



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 95 OF 2015

N N N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 771/13 at Siakago Senior Principal Magistrate's Court by A.N. MAKAU – Ag SRM on 4th July, 2014)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of ten years imprisonment imposed by the court of the Acting Senior Resident Magistrate at Siakago on 4th July 2014 on the alternative charge of indecent act against a minor child, following his acquittal on the main charge of defilement.
2. The appellant has listed seven grounds of appeal in his petition to this court. In ground 1, he has stated that he did not plead guilty. In ground 2, he has stated that his defence was rejected by the trial court although it was plausible. In ground 3, he has attacked the judgement because the conviction was based on the evidence of a single witness. In ground 4, he has stated that no exhibit was produced in court to support the charge upon which he was convicted. In ground 5, the appellant has stated that the medical evidence did not support the prosecution case. In ground 6, the appellant has stated that the prosecution had failed to prove the case against him beyond reasonable doubt. In ground 7, the appellant has stated that the court erred in both law and fact by not informing him of his constitutional right to an advocate and for further failing to assign to him an advocate at the government expense. These failures he asserts violated his fair trial rights in terms of **Article 50 (2) (g) and (h) of the 2010 Constitution of Kenya**.
3. The state through Ms Matere has conceded both the conviction and sentence pointing out that there were material contradictions in regard to which the trial court failed to make specific findings. She also added that the delay of one year on the part of the complainant to report to the police was an additional ground for conceding the appeal.
4. The complainant (PW 2 name withheld) was a nine year old student at the time of giving evidence in 2013. The offences were allegedly committed in the month of September 2012. According to the complainant, during one afternoon after returning from school she met the appellant. The appellant told her to go where he was cutting firewood in the bush. She says that the appellant was alone. Shortly thereafter the appellant removed his trouser and a pair shorts and he then proceeded to lie on a stone (rock). He then told the complainant to lie on top of him. Thereafter the appellant attempted to insert his penis into her vagina. He was unable to do so. It is also her further evidence that she felt pain but did not cry. The appellant then poured “milk” on her thighs. He then told the complainant to use her pair of pants to wipe herself. She then left and went home leaving the appellant to cut firewood.
5. Her further evidence is that she told her student friend (PW 5 name withheld) in respect of what

- the appellant had done to her. Like the complainant PW 5 was aged nine years old.
6. The evidence of the school teacher D M N (PW 4) was that when she was on duty a group of class four pupils went to the staffroom and all shouted in unison that the complainant “*told them that she engaged in sexual act with “Baba M”*”. She knew Baba M as her brother in law. This was on 7th August 2013 which was a year later after the offences were allegedly committed.
 7. Upon being placed on his defence the appellant denied committing this offence in his sworn evidence. According to him the charges and the evidence against him is both false and a frame up. He stated that he had not escaped or gone far away. His further evidence is that the complainant never told her friends in school about this defilement for a whole year. She also did not tell her mother about this incident. He denied seeing the complainant on the material date when the offence was allegedly committed. According to him D M N (PW 4) was his elder brother's wife with whom he had grudges arising from family issues. He also adds that there were family grudges between himself and the family of PW 5. Under cross-examination, he confirmed that he had no grudges with PW 5, also a minor student pupil.
 8. This is a first appeal. As a first appeal court, I am required to re-assess the entire evidence and come to my own independent conclusions according to ***Peters v Sunday Post Ltd (1958) EA 424***, while deferring to findings made by the trial court based on the credibility of the witnesses. I have done so. Having so I find from the evidence that the trial court properly conducted a *voire dire* examination in respect of the minor children who testified as PW 2 and PW 5. I also find that the trial court fell in error in law in finding that the complainant was a truthful witness. The reasons for this are as follows. The trial court failed to resolve material contradictions in the evidence of the prosecution witnesses. Firstly the complainant (PW 2) told the court in her evidence in chief that she did not tell her mother that the appellant had defiled her.
 9. Under cross-examination the complainant stated that she told her mother that the appellant had defiled her the following day after the alleged commission of that offence. This contradiction was not considered by the trial court. There was no finding made on that issue by that court. Furthermore, the trial court also failed to consider the evidence of PW 5 who was a close friend of the complainant. According to the complainant, she told PW 5 about the defilement in August 2012, a year later after the commission of the offence.
 10. The evidence of PW 5 in this regard is that the complainant told her about the defilement in a year later in 2013. This was a material evidence that should have been addressed by the trial court. Furthermore, the trial court also failed to take into account the evidence of the investigating police officer No. 93590 PC (W) Agnes Atolo (PW 6) who stated that the complainant told her that the appellant penetrated her vagina . This evidence is contradicted by that of Dr Godgrey Njuki Njiru (PW 1). According to the doctor, the hymen of the complainant was intact and according to his examination, there was no evidence of penetration of the vagina. This was also another material contradiction in the prosecution evidence.
 11. The trial court also fell in error in law by failing to administer a warning upon itself in view of the fact that the complainant was a minor, whose evidence was not corroborated. It is a requirement of the law according to the Court of Appeal in ***Kibangeny Arap Kolil v. R (1959) EA 92*** that a trial court is required to warn itself on the danger of convicting upon the evidence of minors without corroboration. The trial court also fell in error in law in acquitting the appellant on a charge of defilement. According to ***Kantilal Jivraj v. R (1961) EA 6***, a trial court is under a duty not to make any finding in respect of the main charge, when it proceeds to convict on the alternative charge. The reason for this is that a trial court in Kenya sits both a jury and as a court of law. As a jury the trial court may find the accused guilty or not guilty of the offence charged. Thereafter as a court of law, the court may then proceed to convict and sentence the accused or acquit the accused of the offence charged and set him free. This is the common law practice which is applicable to this country by virtue of the reception clause in section 3 of the Judicature Act (Cap 8) Laws of Kenya, which imported the English common law doctrines of equity and the English High Court rules of procedure and practice into this country.
 12. The combined failures of the trial court in assessing the material contradictions in the evidence of the prosecution witnesses and the failure to warn itself on the dangers of convicting on the uncorroborated evidence of the minor complainant (PW 2) have compelled me to agree with Ms Matere that this conviction cannot stand.
 13. In view of the foregoing, I hereby quash both the conviction and sentence imposed on the

appellant. He is therefore set free unless held on other lawful warrants.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this 23rd day of February **2016**

In the presence of the appellant and MS Mbae for the State.

Court clerk Njue

J.M. BWONWONGA

JUDGE

23.02.16.