REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 32 OF 2016.

G D B.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Senior Resident Magistrate Hon.

GATHOGO.S. delivered on 14/2/2012 in MOYALE Court Criminal Case No. 32 of 2016.)

JUDGMENT

The appellant was charged with the offence of defilement of a girl under the age of 11 years Contrary to Section 8 (2) of the Sexual Offence Act number 3 of 2006. The particulars of the offence are that the appellant on the 4th day of September 2011 at round 1600hrs in Marsabit County, willfully and unlawfully caused an Act of penetration to F.J, a girl aged 8 years by inserting his penis into her vagina.

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

1) The trial court misdirected itself by not warning itself on the danger of acting on the uncorroborated evidence of a single minor witness,

2) The trial court didn't evaluate the testimony of the complainant and didn't give reasons for finding the complainant as a truthful witness.

3) The trial court misdirected itself by concluding that the clinical findings were sufficient corroboration when such findings were devoid of any proof.

4) The trial court failed to appreciate that the medical findings were overwhelmingly inconsistent with the offence of defilement in that no injuries were found on the labia areas of the complainant. The broken hymen could have been done either earlier or after the alleged incident and no bleeding or lacerations were noted.

5) The trial court erred in law by admitting the medical evidence by a doctor from Sololo hospital.

6) The prosecution evidence particularly that of PW4 and PW5 has fundamental variations as to when the appellant was arrested.

7) The trial court erred and misdirected itself by concluding that the complainant was telling the

truth despite the fact that the complainant told no one of the sexual assault on 4th September 2011 her evidence was exaggerated, the appellant was not arrested on September 4th 2011 despite the opportunity to do so and that the complainant was taken to hospital three to four days after the incident.

Mr. Mukira appeared for the appellant. Counsel submit that the complainant was the only eye witness. The trial court failed to warn or caution itself on the dangers of acting on the evidence of PW1.Failure to give such warning is fatal to a conviction. Counsel relies on the cased of **CHILA VS REPUBLIC (1967) EA722** which case was cited in the case of **JULIUS KIUNGA M'BIRITHIA VS REPUBLIC, Meru high court Criminal Appeal 111 of 2011**. It is further submitted that although the proviso to section 124 of the Evidence Act empowers a court to convict if it believes the evidence of the victim, the court should give reasons for such beliefs. These reasons can be given when the trial court analyze and evaluate the evidence of the single witness and give reasons for believing that the witness is telling the truth. The trial court did not state the reasons as to why it was satisfied that the complainant was not lying. The trial court only assumed that because the complainant was a close relative to the appellant then she was not giving false evidence.

Counsel for the appellant further submits that the trial court sought collaborative evidence and relied on the clinical findings. According to the trial magistrate, the clinical findings were, "pointers" to the sexual assault. The main pointers were the torn hymen, and abdominal pains. No lacerations or signs of bleedings were noted. The medical evidence made an assumption that there was use of lubricant. This is purely speculation. The medical evidence is wholly inconsistent with the offence of defilement. There were no injuries found on the complainant's labia. If the hymen was torn, some bleeding could have been noted as alleged by the complainant. The alleged offence occurred on 4th day of September 2011 at about 4pm and the complainant was examined on 6th day of September 2011. The broken hymen could have been caused either prior or after the date of the incident. The complainant alleged that she bled but the doctors didn't find any signs of bleedings. The doctor made his own opinion that PW1 was in shock and that there was use of a lubricant.

There are multiple inconsistencies which raises doubt on the prosecution case. Counsel relies on the case of **CHRISPSINE WAWERU NJERI VERSUS REPUBLIC; VOI CR. APPEAL NO. 6 OF 2015 (2015) eKLR.** In that case the court held that the medical examination has to be done at the earliest possible time where there is no other eye witness and when there is delay in doing the examination questions would arise as to the person responsible for breaking the hymen and that the standard of proof in defilement cases is beyond reasonable doubt.

Mr. Mukira further contends that the P3 form was produced by PW3 who was not the maker of the document. There is no indication that PW3 knew the doctor or was familiar with his signature. Further, the date of arrest is not clear whether the appellant was arrested on 4th of September or 5th of September, or 17th of September 2011. The evidence on arrest is contradictory. Two witnesses by the name **OSMAN** and **JARSO** were mentioned to have arrested the appellant but none of them testified. It is possible that the appellant was arrested for reasons not linked to the alleged sexual offence. PW1 was the complainant. The incident occurred at her sister's home but the sister did not testify. At the age of 8 or 9 years old the testimony of PW1 is exaggerated and should not be believed. She testified that people answered her screams and they went to the house but this evidence seems to be false. The trial Magistrate lowered the standard of proof and adopted the standard used in civil cases which is on a balance of probabilities.

The state opposed the appeal. Mr. Chirchir submit that corroboration is not required in sexual offences. The trial court can convict on the evidence of the victim if such evidence is believable. There was no case of mistaken identity since the appellant is related to the complainant. The trial court conducted voire dire examination on PW1 and noted that she was well oriented in time and place. The trial magistrate explained its decision in the judgment. The medical evidence supports the prosecution case. Treatment notes were produced which state that a sexual act had been committed on PW1. The treatment notes and P3 form corroborated the evidence of PW1. The medical findings were not challenged or rebutted by the appellant. The doctor who filled the P3 form saw the appellant who was in pain and suffered from the

trauma she had undergone. The doctor observed that the initial treatment notes had confirmed that penetration had occurred by use of a lubricant. This opinion was based on an expert and professional assessement. It was not mere speculation. PW3 produced the treatment notes which he relied on. Section 77 (1) of the Evidence Act was complied with. The issue of the date of arrest is clear according to the record. The appellant could not have been arrested on 17th day of September 2011 because the plea was taken on 8th day of September 2011. They are anormallies on the date of arrest but this can be cured by section 382 of Criminal Procedure Code. The treatment notes show that PW1 was treated on 6th day of September 2011 which is about 48hours after the incident.

This is the first appeal and the court is required to evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. She gave unsworn evidence. She testified that she was nine years old and a standard two pupil. Her sister is married to the appellant's brother. On 4th day of September 2011 at around 4pm she was at her sister's house with the appellant. Her brother in-law was in the grazing field and her sister had taken food to him. She finished eating her food and went to put her plate on the table. The appellant followed her from behind and grabbed her on the mouth. He forcefully removed her pantie and took her to the bedroom. The appellant then defiled her. She cloud not scream because the appellant had blocked her mouth with his hand. She felt a lot of pain. The appellant then put on his trouser and started walking away. She tried to lock him in the house but he kicked the door and left. When her sister returned to the house she told her what had happened. She was taken to the police camp at Ambalo and later to the Sololo police station. She was then taken to Sololo Mission Hospital where she was examined and treated. She was bleeding from her vagina and was in great pain. When the appellant stopped gagging her mouth she screamed and that is when the appellant escaped when he saw people arriving outside the house.

PW2, KJ is the complainant's mother. She got information about the incident on 5th day of September 2011 at about 3pm. She went to the hospital with PW1 who was examined in her presence. PW1 told her that it was the appellant who had sexually assaulted her. PW2 knew the appellant who is a brother to her other daughters husband. **PW3, Doctor ISAAC KARUGU MWANGI** is a medical officer who was stationed at Moyale District hospital. He attended to PW1 on 8th day of September 2011 and filled a P3 form. PW1 had been examined at Sololo Mission Hospital where she had been treated. PW3 saw the treatment notes from Sololo Mission Hospital. It is his evidence that PW1 was in shock and could not reveal the time the event occurred. On examining her private parts there were no injuries on her labia. However, her hymen was broken. No bleeding was observed. Apparently a lubricant had been used hence the absence of bleeding and injuries on the genitalia.

PW4, APC Constable **MOHAMED OSMAN YUSSUF** was stationed at the Ambalo administration police post which is about 80 km from Sololo. On 4th September 2011 at about 5pm he was at the police post when a village elder by the name **JARSO** arrived at the station with a small boy. He informed him that the boy's sister aged 8 years old had been sexually assaulted by a youth. They proceeded to the scene. They saw the appellant a short distant away and the appellant started running away. They returned to the camp and waited until 17th September when the appellant was arrested. Regular police from Sololo police station went to the Administration Police Post and picked the appellant. **PW5, PC RICHARD MEBEI** was stationed at the Sololo police station on 5th September 2011 at around 4.30pm he was at the station when two police officers from Ambalo AP CAMP took the appellant to the station. The appellant had been arrested for the offence of defilement. Pw5 took over the investigations and escorted PW1 to Sololo mission hospital and then to Moyale district hospital. The age of PW1 was assessed and she was found to be between 9 and 10years old. He caused the appellant to be charged with the offence of defilement.

In his unsworn defence the appellant testified that he is a herdsman. He knows PW1 who is his relative. His brother is married to PW1 sister. On the material day he went out on his personal errands and when he returned home he was arrested by the administration police officers on suspicion of defiling the girl. He testified that it was true that he was in his brother's house but he was not with the complainant. The complainant was at her mother's home. His further evidence is that PW1 family has deep rooted differences with him and that is why he was framed.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. Counsel for the appellant has raised issue with the date of arrest. The incident took place on 4th September, 2011. The charge sheet gives the date of arrest as 6th September, 2011. The record shows that the plea was taken on 8th September, 2011. PW4 made reference to 17th September, 2011 as the date when the appellant was arrested. The handwritten record seems to have indicated 7th September, 2011 although there is a small line before the letter 7. The plain fact and sequence of events is clear. The charge sheet provides documentary record of the date of arrest. The appellant did not allege that he was arrested for a different offence. I do find that this ground of appeal lacks merit.

The other ground of Appeal is the evidence of PW1. According to the appellant, the evidence is exaggerated and not truthful. Counsel for the appellant submitted that the trial court ought to have given reasons as to why it believed PW1 yet she is a minor who gave unsworn evidence. The trial court conducted voire dire and found that PW1 could not testify under oath. The court followed the proper procedure. The trial court indicated that PW1 gave evidence on how the incident occurred. To use the words of the trial court, PW1 gave **"blow by blow account how the accused took advantage of their solitude in her sister's house and attacked her before forcefully penetrating her"**. The trial court also observed that the evidence of PW1 was corroborated by the clinical findings. Since there was corroboration of PW1'S evidence, there was no need to record reasons of believing PW1. Section 124 of the Evidence Act provides that if the **only evidence** is that of the victim. The presumption is that in such situation there will be no other evidence which supports the victim's allegation that a sexual offence has been committed. The presence of medical evidence is clearly **"other evidence"** and once a medical officer testifies and confirms that the victim was defiled, raped or sodomized, then the proviso under section 124 of the Evidence Act becomes inapplicable. Section 124 does not require that the other evidence must be that of an eye witness. Who in his sane mind would defile a child in public or in the presence of witnesses? I do find that there was no need for the trial court to give reasons for believing the evidence of PW1.

The evidence of PW1 is that the appellant is her relative. The appellant confirms that contention. It is clear that PW1 was at her sister's house. The appellant in his defence admitted being in the house but denied that the complainant was with him. The issue is whether PW1 was simply making wild allegations that she was defiled yet she was not. PW1'S allegations are confirmed by the medical evidence. The treatment notes from Sololo Catholic Hospital show that PW1 was attended to on 6th day of September 2011 at the hospital. The complainant's mother got the information on 5th day of September at 3.00pm: According to PW4, Ambalo is about 80km from Sololo. The delay to have PW1 examined by a medical officer is understandable. It is not always the case that a victim of Sexual Offence would be attended to at a medical facility immediately after the incident. The fact that two days lapsed before PW1 was examined does not lead to a conclusion that her hymen was broken within those two days or before the incident. There must be evidence to prove that allegation. It is not an automatic presumption that once there is delay in having the victim medically examined, then the perforation of the hymen can be held to have been done within the delayed period or before the incident. It is the medical officers who examine the victims of Sexual Offences. At times the medical officer's do indicate that the victim was already sexually active. There is no requirement that a defiled child's hymen must be torn or perforated to prove defilement. Penetration is defined under section 2 of the Sexual Offences Act as the partial or complete insertion of one's genital organs into the genital organs of another person. Partial insertion may not lead to perforation of the hymen.

The appellant contends that PW3 erroneously produced the treatment notes. The record shows that PW3 attended to the complainant on 8th day of September, 2011. PW1 went to Sololo District Hospital with her treatment notes from Sololo Catholic Hospital. There is no doubt that PW1 had been treated at the Catholic hospital. PW3 Physically saw PW1. I do find that the production of treatment notes cannot be faulted. I do acknowledge that Sololo Catholic Hospital is not a government institution to fall within the provisions of section 77 of the Evidence Act. However, PW3 is a doctor. He saw the history of the treatment on PW1 as recorded by another medical officer. This was two days after the treatment. The treatment notes bare the stamp of Sololo Mission Hospital. There is no evidence that these treatment notes had been prepared elsewhere and not at Sololo Mission Hospital.

It is submitted for the appellant that the medical evidence made wild allegations that there was use of a lubricant. The treatment notes from Sololo Mission Hospital made that observation. That was an expert opinion which was not the reason for the conviction. The trial court was not bound by that opinion and indeed did not make reference to it. The fact that no injuries were noted on the labia areas of PW1'S vagina does not mean that there was no defilement. It is not a legal requirement that a victim of a Sexual Offence must suffer lacerations, cuts, bruises or any other injury on the genital organs.

The evidence on record does prove that PW1 was with PW2 on the 4th day of September 2011 at the house of the PW1's sister. It is established by the evidence of PW1 and PW3 that indeed PW1 was defiled. The appellant's contention that PW1's family had a grudge with him does not disprove the fact that PW1 was indeed defiled. According to PW1, it is the appellant who defiled her. The incident took place during the day. PW1 knew the appellant. I am satisfied that it is the appellant who defiled PW1. PW1's age was assessed and found to be between 9 to 10 years. The appellant's age was assessed and he was found to be an adult. He should be held responsible for his actions.

The upshot is that the appeal lacks merit and is hereby disallowed.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 18 DAY OF DECEMBER, 2017.

S. J. CHITEMBWE

JUDGE.