



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 181 OF 2015

DANIEL KIPKURUI KUNG'OTO APPELLANT

VERSUS

REPUBLICSTATE

JUDGMENT

The appellant **DANIEL KIPKURUI KUNG'OTO** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts. The appellant had been arraigned before the trial court on 17/3/2011 on a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 1st day of March 2011 in Kuresoi District within Rift Valley Province intentionally caused his penis to penetrate the vagina of M C C a child aged seven years”

The appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges. His trial commenced on 31/10/2011 at which trial the prosecution called a total of six (6) witnesses in support of their case.

The complainant **M C** testified as **PW1**. She told the court that she was aged nine years (at the time of the trial) and was in class 3 at [particulars withheld] Primary School. **PW1** told the court that on the night of 14/3/2011 her mother was ill. Her father **D K C PW2** had taken the mother to hospital leaving their three young children inside their house alone.

At about 8.00pm the children retired to sleep. During the night their window was forced open and the appellant came in. he dragged **PW1** out of the house and took her to a nearby grassy area where he removed her under pant and defiled her. After the act the child ran to a neighbour’s home to seek help.

PW3 COSMAS KIPYEGO KOECH told the court that on the night of 14th/15th March 2011 he was in his home. The complainant’s brother called Z K (he testified as **PW4** in the case) came and informed him that the complainant had been taken away by ‘**Daniel**’ (appellant). They launched a search for the child. **PW3** said they met the child weeping and without her clothes. She informed them that the appellant had defiled her. **PW3** phoned the complainant’s father to inform him of the incident. He later hired a boda boda bicycle to take the child to hospital where she was examined and treated.

The neighbours began to search for the appellant. He was found the following day hiding in the forest. The matter was reported to police who upon conclusion of their investigations charged the appellant with this case of Defilement.

Upon conclusion of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having defiled the complainant.

On 21/7/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentence him to serve life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was unrepresented at the hearing of his appeal opted to rely entirely upon his written submissions which had been duly filed in court. **MR. CHIRCHIR** learned State Counsel made oral submissions opposing the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same. **AJODE Vs REPUBLIC [2004] 2 KLR 81** the Court of Appeal held that

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that”

I have perused the submissions filed by the appellant. In them he raised the following as grounds for his appeal.

1. Defective charge sheet
2. Failure to comply with Section 200(3) of the Criminal Procedure Code
3. Insufficient evidence to prove the charge
4. Failure to consider his defence

I will proceed now to consider each ground individually.

The appellant has submitted that the charge sheet as framed was fatally defective. I have perused the charge sheet. I find no fatal defect in the same. I do note that the charge read **“Defilement contrary to Section 8(1) (2) of the Sexual Offences Act”**. The proper format should read Section 8(1) **as read with** Section 8(2) of the Sexual Offences Act. However this defect did not render the charge fatally defective. No prejudice was suffered by the appellant by this manner of drafting the charge.

I have no doubt the appellant fully comprehended the nature of the charges he faced. His active and robust participation in the trial is evidence of this fact Article 159(2) (d) of the Constitution exhorts courts to administer justice **“without undue regard to procedural technicalities”** This defect in drafting the charge is one such procedural technicality. I find that there was no ambiguity regarding the charge. This was a curable defect and I therefore dismiss this ground of the appeal.

The second ground of appeal relates to the application of Section 200(3) of the Criminal Procedure Code. This is the provision of law governing the conduct of a trial where the initial trial magistrate for one reason or another is unable to continue with the conduct of the case. Section 200(3) provides

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”

The appellant's trial was handled by two (2) different magistrates. The trial commenced on 3/10/2011 before **HON. SOITA** Principal Magistrate who heard the first five (5) witnesses.

Apparently the trial initially proceeded before witnesses statements had been availed to the appellant. On 27/1/2012 after being given the witness statements the appellant applied to have all the four prosecution witnesses recalled for further cross-examination. The trial court allowed this application and **PW1** and **PW4** were all re-called and were cross examined afresh by the appellant.

On 11/5/2012 **HON. H. M. NYANGA** Senior Principal Magistrate took over the conduct of the trial. The record shows that the provisions of Section 200(3) were explained to the appellant. He opted to have all the witnesses re-called (in effect he sought a *de novo* hearing). Once again the court allowed this application and directed that all the prosecution witnesses be recalled.

However, this is where a problem arose. Despite several adjournments given to enable the prosecution recall the witnesses they could not be traced. This was not due to any laxity or lack of effort on the part of the prosecution. **PW1**, **PW3** and **PW4** who are all members of the same family could not be traced. The appellant who was by then out on bond and who continued to loudly insist that the witnesses were traceable was directed by the court to assist the police by pointing out where these witnesses were. He was unable to do so.

Finally on 6/2/2014 about 2½ years after the trial had began the Investigating Officer one **CORPORAL BISMARCK KOMBO** stated under oath the efforts he had made to trace these witnesses. It transpired that the parents of the complainants including **PW2** had died. The children of the family who included the complainant and her brother **PW4** had been sent away to live with different relative in unknown locations. Thus the only witnesses who could be traced were **PW3**, **PW5** and **PW6**. These three were recalled and did testify afresh.

The trial magistrate delivered a ruling on 15/10/2014 in which he ruled that in view of the unavailability of the witnesses the case would proceed and the evidence recorded by the preceding magistrate would be relied upon. He relied on the decision of the Court of Appeal in the case of **NDEGWA Vs REPUBLIC [1985] KLR 534** wherein the court held as follows:-

“1 The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly, and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2. The provisions of Section 200 should not be invoked where the part heard trial is a short one and could conveniently be started de novo. Furthermore it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution”

Based on this ruling this was a case in which the provisions of Section 200(3) Criminal Procedure Code **ought not** to have been invoked. This was **not** a short trial in which few witnesses had testified. It was a trial over two years old in which a total of five (5) witnesses had already testified. Further these witnesses were no longer locally available. Two had died and two (minors) had been sent to live with relatives elsewhere. To insist on a re-trial would have caused great prejudice to the prosecution.

In the circumstances the decision of the trial magistrate to dispense with these witnesses and to rely on the pre-recorded evidence of his predecessor was the only viable alternative. I have no doubt that the appellant was insisting on the *de novo* trial because he was fully aware that the witnesses would not be traced. In any event as I have stated earlier these witnesses did testify twice at the behest of the appellant and he did cross examine them at length. I find that Section 200(3) could not be complied with in the circumstances of this case and I uphold the decision of the trial magistrate to proceed with the trial and to have only the available witnesses re-called.

I will now proceed to consider the evidence on record with a view to determining whether the offence of Defilement was proved to the standards required by law.

The first question to be answered is whether the complainant was in fact defiled as she had alleged. The complainant testified that she was dragged out of their home on the night in question and defiled out in the open. **PW4 Z K** a brother to the complainant who was with her in the house at the time confirms that man forced himself into their home and dragged his sister away. **PW4** ran away and went to report to their neighbor who was **PW3**. **PW3 COSMAS KIPYEGO KOECH** a neighbor confirms that he was informed by the complainant's brother that a man had forced his way into their house through the window and taken away his sister. **PW3** alerted neighbours and they began to search for the child. He states that he came across the child weeping as she walked to his home. The complainant told **PW3** that she had been defiled. In his evidence at page 50 line 5 **PW3** stated

“I noted that M (the complainant) had a T-shirt on. She had no skirt/short or pants”

PW3 gave the child some clothes and took her to hospital. The evidence of **PW3** regarding the state in which the complainant was when he found her corroborates her allegations of having been defiled.

PW5 JULIUS KIPNGENO KOECH was a Clinical Officer attached to Olenguruone Hospital. He testified that he examined the complainant. He noted that she had bruises on her vulva. Her hymen was torn and she was bleeding. This was expert medical evidence. **PW5** concluded that **“There was an obvious penetration”**. He filed and signed her P3 form which he produced as an exhibit **P.Exb 1**. The bruises on the vulva, the torn hymen and the bleeding are all clear signs of a forcible penetration of the complainant. From the evidence on record I am satisfied that the fact of defilement of the complainant had been proved beyond reasonable doubt.

The next question relates to the identity of the perpetrator. Has it been proved beyond reasonable doubt that it was the appellant who defiled the child? The incident occurred at night after the child had retired to sleep and no doubt it was dark. Both **PW1** and **PW2** state that they were able to see the appellant as **PW4** shone a torch on the man when he broke into their house. Further both children told the court that the appellant was a man whom they knew very well and they were able to recognize his voice. Indeed both witnesses referred to the appellant by his given name **‘Daniel’**. In her testimony **PW1** states at page 10 line 12

“When we were in bed Daniel came through the window. It was night. I knew it was Daniel when he talked.....”

On his part **PW4** states at page 16 line 5

“When asleep the window was banged and it gave way. Daniel entered through the window and came to the bed. I flashed the torch and saw it was Daniel. He hit the torch and I decided to open the door and ran out while screaming. I ran to the home of Cosmas (PW3) and told him what had happened.....”

Under cross examination **PW4** affirms his evidence and stated at page 26 line 2

“I was able to identify you I was able to flash a torch on you. You took it and dropped it behind me....”

Both children gave clear and consistent evidence. They corroborated each other all material aspects of their evidence. Each child was carefully taken through a **‘voire dire’** examination before testifying. Each gave sworn evidence and remained unshaken under cross examination by the appellant.

Later when **PW3** found by the complainant she immediately told him that **‘Daniel’** had defiled her. The child was in the company of the appellant from the time she saw him as he dragged her out of the house to the spot about 500 m away where she was defiled. At no time did she leave his custody. The

complainant had remained constant regarding the identity of the man who defiled her. At no time did she ever waver in her identification of the appellant.

Aside from mere visual identification there is also evidence of recognition by **PW1** and **PW4**. **PW3** also told the court that he knew the man the children identified as ‘**Daniel**’ as he was a neighbor. In the case of **ANTONONI Vs REPUBLIC** the court held that

“..... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

The appellant’s claim that the trial court failed to give consideration to his defence is not factual. In the judgment at page 15 line 12 the trial court stated

***“The accused defence is that he has been fixed by M father. At the material time PW2 was actually in the hospital. He was called by Cosmas who had no issue with the accused at all*”**

In his defence the appellant claimed that he had been framed due to a pre-existing grudge between the two families. **PW2 D K C** the father to the complainant confirms that he had once before reported the appellant’s brother to police. However, I do not see how this would cause the complainant a mere child to frame the appellant. The child herself had no grudge against the appellant. Moreover when this suggestion was put to both **PW1** and **PW2** they each denied having been coached by any person on what to tell the court. I reject the appellant’s defence.

Based on the evidence I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant.

Finally the question of the complainant’s age must be addressed. In any charge brought under Section 8(1) of the Sexual Offences Act the age of the victim is a fact in issue – one which requires proof beyond reasonable doubt. This is because the age of the child will determine the nature of sentence to be imposed in case a conviction is returned.

In this case the complainant stated that she was 7 years old when the incident occurred. No document e.g Birth certificate, Health card, Baptism card or School document was produced to establish her date of birth. **PW2** the complainant’s father did not mention her age or date of birth in his testimony. Thus there exists no independent or tangible proof of the age of the complainant. For this reason the conviction rendered by the trial court on the main charge of Defilement cannot stand and I do hereby quash that conviction. However I am satisfied that the evidence on record is more than sufficient to prove the alternative charge of Indecent Act with a child contrary to Section 11(1) of the same Act. I therefore substitute a conviction against the appellant on this alternative charge. The sentence of life imprisonment imposed upon the appellant is hereby set aside and in its place I do substitute a sentence of ten (10) years imprisonment. This sentence will run from the date of his conviction before the trial court. It is so ordered.

Dated in Nakuru this 20th day of December, 2016.

Maureen A. Odero

Judge

Appellant in person

Ms Motende for DPP