



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 33 OF 2015

PETER OCHIENG AMIMO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Tamu

(Hon. M C. Nyigei RM) dated the 29th October 2014 in Tamu SRMCCRC No. 11 of 2014]

JUDGMENT

The appellant was found guilty and convicted on a charge of defilement contrary to section 8(1)(2) of the Sexual Offences Act and sentenced to life imprisonment and being aggrieved he has appealed against that conviction and sentence.

Briefly the facts of the case were that on 10th July 2014 at about 6.30AM the complainant a child aged 3 years went into the appellant's house just as he was preparing breakfast. They were just the two of them in the house. He removed her skirt and put her on his bedding on the floor and defiled her. According to her, he "put his dudu into her buttocks where I pass urine". He then gave her a banana and told her to go eat it with her brother T. Abraham Simiyu (PW2) the appellant's co-worker who lived next door had seen the child going into the appellant's house and heard the appellant and the child talking and when the conversation ceased he decided to look through a hole in the iron sheet wall separating their houses. That is when he saw the appellant removing his belt and trouser and then putting the child on a mattress and then lying on her. He also saw him insert his penis into the child's vagina. He quickly called David Wesonga (PW3) another neighbour and co-worker to go and see but by the time he peeped into the appellant's house it was dark as the appellant had closed the door and the house was dark and so he could not see anything. When the appellant opened the door both Simiyu (PW2) and Wesonga (PW3) saw the house inside and asked her what had happened. Initially she was very reluctant to disclose what had happened but with a little prodding she told them the appellant had defiled her. Her father, PW4, who had gone to the shop to buy sugar and mandazi leaving his wife and children in the house returned happened on the three of them (PW2, PW3 and the appellant) talking but was going to deliver beans to his employer and so did not stop to hear what they were saying. Upon going back and hearing what the appellant had done to his daughter he took him to Koru police station and made a report. He then took the child to Muhoroni Sub-District Hospital. She was examined by Clinical Officer Dorothy Aseyo (PW5) who confirmed that she had been defiled. The appellant was subsequently charged.

To prove the age of the child the prosecution tendered a Mother and Child Health Booklet showing the child was born on 5th December 2010. A P3 form evidencing penetration was also produced.

In his defence the appellant testified that on that day he had woken up at 4AM and left to water his

tomatoes. He then returned to his house to prepare for work. He contended that the complainant's father was not happy that it was him (the appellant) who had solicited for the work. He stated that he did not know the complainant and her parents well as he had only lived there for 1 ½ months. He denied he defiled the complainant and attributed the allegations made against him to work related disputes between him and her father. He admitted that Simiyu (PW2) and Wesonga (PW3) were his neighbours. He also stated that he was married and lived with his wife at the material time.

His Petition of Appeal raised the following five grounds:-

- 1. That the learned trial magistrate erred in law and facts by failing to notice that penetration was not proved by the medical officer according to P3 form which was availed before the trial court.**
- 2. That the learned trial magistrate erred in law and facts by failing to observe that the case was framed against him because of land dispute.**
- 3. That the learned trial magistrate erred in law and facts by not appreciating that the case against him lacked prove beyond reasonable doubt from the prosecution.**
- 4. The learned trial magistrate erred in law and facts by not observing that the investigation done to this case was shoddy as required by law.**
- 5. The learned trial magistrate erred in law and facts by failing to observe that there was a lot of contradiction among witnesses in this case.**

At the hearing of this appeal the appellant relied on his home made written submissions in which he stated that the trial magistrate erred by relying on the evidence of a single identifying witness without first warning herself on the dangers of relying on the evidence of a single identifying witness. He argued that PW2 claimed that he was able to see him (the appellant) defiling the complainant through a hole in the iron sheet wall but PW3 stated that he was not able to see anything as it was dark. The appellant relied on the case of **Abdallah Bin Wendo vs R [1953] EACA 20**. The appellant submitted further that the medical evidence adduced in court was unsatisfactory as it did not link him to the offence. That there were no further medical tests carried out as such as DNA test to link him to the offence. The appellant told the court that the whole matter was orchestrated by a dispute that existed between the victim's father and himself and thus the trial magistrate erred in failing to consider that in arriving at her judgment. He also faulted the trial magistrate for shifting the burden of prove to him.

The state opposed the appeal. The learned state counsel told the court that the victim was a three year old child and the medical officer who examined the child indeed confirmed that the child had been defiled and proved the ingredient of penetration. PW1 was able to identify the appellant as the culprit by name and her evidence was corroborated by PW2's testimony. PW2 saw the appellant in the act. Counsel submitted that the prosecution had proved its case beyond reasonable doubt and termed the appellant's submissions as mere denials.

As the first appellate Court I have reconsidered and evaluated the evidence adduced at the trial by both sides so as to arrive at my own conclusion. There is plausible evidence that the child victim was 3 years old at the time of this incident. There is also cogent evidence that on the morning of the alleged incident the child was seen entering the appellant's house by PW2 . Indeed PW3 even saw the appellant removing his trousers and lying on the child and inserting his penis into the vagina of the girl. That PW3 confirmed being called by PW2 and also peeping into the house but not seeing anything as it was dark only goes to confirm PW2 is a truthful witness. It is noteworthy that the appellant although he attributed his woes to the girl's father did not in any way discredit the evidence of these two witnesses. He admitted that they were his neighbours. On my part I found them credible and reliable. Whereas the evidence of a victim of a sexual offence requires no corroboration that of the complainant in this case was corroborated by these two witnesses as well as by medical evidence. The girl gave a vivid description of what the appellant did to her and I believed her. The trial magistrate fully considered the appellant's defence. Like

her I do not find that it

shook the prosecution's case in any way. The charge against him was proved beyond reasonable doubt. The sentence was also lawful being the minimum prescribed by the law.

Accordingly his appeal is dismissed and the conviction and sentence are upheld.

Signed, dated and delivered at Kisumu this 21st day of April, 2016

E. N. MAINA

JUDGE

In the presence of:-

Wakio for the state

Appellant in person

CC: Felix Magutu