11th My 2007. He charged the appellant with the offence of defilement. During the hearing, the girl's mother PW2 produced the health clinic immunization card as exhibit, Ex1. The clinical officer who initially treated the girl at Matungu Health Centre, PW5 produced the treatment notes as exhibit, Ex2. The clinical officer who completed the P3 form PW3, produced it as exhibit, Ex3.

6. In his defence, the appellant stated in a sworn statement that he was working at a butchery at Mayoni. That on the 6th September, 2013 at 8.30 pm he was on his way home from work on a motor cycle when he was stopped by administration policemen who were on patrol. He did not have an identification card. He was arrested and taken to Mumias Police station. A lady was brought to the station and he was identified as the one. He was later brought to court and charged with defilement.

7. The appellant further said that the mother to the complainant had a grudge against him. That her husband had been jailed over an offence of robbery with violence. His family accused him, (the appellant), of implicating him. The complainant's mother warned him that he will end up in jail. The appellant further said that he had worked for the complainant's mother and that she owes him some money.

Submissions by the appellant:

8. The appellant submitted that the complainant was taken to hospital after 5 days and that there was no explanation for the delay. That there was no medical evidence to prove the charge. That the witnesses who testified against him were members of the same family and therefore that the complainant must have been couched by her mother. That the younger sibling of the complainant did not testify in the case. That the appellant was not arrested until after 8 days and therefore that if the witness knew him it should not have taken long to have him arrested. That the court did not consider his alibi. That the health card stated different dates of birth and therefore that the age of the complainant was not proved.

Submissions by the State:

9. The prosecution counsel submitted that the charge was proved beyond all reasonable doubt. That it

was proved by the evidence of the complainant's mother and also by the clinic health card that the complainant was aged 6 years at the time that the offence was committed. That the evidence of the complainant that the appellant penetrated her was proved by medical evidence and supported by the clinical officers PW3 and PW5. That defilement is proved by witness evidence and not by medical evidence as stated in the case of ***Silas Asava vs R*** (2006) eKLR. That the complaint knew the appellant as her neighbour which evidence was confirmed by her mother PW2. That therefore the appellant was identified as the person who defiled he complainant. The state submitted that the appeal has no merits and should be dismissed.

Findings of the lower court:

10. The trial magistrate found that it was proved that the complainant was aged 6 years at the time that the offence was committed. He found that there was evidence of penetration and that it is the appellant who had penetrated the complainant. He dismissed the allegation that there was any grudge between the complainant's mother and the appellant.

Duty of appellate court:

11. This is a first appeal. The Court of Appeal in ***Okeno vs Republic*** (1972) E.A 32 at page 36 set out the duty of a first appeal in the following words:-

> ***"An appellant on a first appeal is entitled to expect evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decision on the evidence the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 has had the advantage of hearing and seeing the witnesses."***

Determination:

12. The grounds of appeal can be condensed into four, that:-

(1) the trial court convicted the appellant against the weight of the evidence.

(2) the trial magistrate convicted the appellant without consideration that he was not examined to confirm that he is the one who committed the offence.

(3) the trial court convicted the appellant on corroborated evidence

(4) the trial court failed to consider that the prosecution witnesses had a grudge against the appellant.

13. The appellant was charged with defilement contrary to ***section 8(1)*** of the Sexual Offences Act. The section reads as follows:-

> *"Any person who commits an act which causes penetration with a child is guilty of an offence termed defilement."*

The prosecution is required to prove the following ingredients in a charge of defilement:

(1) the age of the complainant.

(2) that there was penetration on the complainant; and

(3) the identity of the person who did the penetration.

14. The importance of proving the age of the complainant in a case of defilement was emphasized by the Court of Appeal in ***Kaingu Elias vs R*** (2010) eKLR where it said that:-

> ***"Age of the victim of the sexual assault under the Sexual Offences 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 this case the complainant gave unsworn evidence in court after the trial magistrate conducted a ***voire dire*** examination on her ad formed the opinion that she was of sufficient intelligence and understood the duty of telling the truth. The girl stated that she was 7 years old at the time that she testified in court on 7th July 2014. The offence was alleged to have taken place in August 2013 which would place her age at that time at 6 years.

15. The mother to the complainant, PW2, testified that the girl was born on 11th May 2007 which means that the girl was aged 6 years in August 2013. The complainant's mother produced a clinic immunization health card, Ex1, that indicated that the girl was born on the stated date. The accused contended that there was contradictory evidence on the complainant's date of birth. That the immunization card had two different dates of birth. However a look at the card indicates only one date of birth. The appellant did not pin point the other date of birth indicated in the card. The age of the complainant recorded in the P3 form as at the time the offence was committed was 6 years. In face of all the above evidence I find that the trial magistrate came to the correct finding that the girl was aged 6 years at the time the alleged offence was committed. The prosecution had thereby proved that the complainant was a girl aged 6 years.

16. Penetration under the Sexual Offences Act no.3 of 2006 it defined to mean:-

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

The complainant's evidence on the issue was that the appellant did bad manners to her on the bed and

> ***"inserted his penis into my vagina."***

17. I think the proper language used by the girl is that the appellant did bad manners to her. It is unlikely that it is the girl herself who stated the words that the appellant inserted his penis into her vagina. Most girls of 6 years of age do not know what these organs are called. It appears that it is the trial magistrate who interpreted as to what the girl meant but then the magistrate should have recorded the exact words used by the girl and then interpret the words into English. However it was evident from the evidence of the girl that she meant that the appellant sexually assaulted her.

18. The complainant did not tell her mother PW2 on the material day of what had happened between her and the appellant. Her mother said in her evidence that it is her young son aged 3 years who hinted to her as to what had happened but that she could not make out properly what the boy was saying.

19. The case was first heard by Hon H. Wandere (PM) before it was later taken over by Hon. S.K. Ngetich. When the complainant's mother testified before Hon. Wandere on 1st October, 2013 she stated that her daughter did not inform her of the defilement until 3rd September, 2013. That it is upon receiving the report on that day that she took the girl to hospital. However when the complainant's mother testified before Hon. Ngetich on 7th July 2014 she stated that her daughter revealed about the incident on the following day, i.e. 31st August 2013. That she did not take any action until when she took the girl to hospital on 3rd September, 2013.

20. The treatment notes and the P3 form indicate that the girl was taken to hospital on 3rd September,

2013 which was 5 days after the occurrence of the incident. The question then is whether the complainant's mother received the report from her daughter on 31st August 2013 or on 3rd September, 2013. If she received the report on 31st August, 2013, why did it take her some 4 days to take the girl to hospital and to report to the police?

21. The clinical officer who treated the complainant was categorical that the girl had been defiled which was evidenced by recently ruptured hymen, tear of the perineum (area between the vagina and anus), mucoid discharge and tenderness inside the cervical region. He stated that he saw the girl after three days from the date of defilement. He said that the date of the defilement was 30th August 2013 and that he saw her on 3rd September, 2013. That means that he saw her after 5 days and not after 3 days. He stated that it was still possible to see the above said observations on the day he examined the girl.

22. The evidence of the clinical officer who treated the girl, PW5, was **convincing** that the girl had been defiled. The rupture of the hymen was evident to him even after 5 days. The tear on the perineum was observable and so was the tenderness in the cervical region. There was thereby evidence to prove penetration on the complainant.

The question is whether the appellant is the one who penetrated the complainant.

23. The appellant submitted that he was not examined to prove that he is the one who defiled the complainant. However, a court can convict an accused person of defilement even without medical evidence to link him to the commission of the offence. This was stated by the Court of Appeal in ***Geoffrey Kioji vs R, Nyeri Criminal Appeal No.270 of 2010*** - cited in ***Dennis Osoro Obiri vs R*** (2014) eKLR) where the court stated that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. …. Under proviso to section 124 of the Evidence Act Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

24. In ***AML vs R*** (2012) eKLR the Court of Appeal sitting at Mombasa held that:-

> ***"The fact of rape or defilement is not proved by a DNA test but by way of evidence."***

By the foregoing authorities, the fact that there was no medical evidence done on the appellant to link him to the crime does not afford him a ground of appeal.

25. The appellant further complained that he was convicted on uncorroborated evidence. The proviso to ***section 124*** of the Evidence Act allows a court to convict an accused person without corroboration in cases involving sexual offences to minors where the court is convinced that the complainant is a truthful witness. The trial magistrate in this case believed the evidence of the complainant that it is the appellant who defiled her. He found that the appellant was known to the complainant as a neighbour. He found that the evidence of the complainant on defilement was corroborated by medical evidence. I do agree with the trial magistrate that there was overwhelming evidence that the appellant is the one who defiled the complainant. The fact that the mother to the complainant gave contradictory evidence as to the exact day that she learnt of the commission of the offence could be as a result of memory loss and not a deliberate attempt to lie to the court.

26. Evidence was adduced that the appellant used to fetch water for the complainant's mother. Indeed the complainant stated in her evidence that after the appellant defiled her he went and fetched water for them and filled up their drums. The complainant's mother testified that when she returned home she

found the drums full of water and the complainant told him that the appellant is the one who had fetched the water. The appellant stated in his evidence that he had worked for the complainant and that she had not paid him. The complainant's mother stated in cross-examination by the appellant that she was not aware that the appellant is the one who had led to the arrest of her husband by the police. She said she had no grudge against the accused. If indeed there was any grudge between the complainant's mother and the appellant, the appellant could not have been fetching water for her. If the debt the appellant talked about was over the fetching of water on the material day the appellant did not state that he thereafter demanded for the money and the complainant's mother refused to pay him. The fact that the appellant fetched water for the complainant on the day the complainant was defiled places the appellant at the scene of the commission of the offence and corroborates the evidence of the complainant that he is the one who defiled her.

27. It is not the complainant's mother who accused the appellant of defiling the complainant. It is the complainant herself who come up with the complaint after which her mother reported to the police. It is incomprehensible that a girl of 6 years of age can come up with such complains due to a grudge between her mother and the appellant. There was no evidence that the girl was aware of any such grudge. There was no grudge between the appellant and the complainant's mother. The trial magistrate rightfully dismissed the allegation of a grudge.

28. The appellant did not offer any alibi in his defence as stated in his arguments. The defence offered by the appellant did not in any way displace the evidence tendered by the prosecution.

I find that the trial magistrate arrived at the right conclusion in convicting the appellant of the offence of defilement contrary to ***section 8(1)*** as read with ***sub-section 8(2)*** of the Sexual Offences Act. The upshot is that both the conviction and sentence are thereby upheld and the appeal is accordingly dismissed.

Delivered, dated and signed at Kakamega this 3rd day of August, 2017.

J. NJAGI

JUDGE

In the presence of:

Appellant …… in person

Ng'entich…….. for respondent

Okoit…….. court assistant

30 days right of appeal