REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 100 OF 2014

JOSEPH LESINIK SEKEL …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from conviction and sentence in original Nanyuki CM Criminal 603/2014 delivered on 11/12/2014 by T.W Cherere Chief Magistrate)

JUDGMENT

The appellant **Joseph Lesinik Sekel** was charged in the Magistrate's court with the offence of defilement contrary to section **8(1)** as read with section **8(2)** of the sexual offences Act; **Act No. 8 of 2006**. The particulars of the offence are that on the 23rd day of June, 2014 at about 0930hrs in Laikipia county in the Republic of Kenya intentionally caused his penis to penetrate the vagina of R A a girl aged 3 years.

The appellant faced an alternative charge of indecent Act to a child contrary to section 608 the sexual offences Act No.6 of 2006. The particulars of the offence are that on23rd day of June 2014 at about 0930 hours in Laikipia County unlawfully and intentionally did an indecent act to R A by touching her private part namely vagina.

After a full trial the appellant was found guilty of the main charge convicted and sentenced to serve life imprisonment. He was dissatisfied with the conviction and sentence and preferred this appeal. He raised five grounds of appeal in his amended petition of appeal. He faulted the trial magistrate for finding her guilty when the offence was not proved beyond reasonable doubt; that the evidence of the prosecution witnesses was riddled with inconsistencies and contradictions; that the trial magistrate disregarded appellants defence without proper reasons; and failing to notice that the prosecution was due to his failure to pay the complainants mother the cash she demanded.

The evidence before the trial magistrate was that on 26/3/2014 R L left her children R A 3 ½ years old and W E aged 7 years at home and went to work. When she came back she found the complainant who informed her that the appellant who was known to her had defiled her. She took the complainant to the Dispensary where she was attended to and reported the matter to police.

PW3 the minor complainant testified that on the material day she had been to a place where children ride camels when the appellant went there and told her to take him to that house. They …….. once in the house the appellant

"**brushed the thing he used to urinate on the thing I use to urinate**" the appellant then gave her Shs.5 to go and buy a sweet. When her mother came, she reported to her. The complainant was examined by Dr. Omeoda who filled the P3 form. When the appellant was put on his defence he gave sworn evidence

where he stated that he was arrested from his home at 7pm on 26/6/2014 and later charged with the present offence which he knew nothing about. That was the evidence before the trial magistrate.

The appellant in his written submissions submitted that the medical evidence showed that there was no penetration which is an important ingredient for the offence of defilement. Secondly he submitted that there was no documentary proof of the age of the age of the complainant and that the medical report produced was filled 3 months after the alleged offence. Thirdly the appellant submits that there are inconsistencies and contradictions in the prosecution evidence and in particular the date when offence occurred whether it was on 26th March, 2014 as the witnesses state or 23rd March, 2014 as per the particulars of the charge sheet. Finally the appellant submitted that the trial magistrate did not consider his evidence and that the learned trial magistrate relied on prosecution evidence which was shaky and riddled with contradictions.

Mr. Njue for the state supported the conviction and sentence. He submitted that the age of the complainant can be ascertained by other means other than documentary evidence except in border-line age cases where documentary evidence may be required. He submits that though the doctor stated there was no penetration, the court found evidence of the same; as there was inflammation of labia minora. He submitted that the appellants defence was considered as can be seen from the judgment but same was dismissed.

This is a first appeal. The dates of the first appellate court was clearly stated in **Ekeno – VS – Republic 1972 EA**. It is the duty of the first appellate court examine the evidence and make its own conclusion but taking into account that they never saw or heard the witnesses.

The appellant in his ground of appeal contended that penetration which is vital ingredient of the offence was not proved. The complainant in her evidence stated

> **"When we went to the house he brushed the thing he uses to urinate on the thing I use to urinate. I felt pain and Joseph gave me Shs.5 and then went away**".

The P3 form produced by PW5 Dr. Isaac Naliura showed that the complainant had injuries to outer part of the vagina and inflammation of labia 'minora' but was inclusive of penetration. The hymen was intact. Penetration is defined in section 2 of the Sexual offences Act.

> ***"Penetration' means the partial or complete insertion of the genital organ of a person into the genital organ of another person"***

The evidence adduced shows that there were injuries to the outer part of the vagina and inflammation of the labia majora. The learned trial magistrate analysed the evidence and found, rightly in my view that there was penetration in the vagina of the complainant.

The appellant raised the issue that the age of the complainant was not proved as no documentary evidence was tendered to show that she is 3 years old. The complainant told the court that she is 3 years old; PW2 R L the complainants mother gave the age as 3 ½ years; the medical report indicates that the age of the complainant is 3 years. All these witnesses in my view were clear that the complainant was 3 years old or thereabout. I do not find in view of such in contradicted evidence that it was mandatory that a certificate of birth be produced to establish her age.

The appellant submitted that the prosecution evidence was full of contradictions and in particular the date when the alleged offence occurred. He submitted that the complainant's mother PW1 testified that the offence was committed on 26/3/2014 and yet the particulars of the offence in the charge sheet indicates offence was committed on 23/3/2014. PW1 testified that the offence occurred on 26/3/2014; PW2 M W testified that it was on 23/6/2014 at about 10am. PW3 E W M stated that it was on 23/6/2014 and the police officer PW6 P.C Elias Ladubai stated that the report was made to Ngobit police station on 23/6/2014. The particulars in the charge sheet indicate that the offence was committed on 23/6/2014. From all the above it is clear that the offence was committed on 23/6/2014 and the evidence of PW1 the

complainant's mother making reference to 26/3/2014 was an error which in my view did not discredit her evidence. I do find that the offence was committed on 23/6/2014 as appears in the charge sheet.

The appellant lastly contends in his submissions that his defence was not considered by the trial magistrate. The appellants defence was brief. He stated

> ***"I was arrested from home about 7pm on 26/6/2014. I was later charged with an offence that I know nothing about. I did not defile complainant as alleged***"

The trial magistrate in her judgment considered the appellants evidence and stated

> **"After an analysis of the complainant's evidence as stated herein above accused's evidence in its entirety".**

It is not therefore correct that the defence evidence was not considered. Indeed it was and was rejected.

Upon careful consideration of the appeal and submissions, I find that the appellant was properly convicted based on evidence. I therefore find no merit in the appeal; which is hereby dismissed. I uphold the conviction and affirm the sentence.

Dated at Nyeri this 21st day of April, 2016.

S N RIECHI

JUDGE