REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 69 OF 2016

LAWRENCE IRIA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act no 3 of 2006.The particulars of the offence were that the appellant on 14 /1/2016 day at [particulars withheld] area at around 0300hrs in Isiolo County within Eastern Region, intentionally and unlawfully attempted to cause his penis to penetrate the anus of J. A a child aged 4 years.

The trial court convicted the appellant and sentenced him to serve 10 years imprisonment. The grounds of appeal are that:

1. The appellant pleaded not guilty to the charges.

2. The prosecution evidence is weak and uncorroborated.

3. The sentence is harsh.

4. The trial court failed to notice that the complainants' mother was the appellant's wife and there was a grudge between the two.

5. The trial court erred in law by failing to notice that the victim was the appellant's biological daughter and according to the culture it is prohibited and a curse to do what is alleged the appellant did to his daughter.

In his submissions the appellant submit that PW1's evidence is contradictory. She testified that she went to sleep and left the appellant. She did not indicate that she was sleeping on the same bed with the victim. Her only complaint was that she saw the appellant sleeping but did not see him in the morning when she woke up. Although PW1 testified that the complainant was defiled, the medical evidence indicates that there was no laceration or penetration done to the minor. The issue of defilement was the opinion of PW1.

The appellant further submitted that there was a grudge between PW1 and the appellant. The complainant did not allege that she had been defiled but only stated that she felt pain in her private parts. PW1 had a grudge because she had separated with the appellant. PW1 was in the same bed where the alleged defilement took place but did not hear anything. All what happened was PW1's suspicion. She testified that she suspected that the appellant had defiled her child. PW1 did not see the appellant defiling her daughter.

The appellant also submitted that the charge sheet was defective. The date of arrest and appearance in court is not indicated. It is also stated by the appellant that the complainants' mother was his wife. He met her with two children and the last born was the appellant's child. PW1 fabricated the charges so that the appellant will suffer behind bars. The complainant gave unsworn evidence and was not cross examined. This violated the appellant's constitutional rights to cross examine the witness. The appellant was arrested because of burning charcoal as stated in his defence. The police officer who testified confirmed that the appellant was arrested because of burning charcoal.

Mr. Odhiambo, prosecution council, opposed the appeal. Counsel submitted that the events occurred at night.

There was a lamp and the complainant identified the appellant. PW6 corroborated the evidence of the victim. She had tenderness on the neck. The appellant was in the house that night. All the people went out but the appellant remained in the house. The age of the complainant was proved. The allegation that the appellant had a grudge with the complainants' mother is an afterthought. The other allegations that the complainant's mother was the appellant's wife were not raised during the hearing.

This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. PW1 JB was the complainants' mother. She testified that she had two children. Her husband lived in a separate Manyatta where they keep goats. On 13th January 2016 in the evening she was at home with A L, E and the appellant. They were chewing Miraa. They stayed there up to 3 am. A and E left. The appellant stayed. After sometime she asked the appellant to leave so that she could sleep. Her children were asleep. The appellant told her that he was chewing Miraa. He asked for a sack. The house has a partition and they sleep on the inside part. She went inside and slept. The appellant woke up and went to sleep where the complainant was sleeping. She woke up in the morning and did not see the appellant. She tried to wake up the complainant but the child was not able to stand. The complainant was swollen around the neck and had pains on her private parts. PW1 removed her clothes and checked the child. She found sperms on her private parts. She called her brother inlaw A who went to check on the child. A called the appellant's sister.

It is the evidence of PW1 that they decided to report the matter to the police. They went to the AP camp where they were advised to take the child to Isiolo Hospital. The child was 4 years old. The appellant was arrested the following day 14 January 2016. She knew the appellant as her neighbor. He normally goes to her house with his friends. It was the first time the appellant was sleeping in her house. The child identified the appellant as the one who wanted to defile her. The appellant usually burns charcoal.

PW2 was the complainant J. A. She gave unsworn evidence. On the material night she was asleep on the bed. The appellant closed her mouth with his hands and did bad manners to her. She was feeling pain around her mouth. He placed his penis on her vagina and held her. She did not scream as the appellant had closed her mouth. She saw the appellant very well as there was a lamp in the house which was on. The appellant was wearing a yellowish T-shirt and a Kikoi. The appellant tried to defile her. After he finished he slept on the bed. She was wearing a skirt but did not have an underpant. The appellant lifted her skirt. When she woke up she did not find the appellant. Her mother checked on her and she had a swollen face and mouth. She was taken to Isiolo hospital where she was treated. She knew the appellant as he usually used to go to their house. The appellant had never tried to defile her before.

PW3 AL is a brother inlaw to PW1. On 13 January 2016 they went to chew Miraa at PW1's house. He was with the appellant. They chewed Miraa that night but he left. After sometime PW1 called her and informed her that her child had been defiled. He went there and saw the child. Her private part did not appear normal. He called JL who is a brother to PW1. They agreed to take the child to hospital and reported the matter to the chief. The appellant was arrested. They found him where he normally burns charcoal. The appellant normally visits them and they chew Miraa together.

PW4 JL is a brother to PW1. He was with PW3 and PW1 that night together with the appellant. They chewed Miraa and he left. The following morning PW3 went to his house and asked him to go and check on Pw1'S child. The child could not walk properly and was complaining of pain on her lower abdomen. She also had bruises on her face. He took the child to hospital. The matter was reported to the police and the appellant was arrested.

PW5 APC STANLEY MWEMA was attached at the Ngaremara AP post. The case was reported at the AP post on 14 January 2016 at 8 am. He saw PW1 and PW2 who was four years old. It was reported that PW2 had been defiled. PW2 was talking in low tones as it appeared as if she had been strangled. They checked on her clothes which had some discharge. She could not walk properly. He called the area chief and they decided to go and arrest the suspect. They went to where the appellant was burning charcoal with his colleagues. The started running but arrested them. They first told them that they were being arrested for burning charcoal. They took them to the AP post. The appellant was later escorted to Isiolo Police station.

PW6 DAUDI DABASO is a Clinical Officer who was based at the Isiolo county hospital. He examined PW2 on 14 January 2016. The clothes of PW2 were not torn. The clothes were stained with discharges. PW2 had tenderness of the neck and tenderness of the lower abdomen. She had difficulties in walking. She had stain of discharges on the thighs. On examination of her reproductive organs, PW2 had tenderness of the vulva but no lacerations or obvious injuries were seen. Investigations showed that defilement had been attempted but there was no penetration. There was no bleeding. He filled the P3 forms on 18 January, 2016.

PW7 Sargent RALIASALA GALGALO was attached at the Isiolo police station in charge of the gender and children desk. She investigated the case. On 15/1/2016 she saw that the case had been reported on 14/1/2016. APs from Ngaremara AP post had taken the appellant to the police station on the allegations that he had defiled a 4 year old minor. She recorded witness statements. The complainant was born on the 10/12/2010 and the mother availed her clinic card. The P3 form was filled and the appellant was charged with the offence.

The appellant gave unsworn defence. He stated that he met his wife B when she had two children. He stayed with her for 3 years and they were blessed with one child. He went away for two months and when he went back he found that his wife had extra marital affairs. He warned her but she did not stop. He then decided to leave her. After one month his wife called him stating that their child was sick. He went and saw the child. In the morning he woke up to go and look for money so that he could take the child to hospital. Police Officers went and arrested them alleging that they were destroying the forest. They were taken to Ngaremara AP post. His inlaw was with them and gave out Ksh 3000/= and was released. He was taken to Isilolo Police station and he was charged with the offence.

The Issue for Consideration is whether the prosecution proved its case beyond reasonable doubt. The appellant submit that PW1 was his wife with whom they had separated. This issue was part of his defence. This was raised after PW1 had testified. The appellant states that PW1 testified that she did not know why the appellant left her and went for the child. According to the appellant, PW2 is his biological child. Unfortunately for the appellant the evidence does not make his contention believable. PW2 testified. She did not state that the appellant is her father. According to PW2, the appellant usually visits their home with other people to chew Miraa. There is no relationship between the appellant and the victim.

There is the evidence of PW1. She stated that her husband lives in another Manyatta where they keep goats. She gave the appellant a sack to sleep on. She did not refer to the appellant as the husband. She testified that she had two children. The appellant's position is that PW1 had two children when he met her. The two were blessed with another child, the complainant. That means PW1 had three children. PW7 produced the immunization card. It shows that PW2 was born on 10/12/2010. The name of the father is given as EF. That is not the appellant's name. The appellant did not state that he uses the name of LAWRENCE ERIA KAAMAN alias EPUR FRANCO. Even if the appellant's contention that PW1 was his wife is true, which I find it is not, there is no evidence that PW1 was out to frame the appellant.

When PW1 was testifying, the issue of a past relationship did not arise.

The appellant further submit that the prosecution evidence is weak and uncorroborated. The evidence of PW1 is that it is the appellant who slept in her house. They chewed Miraa up to about 3:00am. That part of evidence on chewing Miraa is corroborated by the evidence of PW3 and PW4. They were both present at PW1's home chewing Miraa. The offence took place between 3:00am and morning. There is no evidence that another man was in the house of PW1 or that someone sneaked into the house and committed the offence. The defence evidence seems to suggest that the appellant slept in the house but left in the morning. The prosecution evidence places the appellant at the scene. According to PW2, there was a lamp that was on. She clearly saw the appellant wearing a Kikoi and a Yellowish T-shirt. There is the evidence of PW6. He examined PW2 and concluded that there was an attempt to defile PW2.

Given the evidence on record, I do find that the evidence is not weak. It is corroborated. The evidence is direct. PW2 knew the appellant. It is not a case of mistaken identity.

The appellant contends that his constitutional rights were violated. He was not allowed to cross-examine the complainant. Article 50(K) of the constitution provides for the righty of an accused to adduce and challenge evidence. The Trial Court conducted Voire Dire on PW2 and made the following remarks:-

> ***Court - I have examined the minor and in my considered opinion she is not capable of giving sworn evidence. She will tender unsworn evidence the court warns itself of the unsworn evidence of a minor child of tender years.***
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> ***J.M IRURA – SRM***

After the child testified, she was not cross examined. That was a wrong procedure. Every witness whether minor or adult is supposed to be cross-examined by the accused person. It is a right accorded to the accused and it is upon the accused to decide either to cross-examine or not. There is a difference between an unsworn witness and the unsworn evidence of an accused person.

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."***
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> ***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 issues which arise is whether the prosecution case should collapse as a result of failure by the Trial Court to allow a minor witness who gives unsworn evidence be cross examined. It is true there is violation of the appellant's constitutional right to challenge the evidence of the minor witness. The evidence of PW2 implicates the appellant. My view is that the court has to evaluate the other evidence independently without that of the minor who was not cross examined and make its own finding. Failure to subject a minor witness to cross examination should not be an automatic licence to acquittal of the accused. The entire prosecution evidence has to be evaluated. The issue is whether the court can still convict the accused without the evidence of the witness who was not cross examined. There is the issue which is also tied up to that of non-cross examination of a minor witness. This is where the minor is not subjected to Viore Dire examination and is allowed to give either sworn or unsworn evidence.

In the case of **LOONKOMOK V REPUBLIC, Mombasa Criminal Appeal No. 68 of 2015 (C.A)**, the court observed as follows:-

> ***"…….it follows from a long line of decision that Voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case…..***

The Court of Appeal in the above case further held that:-

> ***"in appropriate cases where Voire dire is not conducted, but there is sufficient independent evidence to support the charge, the court may still be able to uphold the conviction".***

In my opinion, where a minor witness gives evidence without undergoing Voire dire and where such a witness does undergo Voire dire but is not cross examined, such omissions should not render the prosecution case as fatally defective. The court should revert to the other

independent evidence and consider whether it is sufficient to warrant a conviction. The omission should not lead to an automatic acquittal.

In the current case, the issue is whether there was an attempt to defile the child. PW1 observed the child and saw that she had a swollen neck and mouth. The child had pains in her private parts. PW5, APC STANLEY MWEMA observed that the child appeared as if she had been strangled. She talked in low tones. She was not able to walk properly. PW6, A Clinical Officer noted that PW2 had tenderness of the lower abdomen and had difficulties in walking. All this independent evidence points to one conclusion, that there was an attempt to defile PW2.

On the issue as to whether it is the appellant who made the attempt to defile PW2, there is the evidence of PW1, PW3 AND PW4. The appellant slept in the house and left very early. Even if the evidence of the victim is left out, the other evidence is still sufficient to sustain a conviction. I am satisfied that the prosecution evidence proved the case beyond reasonable doubt.

In the end, I do find that the appeal lacks merit and is hereby disallowed. The 10 years imprisonment sentence is not harsh as it is the minimum sentence under section 9 (2) of the Sexual Offences Act.

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