



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CRIMINA APPEAL NO. 16 OF 2015
ALEX ABUGA MONYONCHO.....APPELLANT
-VERSUS-
REPUBLIC.....RESPONDENT

J U D G M E N T

This is a criminal appeal by **ALEX ABUGA MONYONCHO**, the appellant herein.

The appellant was first charged for defilement contrary to **Section 8 (1)** as read with **sub-Section 3** of the **Sexual Offences Act, No. 3 of 2006**.

Particulars thereof were that on the 13th day of September 2012 in Borabu District, within Nyamira County intentionally and unlawfully caused his penis to penetrate the vagina of **L N** a child aged 12 years.

The appellant denied the charge and subsequently a trial proceeded on. The accused, **ALEX ABUGA** was found guilty and convicted of the offence of defilement under **Section 215** of the **Criminal Procedure Code**. He was then sentenced to serve (20) twenty years imprisonment.

The accused being dissatisfied and aggrieved has filed an appeal against both conviction and the sentence of the learned magistrate at Keroka, **Criminal Case, No.1183 of 2012** delivered on the 1st September, 2015.

By his petition dated 2nd September, 2015, then filed in Kisii High Court, but later transferred to Nyamira High Court.

He sets out several grounds of his appeal in his said Petition. These are:-

1. The learned magistrate erred in law and fact by failing to appreciate the fact that no evidence was tendered as to the age of the victim
2. The learned magistrate erred in law and fact by not taking into consideration that the potential witness an **Aunt G** was not called as a witness.
3. The learned magistrate erred in law by not applying **section 200** of the **criminal procedure Act chapter 75**.
4. The learned magistrate erred in law and fact by believing the evidence of the victim a person of tender age without any corroboration of evidence e.g. state that did not meet anybody while she

met **D**.

5. The learned magistrate erred in believing the evidence of the victim without any material evidence.
6. The learned magistrate erred in believing P.W.2 (mother of the victim) when the victim took a bath.
7. The learned magistrate erred in believing the clinical officer who estimated the age of the victim.
8. The learned magistrate erred in believing the arresting officer who stated that the OB has errors.
9. The learned magistrate erred in relying on the medical records that were having errors.
10. The learned magistrate erred in law and fact by relying on unsigned medical documents
11. The sentence imposed was manifestly harsh and excessive in the circumstances.

The Appellant's Submissions

The hearing of the appeal commenced on 24/02/2016.

The learned counsel, Nyamwange, submitted that:-

1. The learned trial magistrate's failure to call **G**, the aunt of P.W.1- to give evidence was an error.
2. The items mentioned at page 6 of the record of proceedings ought to have been investigated.
3. The age of the minor was not ascertained by production of any documentary evidence. The mother was not asked to give the age of the victim.
4. P.W.2's evidence touching on pants and insertion of (P.W.1's) private part into the victim's private part is but hearsay and has no probative value.
5. The issue of sperms and watery pants were not examined nor produced in court. This was crucial to this case, its absence, diminishes the case's probative value.
6. The evidence of P.W.2- the mother is at variance with the evidence P.W.1. Therefore the trial magistrate failed to appreciate the variance.
7. The magistrate ought to have noticed that the names were tampered with, and therefore could have arrived at different conclusion.
8. The evidence was disjointed, at variance and was not corroborated.

Therefore I urge the court to allow the appeal and set-aside both the conviction and sentence.

The Respondent's Submissions

The learned counsel, Malesi opposed the appeal as follows:

1. On assertion that Grace, the aunt to the victim ought to have been called to give evidence, as at page 4 of the record. G did not witness the commission of the offence. She had nothing useful to contribute to this case.
2. The issue of the pant not being produced. In Sexual Offences, the failure to produce the medical

evidence in itself is not fatal to the prosecution case. P.W.3 – the Clinical Officer examined the victim and returned the conclusion that there was penetration and ejaculator. P3 form was produced as an exhibit.

3. On the issue of age, of the victim, that no documentary evidence to prove age was produced. I submit that the prosecution need not a document to prove age: *See the judgement of David Kiso – vs- Republic 2016 e KLR.*

The complainant repeats her age to be 12 years, at page 2 and 3 of the record.

I submit that the issue of age was not in doubt.

4. The issue of uttering treatment document. The booklet was not admitted in evidence. It was only marked for identification. At page 9 of the record P.W.2, clearly stated that the booklet was not being used for the first time.
5. In respect of grounds 4 & 5 of the petition are diminished by **Section 124 of Evidence act**, where corroboration is unnecessary in Sexual offences cases.
6. In respect of ground 3 of the petition, I submit that the entire proceeding complied with **Section 200 of CPC.**
7. Therefore, for reasons adduced in my submissions, the conviction was lawfully and/or rightly passed for the mandatory sentence under **Section 8 (3) of the Sexual Offences Act.**
8. I therefore oppose the appeal and pray for conviction and sentence be upheld.

The duty of the first appellate court

It is a requirement that the first appellate court is mandated to reconsider, and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witness, before making a determination of its own . See, **Okeno –vs- R [1972] E.A. 32.**

The proceedings in the lower court and testimonies

PW1 – L G N is the complainant narrated how the appellant lured her to his house where he raped her forcefully and through intimidation.

PW2 – E M N is the mother of the complainant – PW1, supra. She admits having sent her daughter to deliver tea at the buying centre, 30 – 35 meters away. She had often sent her to the centre in the past.

PW3 – Joel Ogaro, a registered clinical officer at Kijauri level 4 hospital. He examined her genitalia. The hymen was broken and cervical was closed. She had a whitish vaginal discharge. He did VRDL test for syphilis and HIV test – fortunately, it was non reactive. He did HVS and found pus cells with spermatozoa. He concluded there was penetration and ejaculation. He authored P3 form.

PW4 – Force No.2005014232 APC Victor Morara of Ratigo Post arrested the accused and took him to Manga Police Station.

PW5 – Force No.34789, CPL Pascal Mwema – Investigating Officer in this case.

PW6 – a laboratory technician at Kijauri hospital. He carried out lab tests and PW1 and the accused. He confirms having found spermatozoa on PW1 and also carried out pregnancy test which was negative. Exhibit 4 referred to the accused person – test results. Exhibit 4b referred to the PW1's test results.

Findings and determination

On submissions, I agree with the respondent's submissions on three areas:

- i. Failure to produce the pants is not fatal. This is rebutted by PW3 – the clinical officer's examination of PW1 and his conclusion that there was penetration, ejaculation and spermatozoa.
- ii. Failure to produce documentary evidence to support age is not fatal especially where age was not in contention. PW1, PW2 and PW3 gave the age to be 12 years. See the judgment of **David Kiso – vs- Republic [2016] e KLR.**
- iii. **Section 124 of Evidence Act** in respect a minor victim need not be corroborated.

On re-evaluation of the proceeding of the lower court by this court on testimonies of all six witnesses, leads me to find the witnesses, in their various testimony, proved beyond reasonable doubt that the accused intentionally defiled a minor **L G N** then aged 12 years. I therefore find that this appeal has no merit.

Accordingly, the appeal or the petition of appeal dated 2nd September, 2015 be and is hereby dismissed.

Orders accordingly.

Dated and delivered at Nyamira High Court this 22nd day of April, 2016.

C.B. NAGILLAH

JUDGE

In the presence of:

Nyamwange for accused person

Konga for the State

Mercy Court clerk