REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.114 OF 2015

MICHAEL KAMORU GUANTAI..... APPELLANT

VERSUS

REPUBLIC …….……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1310 of 2009 of the Principal Magistrate's Court at Tigania by Hon. J.W Gichimu – Principal Magistrate)

JUDGMENT

The appellant, **MICHAEL KAMORU GUANTAI**, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 23rd September 2006 [particulars withheld], in Meru North District of the Eastern Province, defiled **J.G**, a child aged 7 years.

The appellant was sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was unrepresented. He raised six grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by admitting the evidence of a clinical officer who was not a medical officer.

2. That the learned trial magistrate erred in law and fact by admitting the evidence of PW2 who had not testified during the initial trial.

3.That the learned trial magistrate erred in law and fact by relying on the complainant's evidence that was contradictory and inconsistent.

4. That the learned trial magistrate erred in law and fact by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The complainant and her brother had gone to fetch some water at a well. They found the appellant there. He pounced on the appellant and defiled her.

In his defence the appellant denied involvement in the offence. He contended that he was framed by his step mother due to a land issue.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

Before I address the issues raised, I wish to observe that the charge in the substantive count was wrongly drafted. It ought to have read:

> **"... contrary to section 8 (1) as read with section 8 (2) ..."**

The appellant understood the charge against him and fully participated in the trial. I therefore find that he was not prejudiced. The defect is curable under section 382 of the Criminal Procedure Code.

The issue as to whether a clinical officer is qualified to give medical evidence was settled by the court of appeal in the case of ***RAPHAEL KAVOI KIILU V REPUBLIC [2010] eKLR***

The Court rendered itself in the following manner:

> ***"Under section 2 of the Clinical Officers (Training, Registration and Licensing) Act Cap 260 (LOK) a clinical officer means:-***
>
> ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act…"***
>
> ***Section 7(4) of the Act states:-***
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> ***The Act goes further to provide that such officers may engage in private practice "in the practice of medicine, dentistry or health work for a fee."It follows that the clinical officer did testify in this case on his area of competence."****Emphasis ours.*
>
> **We agree with this proposition. A clinical officer, being authorised under the Clinical Officers Act is an authorised person who can render medical services, and further can give medical evidence under *section 77* of the Evidence Act.**

In the instant case I concur with the holding by the court of appeal and find that this ground of appeal has no merit.

When a retrial is ordered, the prosecution is not limited to calling the witnesses who had earlier testified. They may call other witnesses as long as these other witnesses had previously recorded their statements at the investigation stage. This is where the retrial is ordered due to procedural errors. There are instances however where new evidence has emerged and the prosecution cannot be stopped from adducing such new evidence as long as the accused is supplied with such new evidence to enable him prepare for the trial. The complaint raised against the calling of PW2 does not have any merits.

Upon my perusal of the evidence on record, I find that the evidence of PW1 and that of PW2 (who are both minors) is supported by the evidence of PW3 and PW4 who were adults as to the identity of the perpetrator of the offence. These two adults testified of how they found the appellant in the act.

The medical evidence by Martha Njeri (PW5) was that she found evidence of defilement upon examination of the complainant. This therefore was corroboration of the complainant's claim.

The appellant was sentenced to life imprisonment. This is a mandatory sentence.

I find that there was overwhelming evidence against the appellant. consequently, his appeal on conviction and sentence is dismissed.

DATED at Meru this 20th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE