REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 216 OF 2011

GILBERT NYONGESA …… APPELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable J. Owiti in Eldoret Criminal Case No. 1734 of 2011, dated 4th November, 2011)

JUDGMENT

1. The appellant was tried and convicted of the offence of defilement Contrary to *Section 8(1)* as read with *Section 8(2)* of the Sexual Offence Act. He was sentenced to life imprisonment.

2. The particulars of the offence were that on diverse dates between 6th and 7th May, 2011 at [particulars withheld] village, Ainabkoi location in Eldoret East District Uasin Gishu County, the appellant unlawfully caused his genital organ to penetrate into the genital organ of *LC* (*Name Withheld*) a child aged 5 years.

3. Aggrieved by his conviction and sentence, the appellant lodged the instant appeal to the High Court. He filed his petition of appeal on 10th November, 2011. Subsequently, on 21st January, 2016, the appellant was granted leave to amend his grounds of appeal under *Section 350* of the *Criminal Procedure Code*.

4. In his amended grounds of appeal, the appellant raised five grounds of appeal which can be condensed into two grounds namely: that the learned trial magistrate erred in law and fact by convicting him on the basis of contradictory, incredible evidence which did not prove the charges against him beyond any reasonable doubt; that the trial magistrate erred in failing to consider his defence.

5. The appellant prosecuted his appeal in person. He entirely relied on home made written submissions which he presented to the court. In his submissions, the appellant evidently put in considerable effort in analysing in his own way the evidence adduced before the trial court. He contended that the medical evidence in the P3 form was unreliable as PW1 testified that she examined the complainant on 7th May, 2015 but signed the P3 form on 12th May, 2011; In his view, this was evidence that he was framed with the offence. He also submitted that PW3's evidence was contradictory and that together with PW5, they were not credible witnesses; that the trial magistrate thus erred by convicting him relying on the provisions of *Section 124* of the *Evidence Act;* that in the absence of corroboration of PW3's and PW5's evidence, the prosecution had failed to prove the charges against him beyond any reasonable doubt; and that the trial court ought to have resolved any doubts arising in his favour.

6. The state contests the appeal. Learned prosecuting counsel *Ms. Mutheu* when opposing the appeal submitted that the appellant was properly convicted because the prosecution had proved every element of the offence beyond any reasonable doubt; that PW3 and PW5 were credible witnesses and that the appellant who was PW3's neigbour was positively recognized by PW3 as her assailant on the material date.

7. This is a first appeal to the High Court. I am reminded of my duty as the first appellate court which is to revisit the evidence presented to the trial court bearing in mind that I did not hear or see the witnesses and give due allowance for that disadvantage. See ***Okeno V Republic 1972 EA 32***; ***Kinyanjui V Republic (2004) 2 KLR 364.***

8. I have considered the grounds of appeal, the evidence on record and the rival submissions made by the appellant and the state. I find that it is not disputed that the appellant was PW5's grandmother's employee and that they lived in the same compound. It is not disputed that the appellant used to stay in her grandmother's kitchen. It is also not disputed that PW3's home neighboured that of PW3's grandmother and that her grandmother (PW2) used to leave her under the care of PW5's grandmother.

9. The appellant admitted that on 6th May, 2011 he had been left alone in "*Mama T's* (PW5's grandmother) compound together with PW3 and PW5. According to the evidence of PW3, a child aged about 5 years , on that day, the appellant took her to *Mama Tai's* kitchen, laid her on his bed and did a "bad thing" to her private part using an object inside his long trouser causing her a lot of pain. The "bad thing" was meant to describe the act of defilement. PW3 recalled that this was the second time that the appellant had defiled her. PW5, another minor testified that she saw the appellant take PW3 to her grandmother's kitchen where he used to reside and later, she found PW3 on his bed crying.

10. PW2 on her part recalled that on the same day, PW3 swore to her that she will never go to *Mama T's* home again as *Gilbert* (referring to the appellant) had done a bad thing to her. Suspecting that the appellant had defiled her granddaughter, she reported the matter to PW4 at Ainabkoi police station. She was issued with a P3 form which was filled by PW1 *Dr. Florence Jaguga*. In her evidence, PW1 testified that she examined PW3 on 7th May, 2011 and noted that she had abrasions on the labia majora and minora; her hymen was freshly torn but no discharge was noted. She produced the P3 form as P Exhibit 1.

11. When put on his defence, the appellant gave a brief sworn statement in which he denied having committed the offence as alleged.

He raised an alibi defence claiming that on 6th May, 2011, he was at Ainabkoi and when he went back to his employer's home, he did not find the complainant. But in his evidence on cross examination, he contradicted that defence by admitting that he had been together with PW3 and PW5 in his employer's home on the material date but that he later left for the grazing field. He did not however say what time he allegedly left for the grazing field or when he got back to the home.

12. One of the grounds of appeal put forth by the appellant is that the learned trial magistrate did not give due consideration to his defence. I have gone through the judgment of the learned trial magistrate. It leaves no doubt that the trial magistrate considered the appellant's alibi defence but found that it was untruthful as he was positively identified by PW3 as her assailant. I find that the trial court correctly rejected the appellant's defence as it appears to have been an afterthought.

13. In convicting the appellant, the learned trial magistrate relied on the evidence of PW1, PW2 and PW3 noting that they were reliable and credible witnesses. She gave what in my view were sound reasons for her finding on the credibility of the prosecution witnesses. She stated *inter alia* as follows;-

> ***"The court had an ample time with PW3 while conducting the voire dire examination likewise to when she testified and cross examined by DW1. The minor though of extreme tender age was not scared of the court environment she was active, jovial, assertive and to the point while testifying in chief and cross examination. PW3 by pointing at her vagina in court as to where she felt pain when DW1 inserted a thing inside his pair of trousers (by pointing at DW1's penis***

at closer range while in court "made the court believe that the minor was actually telling the truth that it is DW1 who defiled her on 6.5.2011 at Mama Tai's home. The fact that PW3's hymen was freshly torn upon being examined by PW1 is an indication that PW3 was telling the court the truth. She stated that she felt pain as DW1 did a bad thing to her in her vagina. This is supported by PW5's evidence that she found PW3 lying on DW1's bed while DW1 was therein and PW3 told her that DW1 had injured her using a needle. It was possible for PW3 to cheat PW5 that DW1 had injured her using a needle. It was possible for PW3 to cheat PW5 that DW1 injured her leg using a needle because DW1 had warned her not to reveal the ordeal to anybody after being given a piece of Mango and Kangumu (Donought). Children of the age PW3 are easily gullible…..PW1 equally indicated in PE-1 that PW3 told her that it was not the first time for DW1(Gili) to do a bad thing for her on 6.5.2011 PW3 equally told the court that prior to 6.5.2011 DW1 had also defiled her. The consistency of PW3's version of the incident herein to PW1 and court shows that PW3 is a credit worthy witness. The court finds no reason to disbelieve her testimony…"

14. After independently evaluating the evidence on record, I am unable to fault the trial magistrate on her finding regarding the credibility of the prosecution witnesses especially PW3. Despite her age, her evidence was clear, consistent, and straight forward. She graphically narrated and demonstrated to the trial court how the appellant had defiled her not once but twice. The appellant's admission that he was her neighbour and that on the material date he was alone in the company of PW3 and PW5 in his employer's home where the offence was committed proves that PW3's recognition of him as her assailant was positive and reliable. The appellant's aforesaid admission proves that he was the only person who had an opportunity to commit the offence.

15. Though ordinarily the evidence of minors requires corroboration as a matter of law, there is an exception in sexual offences. As the learned trial magistrate correctly stated, the proviso to *Section 124* of the *Evidence Act* permitted a trial court to convict an accused person on the evidence of the victim alone if it was satisfied that she was telling the truth and recorded reasons for that finding.

As demonstrated in the passage from the trial court's judgment reproduced above, the learned trial magistrate believed that PW3 was a truthful witness and gave reasons for that finding. I find no reason to deviate from that finding by the learned trial magistrate as she is the one who had the advantage of seeing and hearing the witnesses and in any event, having examined the evidence of PW3, I have no reason to doubt her credibility.

16. In this case, though there was ample corroboration of PW3's evidence by the evidence of PW1 and PW5, even if there was no such corroborative evidence the learned trial magistrate was perfectly entitled going by the provisions of *Section 124* of the *Evidence Act* to convict the appellant on the strength of PW3's evidence alone. For all the foregoing reasons, I am convinced that the appellant was properly convicted.

17. On the appeal against sentence, the appellant was sentenced to life imprisonment which is the only sentence prescribed by *Section 8(2)* of the *Sexual Offences Act* for accused persons convicted of the offence of defilement involving minors who are below 11 years of age.

There is evidence in this case that the complainant was slightly over 5 years old at the time the offence was committed – See copy of the child health card.

18. It is important to note that the complainant's age was not challenged during the trial. Her stated age was therefore not disputed and taking into account her age, there is no doubt that the sentence imposed on the appellant by the trial court was lawful as it was in accordance with the law. I consequently have no reason to interfere with it.

19. In the result, I find no merit in this appeal. I accordingly dismiss it in its entirety.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of July, 2016

In the presence of:

The Appellant

Ms. Mokua for the state

Ms. Naomi Chonde – Court clerk