REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 1 OF 2015

(Being An Appeal Against Conviction And Sentence In Narok Criminal Case No. 1092/2014 – T. A. Sitati Ag Srm)

SAMUEL KORGOREN METIT…..…….APPELLANT

-VERSUS-

REPUBLIC…….RESPONDENT

J U D G M E N T

1. The Appellant herein was tried before the Chief Magistrate's Court Narok for the offence of Defilement contrary to Section 8(1), as read with Section 8(2) of the Sexual Offences Act. The particulars stated that on the 22nd June 2014 at 1700 hrs at [particulars withheld], Narok South District of Narok County, intentionally and unlawfully caused his penis to penetrate the vagina of **M. C.** a child aged eleven (11 years).

2. At the close of the trial, the Appellant was found guilty and convicted. He was sentenced to serve life imprisonment. On the eve of the hearing of the appeal, the Appellant filed amended grounds of appeal.
3. Grounds 1 and 4 challenge the prosecution evidence upon which the conviction was based, while in ground 5 the Appellant complains that his defence was not accorded proper consideration. In grounds 2 and 3, the Appellant complains that crucial witnesses were not called to testify.

4. The Appellant relied on his home-made submissions in support of the appeal. In regard to the 1st, 2nd and 3rd grounds, the Appellant contends that the medical evidence adduced at the trial did not support the alleged penetration of the minor. Moreover, that no samples were taken from him or P3 completed in respect of his examination by the clinical officer **PW3**.

5. He highlighted the victim's failure to report the defilement to her grandmother who allegedly delayed in taking action as evidence that tends to disprove the defilement. He argues that failure to call an eye witness, one Elijah, and others, including a chief rendered the prosecution case weak.

6. He contends, with respect to ground 4 and 5 that medical evidence tendered could not, absent positive samples, be conclusive evidence of defilement. That it was not enough that the victim's P3 form indicated swelling of the vulva. He also complains that he did not get sufficient time after being placed on his defence to prepare a defence and that his defence was dismissed without good reasons.

7. Appearing on behalf of the DPP, Mr Kibelion opposed the appeal. He reiterated the evidence of the Complainant observing that she was known to the Appellant. He stated that the medical evidence adduced through **PW3** confirmed, not only the age of the victim, but also penetration. He took the position that the conviction was safe and sentence legal.

8. The first appellate court is obligated to subject the trial evidence to an exhaustive re-evaluation in order to draw its own findings. While so doing, the court must bear in mind that the trial court had the opportunity to hear and see the witnesses testify. The appellate court will not interfere with findings of fact based on the credibility of witnesses unless those findings are plainly wrong and no tribunal properly applying its mind could have made them. (**See Ajode -Vs- Republic (1972) E.A 32; Okeno -Vs- Republic (1973) E.A. 32)**.
9. The prosecution case at the trial was that the Complainant **M.C (PW1)** was an orphaned girl aged about 11 years. She lived at Tenduet with her grandmother **R.K (PW2).** The Appellant also lived in the same place. On 22/6/14 at about 2.00pm, **PW2** dispatched **PW1** to the posho mill with maize for making maize meal. At about 5.00pm **PW1** was queuing for her turn at the posho mill when the Appellant whom she knew as "Mr. Samuel" came and asked her to accompany him to his house to get some maize for milling.

10. **PW1** walked with the Appellant through a place **PW1** referred to as "Alexander's forest" which had many trees. The Appellant pulled her into a thicket. After pushing her to the ground, undressing her, he penetrated her. When some passersby came by, the Appellant ran away. **PW 1** returned to the posho mill and collected her flour.

11. It was on the next day that she reported to **PW2** who told her she already knew about the incident. The matter was reported to the chief. The Complainant was examined by **PW2** and later by the doctor after reporting the matter to police. The Appellant, whose name had been given to **PW2** was arrested.
12. In an unsworn defence statement, the Appellant confirmed that he resided at Tenduet. He testified that he was away in Mulot on the material date returning home on 23/6/14 and was surprised to be arrested two days later. He denied committing the offence.

13. I have considered the evidence at the trial in light of submissions made on this appeal. Firstly, there is no dispute that the Appellant lived at [particulars withheld] where the Complainant lived with her grandmother **PW2**. The parties were well known to each other.

14. Regarding the opportunity for defilement, **PW2** confirmed that she had sent **PW1** on an errand to the posho mill on the material date and that she delayed in returning home. This evidence confirms **PW1's** evidence regarding her whereabouts prior to the offence.

15. The Complainant stated that the Appellant lured her away from the posho mill at 5.00pm by pretending that he wanted to give her some maize to mill for him. That on the way there, he took advantage of a forested part of "[particulars withheld] " to knock down and defile the minor.
16. The evidence tendered by **PW3** confirms indeed that there was penetration. There is no requirement that only findings based on analysis of samples taken from a defilement suspect and victim can prove penetration, even though that may be useful in identifying the assailant.

17. Penetration is defined in Section 2 of the Sexual Offences Act as follows:

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

18. In the case of **Uganda Court of Appeal in Twehangane Alfred -Vs- Uganda Criminal Appeal No. 139 of 2001, (2003) UGCA 6** which has been severally quoted with approval by the Court of Appeal in Kenya, the court stated regarding penetration that:

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ**

is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

19. **PW3** examined the Complainant on 27/6/2014. He observed on the genitalia the "swollen vulva and redness of vagina…" The fact that there were no tears or laceration to PW1's genitals, or that there was no indication that the hymen was breached does not exclude penetration. Equally, that **PW1** delayed in reporting the incident to her grandmother **PW2** does not by itself mean that she lied. Besides, when **PW2** examined **PW1** physically on receiving her report, she noted swelling and inflammation on the genitalia.

20. The Complainant said she was in "shock and pain" after the ordeal. What **PW1** said had been done to her was confirmed by **PW2** and medical evidence. Whatever the reasons for not reporting immediately she arrived at home, her evidence on the defilement is credible.

21. It is true as the Appellant has argued that the prosecution ought to have called "Elijah" as a witness. **PW1** said he moved away to another place. Under Section 124 of the Evidence Act, a conviction for an offence under the Sexual Offences Act can be properly based on the evidence of one witness, the victim, if the court believes her and gives reasons.

22. Evidently, the trial court believed **PW1** stating in the judgment that:

> **"The court found the girl's narrative as a simple and straight forward account credible in all respects. The court had no reason or found no ground to disbelieve her…It emerged that the accused person knew this family well and was also very well known by them and there were no grudges between the parties."**

23. The offence occurred during the day. The Complainant gave the appellant's name to her grandmother when she eventually reported the incident to her. There does not appear to be any reason why the Complainant could falsely implicate the Appellant by making up a story. And as the trial court correctly observed, his alibi defence was not canvassed with **PW1** and **PW2** during cross-examination.

24. It is the correct position of the law that the Appellant had no duty to prove the said defence. As stated in **Sekitoleko -Vs- Uganda (1967) E.A 531** and also in **Osiwa -Vs Respublic (1989) KLR 469** as well as in **Ssentale -Vs- Uganda (1968) E.A 365,** an accused person who pleads on alibi defence does not assume the burden of proving it.

25. The defence he offered however was effectively dislodged by the identification evidence of **PW1**. Not only did he have a conversation with the Complainant at the mill but also walked with her some distance, ostensibly to go collect some maize from his house. Thus **PW1** had more than ample opportunity to identify her assailant. This does not change, whether "Elijah" gave evidence or not.

26. Seemingly, Elijah from his initial conduct as described by **PW1** did not want to be entangled with the matter. He also moved to another village. It is not unusual for members of public to mind their own business regarding matters that may involve the police. Under Section 124 of the Evidence Act the court is entitled to convict on the sole testimony of a sexual victim if satisfied that the witness is truthful. In this case, the trial court believed the evidence of PW1 and gave reasons.

27. The age of the Complainant was proved through **PW2** who was the guardian of the Complainant as she was an orphan. The production of an immunization card by the investigating officer without it being identified by **PW1** and **PW2** was highly irregular. In its recent decision in **Mwalongo Chichoro Mwanjembe -Vs- Republic, Mombasa Criminal Application No. 24 of 2015 (UR),** the Court of Appeal has observed that the age of a victim of a sexual offence may be proved through oral or documentary evidence as long as it is credible.

28.The court observed that:

> **"…...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -vs- Uganda Criminal Appeal No. 2 of 2000.**
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> **We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable……"**

29.That decision was cited in **Bakari Ndoro -Vs- Republic [2016] eKLR** where the evidence of age of the victim was not dissimilar to the present case. This is how the court delivered itself on the matter of age:

> **"In this case the Complainant herself in her voire dire examination as well as in her evidence under oath stated her age to be 8 years. By the act of the court conducting a voire dire examination of the complainant before receiving her evidence, the court was satisfied that the Complainant was a child of tender years. PW3, her mother, also testified and stated emphatically that the complainant's age at the time was 8 years…… The Appellant did not cross-examine these witnesses on this aspect…. On the whole, we are satisfied that the age of the complainant was proved to the required standard."**

30.In my own evaluation, the evidence before the court in this case, even excluding the immunization card, proves that **PW1** was aged 11 years or thereabouts at the time of the offence. The evidence tendered through the four prosecution witnesses was credible and sufficient to sustain the charge laid against the Appellant. Grounds 1-4 of the appeal therefore have no merit and are rejected.

31. Similarly, the trial magistrate was entitled, after reviewing the evidence before him, to reject the Appellant's defence as he did for the reasons given. Complaints that the defence was not given due consideration have no merit as the judgment of the trial court clearly demonstrates otherwise.

32.The Appellant also asserted in submissions under the fifth ground that he was not given sufficient time to prepare for his defence upon being placed on his defence. The record of the 10th and 12th November 2014 shows that there was a break of at least one day after the ruling was read. When the trial commenced for the defence on 12/11/2014, the Appellant addressed the court indicating readiness to proceed. The present complaint in regard to preparation is therefore without substance.

33.In the result, the Appellant's appeal against conviction has no merit and is hereby dismissed. The sentence meted out on him is legal and is also confirmed.

Delivered and signed at Naivasha on this 23rd day of June, 2016.

In the presence of:

For the DPP : Mr. Koima

Appellant : Present

Court clerk : Barasa

C. MEOLI

JUDGE