



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 96 OF 2016

I K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with the offence of sexual assault contrary to section 5(1) (a) (i) and (2) of the sexual offences Act no. 3 of 2006.

The particulars of the offence were that the appellant on the 23rd of July 2012 at [particulars withheld] village in Buuri District of the Meru County unlawfully used his fingers to penetrate the Vagina of M.G a child aged 5 years old. The trial court convicted the appellant and sentenced him to serve 20 years in prison.

The grounds of appeal are:-

1. There were domestic wrangles in the family as the appellant had already separated with his wife.
2. The appellant is the sole bread winner in the family and could not commit such an offence to a child.
3. The case is fabricated.
4. The prosecution case was not proved beyond reasonable doubt.
5. There is no direct evidence to link the appellant to the offence.
6. The criteria used by the doctor to ascertain that the victim was defiled with a finger were not well proved.
7. The appellant was not represented by an advocate.

The appellant submit that there is no direct evidence connecting him with the crime. The complaint only stated that the fingers were inserted into her vagina and were removed after a while and she felt pain. The pain is to be felt when the fingers are inside and not after they were removed. Why didn't the victim tell any other person other than her teacher and not the village elder. The case was not proved beyond reasonable doubt. Even the doctor does not know what exactly caused the penetration. The hymen can be broken through games in school. The investigations were shoddy. The appellant is the sole bread winner of his family and a non-custodial sentence could have been preferred.

Mr. Namiti opposed the appeal. Counsel maintains that PW2 narrated what the appellant did to her. Although PW2's evidence was unsworn, she stated that the appellant inserted his fingers into her vagina. PW3 who was the complainant's teacher noted some abnormalities on her. PW2 told PW3 what had happened to her. She gave the appellant's name. The appellant is the victim's father. PW1, a doctor testified that there was redness and inflammation of the vagina and the hymen was broken. The evidence is sufficient for the conviction.

This is a first appeal. There is need to evaluate the evidence afresh. Five witnesses testified for the prosecution. PW1 DR. WINNIE MUENI SAUMU was based at the Meru level five hospital. She is a medical officer. She produced a P3 form which she filled on 16/8/2012. The complainant was taken to her by a pastor (PW4). PW2's genital organs were examined. There was redness of the Libia Minaret and inflation of the outer area of the vagina. The hymen was broken which was evidence of penetration.

PW2 M.G is the complainant. She testified that she was a nursery school pupil. Her mother was unwell and she was staying with her father,

the appellant. Her father inserted his fingers in her vagina. The fingers stayed inside and when he removed them she started feeling pain. Her father had removed her pantie before inserting his fingers. In the morning, she went to school and informed her teacher (PW3). She was taken to hospital.

PW3 LKK was a nursery school teacher at [particulars withheld] Academy. She noticed PW2 was behaving in a strange manner. She noticed that PW2's clothes were damp at the back. She talked to PW2 who told her that her father had put water in her body. The school is managed by the church. PW3 called a pastor (PW4) and they both talked to the child. PW2 told them that her father had put the water in her private parts using his fingers. They decided to report the matter to the Police. They were given a letter to go to hospital. PW2 was taken to Meru level 5 hospital. She knew the appellant before the incident.

PW4 MKF is a Pastor with the Deliverance church. The church runs the [particulars withheld] Academy. On the material day he was called by PW3 who informed him that there was a child who looked disturbed and was walking in a strange manner. He went there and called a lady to check on PW2. He was informed that it appeared like PW2's private parts had been touched. They talked to the child who told them that her father had inserted his fingers in her private parts that night. PW2 was being sponsored at the school by the church. PW4 reported the matter to the Police. He had known the appellant for over 15 years. He denied that he had taken the appellant's wife.

PW5 P.C MOSE KABAI was stationed at Kiirua Police Station but attached to the Tatua Police post. The case was reported at Tatua Police post on 23/7/2012 by PW3 and PW4. He referred PW2 to Meru General Hospital and issued her with a P3 form. PW5 investigated the case and had the appellant charged. PW2's mother had been admitted in hospital with their younger child when the incident happened. The appellant was alone with PW2.

The appellant tendered a sworn defence. He stated that he had separated with his wife. His wife had an affair with PW4. PW4 told him that he will never see his wife and children. After two weeks, PW4 went with Police Officers and had him arrested. PW4 went to arrest him while in the company of a teacher (PW3). The charges are fabricated. He had separated with his wife in 2012. They had two children, PW2 who was 7 years old and another child aged 2 ½ years. His wife went with the children; PW4 rented his wife a house. The appellant was not staying with any of the children.

The issues for determination are:-

1. Whether PW2 was sexually assaulted.
2. Whether it was the appellant who sexually assaulted PW2.

It is the evidence of PW1 that PW2's hymen was broken. The doctor observed redness and inflammation of PW2's private parts. The doctor concluded that PW2 had been penetrated. PW3's evidence is that he noted that PW2 was behaving in a strange manner. She observed dampness in her clothes. PW4 was notified by PW4 and he requested another woman to check on PW2. He was told that PW2's private parts had been touched. These are independent witness. Their evidence is to the effect that PW2's private parts were interfered with. I do find that indeed PW2 was sexually assaulted.

The next issue is who sexually assaulted PW2. It is the evidence of PW2 that it is her father who inserted fingers in her vagina. It is the appellant's evidence that PW2 was 7 years old. The incident took place at night. According to PW2, she informed her teacher the following morning. PW2's mother was not at home that night. The appellant was alone with the PW2. The appellant's defence is that he is being framed. PW4, a pastor took away the appellant's wife. PW4 told the appellant that he will not see his children and wife again. The case was just a way of PW4 getting to the appellant to fulfill his threats.

It is established from the evidence that PW2 was a student at the school sponsored by the Deliverance Church. It is not PW4 who told the complainant to state what she said. It is PW2's evidence that her father inserted fingers in her vagina. There is no evidence that PW2 was told by PW4 or her mother to state what she said. It cannot be true that even PW1 was brought into the alleged plot to frame the appellant. How was PW1 going to benefit from the whole dispute. PW4 testified that he had known the appellant for 15 years. Where was the appellant's wife all along the time they had known each other. It is not established that PW4 was out to punish the appellant. And why would he punish the appellant if he was comfortably living with the wife.

The appellant contends that the case was due to domestic wrangles. There is no evidence to that effect. The prosecution did not have to investigate the alleged wrangles. According to PW5 the complainant's mother had been hospitalized. The evidence against the appellant is direct. The doctor could not tell what caused the penetration. That is simple logic as the doctor was not present when PW2 was being sexually assaulted. The case is not fabricated.

The record shows that PW2 was not cross-examined. The Trial Magistrate simply took her evidence and did not invite the appellant to cross examine her. That is a wrong approach. I believe the Trial Magistrate thought that since PW2 had given unsworn evidence, there was no need to have her cross-examined.

In the case of **Sula V. Uganda (2001) 2: E.A**, the **Supreme Court Of Uganda** held as follows:-

“Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.

Similarly, In the case of **Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006 (C.A)**, It was held:-

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.”

That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

The issue which follows is whether if the minor gives unsworn evidence and is not cross examined then. The entire suit is lost? My view is that the suit is not lost. The Court has to evaluate the other evidence independently and make a finding as to whether it is sufficient to sustain a conviction. A case is not based on the evidence of a single witness. Even in sexual offences cases, even if the Court can convict on the evidence of the complainant if it finds such evidence truthful, it will not be the evidence of the victim only.

There are situations where the victim of the sexual offence may not testify. This can be due to mental illness or being extremely young. It is not expected that a two year old child can be expected to testify in Court. We have experienced sexual offences being committed to children as young as one year old. Such a child cannot be expected to testify and be cross examined. There are those who are mentally unstable to the extent that even the presence of an intermediary may not help them testify. The mere fact that such victims may not testify does not make the prosecution case weak or lost. The evidence of the other prosecution witness has to be evaluated. Each case has to be determined on its own merit:

In the current case, the victim was five years old. The perpetrator is the victim’s father. The case involves sexual assault not defilement. Although the child was not cross examined, there is the independent evidence of PW1, PW3 and PW4. PW1 examined PW2 and found that her hymen was broken. PW3 was the first person to be told about the incident. PW3 observed that PW2 was not behaving normally. PW3 called PW4 and they were told that the appellant had inserted his fingers on PW2’s Vagina.

The totality of the evidence of PW1, PW3 and PW4 is to the effect that the child was sexually assaulted. Even without the evidence of the victim, PW2, the other evidence is sufficient to warrant a conviction. The offence was committed. I do find that the conviction is proper. The evidence establishes that the child was living with the appellant. There was no other person in the house when the incident occurred. It is therefore the appellant who committed the offence.

The minimum sentence under section 5 of the Sexual Offences Act is 10 years imprisonment. The Trial Court sentenced the appellant to 20 years. Being a first offender, I do set aside the 20 years sentence and replace it with the minimum of 10 years imprisonment. In the end, the appeal on conviction is disallowed. The Trial Court’s 20 years imprisonment sentence is set aside and replaced with ten (10) years imprisonment.

Dated and signed at Marsabit this....day of November, 2017

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Meru this 29th Day of November 2017

A. MABEYA

JUDGE