REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCR NO.9 OF 2015

SAMWEL MOMANYI NDUBI……….………………APPELLANT

-VERSUS-

REPUBLIC…………………………………...………RESPONDENT

J U D G M E N T

Introduction

This is a criminal appeal by Samwel Momanyi Ndubi against the judgement of Senior Principal Magistrate, delivered on 27th June, 2012 in **Nyamira Criminal Case Number 786 of 2011** on charge of Defilement, contrary to **S. 8 (1), (2) of the Sexual Offences Act No.3 of 2006** on the 5th day of November, 2011 at [particulars withheld] in Nyamira District within Nyamira County, intentionally caused his penis to penetrate the vigina of D N, a child aged 6 years.

There was also an alternative charge: committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, No. 3 of 2006.**

The particulars thereof were that on the 5th day of November 2011 at [particulars withheld] in Nyamira District within Nyamira County unlawfully and intentionally touched the private parts namely vagina of D N a child aged 6 years

The Appellant's Appeal

Being dissatisfied, and aggrieved with this court decision, the accused has filed an appeal against the said conviction and sentence. In his petition dated 9th July 2012, he raises the following grounds:

1. **The learned trial Magistrate erred in law and fact when she convicted the Appellant on the charge of defilement under section 8 (1) & (2) of the Sexual Offences Act when there was no proof of same.**

2. **The Learned Magistrate erred in not finding that alleged bruising of the buttocks and anus did not constitute an offence under Section 8(1) & (2) of the Act.**

3. **The Magistrate erred in law and fact when she acted prosecutor herself in explaining why crucial witnesses, to wit, the Doctor (who under-completed the P3 form) and the investigating officer (who did not attend court so testify) and baselessly proceeded to accept their findings with a view to securing the Appellant's conviction.**

4. **The learned trial Magistrate erred in law failing to appreciate that the medical evidence that was sneaked onto the record did not contain crucial and mandatory findings on "Section C, 4" of the P3 Form – under the heading: male accused of any sexual offence;" particularly as the defence evidence pointed to the Appellant being a Eunuch or a case of complete sexual inactivity and erectile dysfunction.**

5. **The trial court ought to appreciate and duly weigh the existence of a vicious grudge on the part of PW2 (the complainant's mother) against the Appellant over PW2's illicit liaisons.**

6. **The Magistrate unlawfully took and accepted the evidence of PW1 a child of tender years.**

7. **The learned Magistrate unlawfully accepted the allegation that there existed "sperms" on PW1 without medical evidence at all.**

8. **The learned Magistrate ought not to have sentenced the Appellant.**

The learned counsel Nyatundo for the appellant filed his written submissions dated on 25th November. He analyzed the testimonies of the witnesses, from PW1- the complainant – to PW4 –the medical officer.

The counsel further submitted that throughout the trial, the evidence for the prosecution did not support the charge, in that there was no mention of the penis or any other genitalia of the appellant, penetrating the genitalia of the complainant as required by the provisions of **S.8 (1) (2) of Sexual offences Act**, that section requires the prosecution to prove the insertion of the genitalia organ of the appellant into the genitalia organ of the accused, either fully or partial. That was not so in the instance case.

Second that the complainant told the court that whatever the appellant did to her was done in the buttocks, not in the vagina.

And therefore because the charge stated that defilement was done to the vagina, the prosecution needed to show that the appellant did the defilement on vagina, not buttocks.

Third, the trial magistrate imposed the findings that there were sperms and yet the P3 form and all the medical evidence confirmed that there were no laboratory tests conducted. Thus the trial magistrate's findings was arbitrary.

Fourth, that the mode of checking the area around the complainant's anus was not clearly spelt out. Nobody informed the court the mode of checking bruises that the same could have been inflicted by those who were checking the private parts of the complainant.

Fifth, for the above reasons, this court is urged to quash the conviction and set-aside the sentence.

<u>Opposition by the State</u>

The learned counsel Malesi, opposed the appeal and submitted as follows:

The lower court satisfied the ingredient of this particular offence. The word genital organs includes the whole or part of male or female genital organs and for purposes of this act, includes the anus.

Therefore if the appellant did his heinous activities from behind – in the anus –and not infront in the vagina, he is well within the requirement of the offence as stated in the charge sheet.

Second, therefore when PW1, said the appellant "***did bad things to me"*** by pointing to her rear part, she meant the anus. This is also corroborated by **P3 form page 35**. Therefore this confirms that penetration did occur.

Third, on grounds 2 of the petition, it is clear on circumstantial evidence that indeed forced penetration

occurred.

Fourth, on grounds 3 & 4 of the petition, although Dr. Bosire did not herself conduct the examination, she lawfully, produced it in court in the absence of the actual author or whole handwriting she was familiar with.

The duty of the first appellate court

The first appellate court is to read the testimonies of the witnesses and to reconsider their evidence, evaluate it and draw its own conclusion in dependently in deciding whether the judgment of the trial court should be upheld, taking into account that it neither saw nor heard the testimonies of the witnesses ***[see Okeno –vs- Republic [1972] EA32.***

Finding and Determination

The main issue for determination before me is whether the conviction of the appellant for the defilement contrary to **Section 8(1)** as read with **S. 8 (2) of the Sexual Offences Act No. 3 of 2006** is sustainable on the strength of the evidence adduced in the lower trial court?

The critical ingredients forming the offence of defilement are:

- **Age of the complainant**
- **Proof of penetration**
- **Positive identification of the assailant**

The age of the complainant is confirmed by the mother, PW2, at **page 22 (19)**, last sentence. There is no reason to doubt her on the age of her child. Even if she were 5 years, it would not absolve the appellant. However, an age between 16, 17 years, could creep to 18 years, thus giving a different complexion to the offence of defilement. Therefore a requirement that the proper scientific assessment of age is but a legal necessity.

On the issue of proof of penetration. This court takes the view that penetration was achieved, by manifestation of bruises around the anus, a mark of forced penetration. ***[See Migori High Court Criminal Appeal No.14 of 2015 GOO –vs- State by A.C. Mrima –J.*** Here the court held:

> **"…….Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration or whether only on surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ……."**

This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

On the issue of identification, in the instance case, it was not necessary as the assailant is a father to the child. It is the issue of recognition rather than identification. The assailant lured easily the complainant that he would buy her kaa ngumu (some type of bun) and the complainant obligingly went in expectation of the bun and knowing that it was his dad asking to accompany him. It was, however, the father whose intention were diabolical and nefarious, who knows what he wanted to do to his daughter. The appellant can only be described a sexual predator and paedophile.

For the foregoing reasons, this court finds that the appellant was properly found guilty of defilement and convicted accordingly.

Consequently this appeal be and his hereby dismissed.

Dated at Nyamira this 14th day of March, 2016.

C.B. NAGILLAH

JUDGE

In the presence of:-

Nyamwange hold brief Nyatundo for the appellant

Malesi for the Respondent

Mercy -Court clerk