



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO 89 OF 2013

[arising from Judgment delivered on 14th June, 2013 by E.C.]

Cherono [SPM] in Webuye criminal case no. 335 of 2012

IDD MUSANIA alias REMMY MUSANIA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

1. This is an appeal from S.P. court Webuye criminal Case No. 335 of 2012. The appellant had been charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act. He was found guilty convicted and sentenced to life.

2. Being dissatisfied with the conviction and sentence he appealed to this court on grounds that; the trial court erred in law and fact by failing to consider credibility of the prosecution witness; the prosecution case was speculative, discernible and fabricated in material particulars, there was violation of Article 50 (2) of the Constitution as the appellant was not informed of the charge promptly and in a language he understands and the charge was defective.

3. In his submissions Mr. Sichangi for the appellant submitted that the case was a mistrial as the accused was initially properly charged as Idd Musania but after the evidence of prosecution witnesses his name was changed. Secondly a crucial witness was left out, She was declared hostile, was stepped down to be brought later which did not happen. Other crucial witnesses like the neighbor who heard the child cry was equally left out. He also stated that although the offence is serious the prosecution case was casually handled. Counsel urged the court to revise the conviction.

4. On its part the prosecution argued that there was no mistrial. The identity of the appellant was not in issue as PW1 was able to point at the appellant. Further that the appellant uses the two names interchangeably. And although **PW4** was declared a hostile witness the trial court did not rely on her evidence. Indeed **PW4** was not a competent witness as under the Evidence Act she could not have been given evidence against her spouse

5. That penetration was proven as the medical corroborated the circumstantial evidence. That evidence pointed at no other person other than the appellant; as on the fateful night the appellant had an argument with his wife and she left the house leaving the appellant with the children; On medical examination of the appellant he was found to have pus cells similar as to what was found on **PW1**; the Scene of crime was at the appellant's house; the appellant simply denied the offence; he failed to explain why the house was full of blood and faeces and why the child was found crying; and the charge sheet was not defective.

The State also submitted that the conviction and sentence were both safe.

6. This being the first appellate court it has the duty to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion see **Okeno Vs. Republic [1973] E.A.**

7. There is ample evidence that the victim **PW1** was aged 4 years at the time of the incident. There is no doubt also that she had been defiled (see medical report). The issue for determination therefore is whether the appellant before court is the one who defiled the victim.

8. Although it did not form part of the grounds of appeal the appellants counsel raised the issue of the appellant's identity in a bid to bring doubt as to whether the appellant was Remmy Musania named to be the one who defiled the girl or Idd Musania as he called himself.

In the interest of justice the court took up the matter and directed the Registrar of Persons to take finger prints of the appellant and file a report.

9. **PW2** confirmed that she is a village elder and the appellant comes from her area. She confirmed that the appellant was Remmy Musania, that Idd Musania was his deceased brother and that the appellant used his late brothers ID card as he has not been issued with one. In a letter dated 29th March, 2016 the Registrar of Persons confirmed that the finger print impressions of the appellant revealed that he had no record meaning that the appellant was not registered. No ID card was availed either meaning that if at all Idd Musania had an ID card that could not be the appellants. In any event in her evidence PW1 said when shown the accused

"... I know him. His is baba. He is Remmy. He is good we live well with him he is usually in the house with my mother ..."

I am therefore convinced that the appellant is Remmy Musania, further at the trial his names were accordingly amended without any objection from him as the issue ought not to arise now.

10. **PW1** was so clear that the person who defiled her was the appellant. She pointed at him at the dock, save his name, called him father and said that the appellant did bad things to her.

The victim repeated the same information to **PW2** and the police. She appears credible and consistent. The fact of defilement was corroborated by the P3 form. Indeed the pus cells found in the victim were also found on the accused. Based on the proviso to Section 124 of the Evidence Act I believe the testimony of the minor. That coupled with the evidence of other witnesses I find myself to be in concurrence with the trial court and cannot fault the credibility of prosecution witnesses whose testimony was cogent and credible.

11. Throughout the proceedings there is an indication that the proceedings were interpreted to Kiswahili. The appellant who participated fully and engaged the court when necessary did not complain. Ground three is certainly an afterthought.

The charge sheet was not defective either and this ground will equally fail.

For the reasons above the conviction and sentence are upheld and appeal is therefore dismissed.

Dated at Bungoma this 18th day of August 2016.

ALI-ARONI

JUDGE.