REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 34 OF 2014

DAVID KAMAU MUTHIKE……..……..APPELLANT

VERSUS

REPUBLIC……..……..……..…….. RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (T. M. Mwangi), Gichugu Sexual Offence Case Number 21 of 2013 delivered on 27th June, 2014)

JUDGMENT

1. The appellant herein**, DAVID KAMAU MUTHIKE** was charged with the offence of defilement contrary to ***Section 8 (1)*** of the **Sexual Offences Act 2006** vide Gichugu Principal Magistrate's Court Sexual Offence No. 21 of 2013. The particulars of the charge were that on the 27th day of October, 2013 at ***[particulars withheld]*** village, Baragwi Location within Kirinyaga County the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of (Name withheld) a child aged 7 years. He pleaded not guilty to the charge but the trial court found him guilty of the offence of attempted defilement contrary to ***Section 9 (1)*** and ***(2)*** of the **Sexual Offences Act** after trial and convicted him accordingly handing him 12 years imprisonment.

2. The Appellant was dissatisfied with both the conviction and sentence and preferred this appeal and listed the following grounds in his petition of appeal.

i. That the learned trial magistrate erred in law and fact by relying on shoddy investigations.

ii. That the learned trial magistrate erred by relying on uncorroborated evidence.

iii. That the learned trial magistrate erred in law and fact by Failing to consider that there was no medical evidence to prove the allegations.

iv. That the learned trial magistrate erred in law and fact by relying on a single witness.

v. That the learned trial magistrate erred in law and fact by not considering a grudge that existed between the appellant grandmother and complainant's grandmother.

vi. That the learned trial magistrate erred in law and fact by not considering that P.W.2 was coached on what to say.

vii. That the learned trial magistrate erred in law and fact by not considering that there were inconsistencies on the evidence tendered.

viii. That the learned trial magistrate erred in law and fact by not taking into consideration appellant's comprehensive sworn defence which cast doubts on the prosecution's case.

3. The Appellant sought to proceed in this appeal through written submissions and was granted the chance to file his written submissions. However, the appellant filed what is headed "amended grounds of appeal" and claimed that in his view were his written submissions in support of his appeal. However in view of the fact that he had not sought leave to make additional grounds or to amend his petition of appeal pursuant to ***Section 350*** of the **Criminal Procedure Code**, this Court shall consider the submissions only in so far as it relates to the grounds listed on his petition as listed above. Before I consider the grounds, I will consider the summary of the facts of the case presented at the trial court. A brief summary of the facts indicates that the Appellant was a neighbour to the complainant's (name withheld) parents. **S N B** the mother of the complainant (P.W. 1) told the trial court about the events that occurred on 27th October, 2013 at around 1 p.m. It was her evidence that the Appellant waylaid, the complainant a girl aged 7 years who was in the company of another child named S (P.W.4) and took her to his house which was nearby and locked her in his house and defiled her. The mother (P.W.1) further gave the trial court information on how in the company of her husband A B K (P.W.3) they went looking for their daughter in the Appellant's house after suspecting that the child was locked up there. They called the Appellant to open the house but according to her, he was reluctant forcing the father (P.W.3) to go and look for help from neighbours. It was the evidence of the mother that when they managed to gain an access to the Appellant's house eventually through the window which the Appellant had apparently used to escape, they found the child in the Appellant's bedroom naked. She further added that she inspected her child and "noticed that the opening of the vagina was open and wide".

4. The child (P.W.2) testified and corroborated the evidence given by the mother. According to her the Appellant "did bad things" to her. The child went further and explained that the Appellant defiled her and threatened her with a beating if she told anyone of what he had done. P.W.4 **S W**, the child who was with the complainant before she was called by the Appellant gave evidence which corroborated the complainant's version of events. The same evidence was also tendered by the complainant's father (P.W.3).

5. The medical evidence tendered by P.W.7 (**Stephen Ngige**), the clinical officer attached to Kerugoya District Hospital indicated that though the hymen was not broken, there were genital injuries in the vaginal wall and also whitish discharge which had some blood which was in his view caused by a "recent penetration."

6. The trial court concluded based on the evidence presented that there was no penetration but there was an attempt by the Appellant to penetrate. She dismissed the Appellant's defence of alibi as an after thought. The learned trial magistrate further found no evidence that could suggest that the witnesses could have been motivated by malice to testify falsely against the Appellant. Having found out that an offence under ***Section 9 (1)*** and ***(2)*** of **Sexual Offences Act** had been disclosed by the evidence tendered she acquitted the Appellant on the offence of defilement contrary to ***Section 8 (1)*** and ***(2)*** and convicted him under ***Section 9 (1)*** and ***(2)*** of the same Act.

7. The Appellant has now submitted that the investigations done by the Police were shoddy and that the evidence presented to court were contradictory. The Respondent has however, contested this through the written submissions made by Eusebius P. O. Omayo, learned counsel representing the state. Mr. Omayo has supported the findings made by the learned trial magistrate and denied that the evidence of P.W.2 was contradicted in any way.

> I have considered the evidence tendered by all the prosecution witnesses and find no basis for the Appellant's ground that the evidence tendered were contradictory or that the Police was guilty of shoddy investigations. I have considered the medical evidence tendered by Stephen Ngigi (P.W.7) in respect to what the minor (P.W.2) told the court and I do not find any contradiction. The said medical officer corroborated what the minor told the court on what happened to her when the Appellant locked the house and took her to his bedroom and undressed her. I have also noted the evidence tendered by P.W.1 and P.W.3 on the chain of events from the time they went to the

Appellant's house to the time P.W.3 entered the house through the window and saw the minor lying stark naked on the bed in the Appellant's house. The evidence of the said two witnesses and that of the minor in my view are largely corroborative and I do not find any significant contradiction. It is true that the minor (P.W.2) told the trial court that she saw the Appellant escape through a window and later saw his father go into the same house through the same window. She however, also said that she did not see the Appellant jump out of the window or saw his father enter the house. Those contradictions in my view did not affect the probative value of the evidence tendered by the minor. The trial court in my view was correct to ignore the apparent contradictions because as I have said were insignificant and did not show that the minor was out to deliberately lie to court. In the case of **ERIC ONYANGO ODENG' -VS- REPUBLIC [2014] eKLR** the Court of Appeal quoted with approval a Ugandan court of appeal decision in **TWEHANGANE ALFRED -VS- UGANDA CRIMINAL APPEAL NO. 139 OF 2001 [2003]UG C.A.** where the following observations were made:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

This Court finds the above observations relevant to this appeal in regard to the contradictions cited by the Appellant.

8. The Appellant has also raised the issue of credibility of the complainant's evidence alleging that she was coached to testify against him. I have considered the evidence tendered by the minor and do not find any basis for doubting her credibility despite not raising an alarm by screaming when she was being defiled. The minor told the trial court that she was threatened by the Appellant and silenced and the trial court found her truthful. The trial court unlike this appellate court had the advantage of observing the minor and her demeanor first hand as she testified. I find no reason to interfere with that finding.

9. I have considered the evidence tendered by the minor (P.W.2) and find that her evidence is well corroborated by the evidence of another witness **S W** (P.W.4) who was also another minor. Both witnesses told the trial court that the Appellant called the complainant on the pretence that he wanted to send her only to lock her in his house with the intention of defiling her. The Appellant has contended that the trial court relied on the evidence of a single witness which was not corroborated. But after looking at the evidence of the complainant's mother – S N B (P.W.1), complainant's father (P.W. 3), Area Assistant Chief (Aurelia Wanjiku Munene – P.W.5) I have noted that the evidence is corroborative to the evidence tendered by the complainant. In addition to this the medical evidence tendered corroborated the evidence by the minor that she had been defiled by the Appellant. This is besides the fact that in sexual offences, the law (Section 124 of the Evidence Act) provides that no corroboration is required to make a finding of guilt so long as the trial court has reasons to be recorded that the victim is telling the truth.

10. The Appellant's other ground in this appeal was that there was no medical evidence adduced to support the conviction. I have considered keenly the medical evidence tendered at the trial and I agree with the Respondent's submissions that evidence of defilement were observed by the clinical officer who treated the victim. The P3 form (Exhibit 1) and treatment notes (Exhibit 3) tendered in evidence by Stephen Ngigi (P.W. 7) who testified on his behalf and his colleague who treated the victim, indicated that the minor had been defiled. He found that the complainant's hymen was not torn and that there was "no penetration but there was genital injuries in the vaginal wall namely the labia minora which is the outer part of the vagina." This finding in my view was significant particularly when coupled with another observation made on the P3 form which was "whitish per vaginal discharge with minimal blood". The doctor concluded that the injuries noted on the outer part of the genitalia was caused by an attempt at penetration. There is no doubt going by the findings made by the medical expert that the minor was defiled and that is why he put the patient (P.W.2) on treatment (antibiotics and post exposure prophylaxis (P.E.P.) to protect the child from contracting HIV or other sexually transmitted diseases. This is significant because looking at the definition of "penetration" under ***Section 2*** of **Sexual Offences Act**,

penetration means "partial or complete insertion of the genital organ of a person into genital organs of another person." Now turning back to the evidence of the minor (P.W.2), this is what she stated at the trial court:

> ***"He did bad things to me……by saying he did bad manners upon me I said he committed it with his thing which he was to urinate and he inserted it inside me (pointing at her vagina)"***

This was a child aged 7 years so the manner in which she expressed the action may have been a bit odd but what is clear is that she was defiled. The trial court found her "truthful" in her evidence but appears to have fell into error when she concluded that there was no penetration. That finding was inconsistent with the evidence tendered and which I have analysed above. The learned trial magistrate noted that the victim was found stark naked in the Appellant's bedroom and found the victim truthful in what she told the trial court. This was backed by the medical evidence tendered. Under ***Section 8 (1)*** of **Sexual Offences Act**:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

As seen from the definition of penetration aforesaid, penetration need not be complete to be termed "penetration" in law. The trial learned magistrate appears to have misdirected herself on the medical evidence tendered which in part observed that there was "attempt at penetration" but clearly from the other observations made; "minimal per vaginal bleeding", "genital injuries in the vaginal wall, whitish discharge and a wet underwear" (Examination done a few hours (2 hours 30 minutes) after the incident) clearly indicated that the minor was defiled and in my considered view the prosecution proved their case against the Appellant beyond reasonable doubt. I agree with the Respondent that the defence of alibi raised by the Appellant could not assist him in view of the overwhelming evidence that pointed at him. The minor knew the Appellant well and I concur with the finding of the trial magistrate that there was no reason for the complainant or the other witnesses to implicate him falsely. There was no evidence tendered to show that there was bad blood between the appellant and the complainant's family.

The long and short of this is that I find no merit in this appeal. The same is dismissed. And in the light of my above finding, I find that the learned trial magistrate erroneously acquitted the appellant on the charge of defilement contrary to ***Section 8 (1) (2)*** of **Sexual Offences Act** and convicted him on a lesser charge under ***Section 9 (1)*** of the **Sexual Offences Act**. There was no basis for the same in view of the fact that the prosecution proved the main charge of defilement under ***Section 8 (1) (2)*** of the **Sexual Offences Act** and did so beyond reasonable doubt. Consequently in exercise of this Court's powers under ***Section 354 (ii)*** of the **Criminal Procedure Code** this Court shall reverse the conviction and the sentence meted out against the Appellant under ***Section 9 (1)*** and ***(2)*** of **Sexual Offences Act** and in its place enter a conviction under ***Section 8 (1)*** and ***(2)*** of the **Sexual Offences Act** and because the law provides for only one sentence, he is sentenced to imprisonment for life.

Dated and delivered at Kerugoya this 25th day of October, 2016.

R. K. LIMO

JUDGE

25.10.2015

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Appellant present.

Interpretation English/Kiswahili

Omayo in person present.

COURT: Judgment signed, dated and read in the open court in the presence of the appellant appearing in person and Mr. Omayo for the Respondent.

R. K. LIMO

JUDGE

25.10.2015