



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 220 OF 2012

P K M APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. H. M. Naga – Senior Principal Magistrate delivered on the 22nd November, 2012 in CMCR Case No. 1389 of 2011)

JUDGEMENT

The accused **P K M** has filed this appeal challenging his conviction by the learned Senior Principal Magistrate sitting at the Molo Law Courts. The appellant had been charged with **DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 15th day of July 2011 at Molo District in Nakuru County did intentionally and unlawfully cause his penis to penetrate the vagina of E W a girl aged 3 years in violation of the said Act”

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 3/11/2011. The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of four (4) witnesses in support of their case.

The complainant who was said to be a girl-child aged 3 years was not able to testify at all. The learned trial magistrate observed at Page 3 line 10 as follows:

“Court – The complainant aged 3 years is not able to communicate with the court. Her evidence will be dispensed with”

PW1 R W is the mother of the child. She states that on 5/7/2011 she left the child with her husband **F N (PW2)** while she went out to the shamba to pluck vegetables when **PW1** returned the child was missing. She alerted **PW2** and they began to search for her.

After a while **PW1** came across the accused who was her husband's cousin carrying the child on his back. When the child got home she was unable to sit and indicated that she had pain in her private parts.

PW1 took the child to a nearby clinic for treatment. The matter was reported to police. The appellant was later arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The appellant opted to make an unsworn statement in which he categorically denied having defiled the complainant. On 22/11/2012 the learned trial magistrate delivered his judgment in which he convicted the appellant and sentenced him to serve life imprisonment. Being aggrieved the appellant filed this appeal. **MR MOTENDE** learned State Counsel opposed the appeal.

This being a first appeal the court is obliged to re-examine and re-evaluate the prosecution evidence and to draw its own conclusions on the same (**see AJODE Vs REPUBLIC [2004] KLR 82**).

In this case the main issues for determination are

- i. Has the child's age been proved?
- ii. If yes, is there sufficient evidence to prove that it was the appellant who defiled the child.

On the first issue **PW1 R W** told the court that on the material date she noticed that her daughter could not sit properly. **PW1** checked the child's private parts and noted that she had bruises. She took the child to the doctor for examination.

PW3 DR. FRANCIS THAITHO BLANO is a medical officer attached to Molo District Hospital. He told the court that on 18/7/2011 he examined the complainant. He noted that her hymen was torn. The vaginal wall had bruises and there was discharge from her private parts **PW3** formed the opinion that the child had been defiled. He produced the P3 form as an exhibit **P.exb 1**. Obviously a torn and vaginal bruises in a child so young is clear evidence of defilement. I find that the evidence shows that the child had indeed been defiled.

In cases brought under the Sexual Offences Act the age of the victim is a critical fact in issue – one which requires proof beyond reasonable doubt. This is because the age of the victim will determine the sentence to be imposed if the accused is convicted.

In this case the child was said to have been 3 years old. No document eg birth certificate, Vaccination Health card or Baptism card were produced on the court as proof of her age. **PW1** the child's mother and **PW2** the father both testified in the case. **PW1** stated that her child was aged 3 years and 3 months. Although **PW1** did not state the date when she gave birth to the child I am satisfied that as the mother who bore the child, she was well qualified to state the child's age. In the case of **RICHARD WAHOME CHEGE Vs REPUBLIC [2014] eKLR** the Court of Appeal held as follows

“..... it is our considered view that age is not proved primarily by production of a birth certificate. PW3 the mother of the child testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth” (own emphasis)

I am satisfied that similarly in this case the evidence of the mother provides sufficient proof of the age of the child.

The final question requiring determination is whether there is proof that it was the appellant who defiled the child. Nobody saw the appellant defile or molest the child in any way.

PW1 and **PW2** the parents of the child state that the child was playing outside the family shop when suddenly it was realized that she was missing. A search was launched for the missing child. Some hours later, the appellant was found by **PW1** carrying the child on his back and walking towards the shop.

It was assumed from these facts that it was the appellant who must have lured the child away from the shop and defiled her. The prosecution relies on circumstantial evidence to prove the guilt of the appellant. In order to prove guilt by way of circumstantial evidence, the available evidence must point squarely at the accused alone as the perpetrator of the offence in question.

In the case of **JUDITH ACHIENG Vs REPUBLIC Crim Appeal No 218 of 2006**, the Court of Appeal in discussing circumstantial evidence held as follows:-

“It is settled law that when a case rests entirely in circumstantial evidence, such evidence must satisfy three tests:-

1. The circumstances from which the inference of guilt is sought to be drawn must be cogently and finally established.

2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused

3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

In this judgment, the learned trial magistrate concludes as follows

“In my view the girl could only have left home in the company of someone she was free with, someone she knew. The accused was one such person. Shortly thereafter he was found with the girl. As stated earlier nobody saw how the child wandered off from where she was playing”.

The trial court’s conclusion that it was the appellant who lured the child away was not based on fact or evidence. The possibility that some other person, even a person unknown to the child may have lured her away has not been properly discounted.

The child herself was unable to testify and therefore did not name or identify the appellant as the man who had lured her away or defiled her.

PW1 the child’s mother did not claim that his daughter named the appellant (who was well known to the child) as the one who had defiled her. All **PW1** said is that her daughter complained of pain in her private parts.

Undoubtedly the fact that the appellant was found carrying the child on his back after she had gone missing raises suspicion that it was he who defiled her. However suspicion alone no matter how strong cannot form the basis for a finding of guilt. (see **SAWE Vs REPUBLIC**). There is no tangible evidence to identify the appellant as the person who defiled the child. The case was not proved beyond reasonable doubt. The appellant’s conviction was in my view unsafe and I hereby quash that conviction. The 20 year sentence imposed upon the appellant is also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 20th day of December, 2016

Appellant in person

Mr. Motende for DPP

Maureen A. Odera

Judge