



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 156 OF 2012

ONINGOI PARSANKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original Conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 1405 of 2011 by Hon. M.A. Ochieng, SRM on 26/6/12)

JUDGMENT

1. **Oningoi Parsanka**, the appellant was charged with the offence of defilement under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, 2006**. Particulars thereof being that on the 25th day of October, 2011 in **Kajiado District**, within the **Rift Valley Province**, did cause his penis to penetrate the vagina of **NM**, a child aged 11 years in violation of **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**.
2. Facts of the case were that **PW1, NM** was looking after goats while the appellant was grazing animals in the fields. He pursued her and she fell down. The appellant seized the opportunity to remove her pants. He inserted his penis into her vagina and anus. On completing the act he ran away. She ran to a nearby home screaming. **PW2, Simon Perr** on hearing the screams went to assist her. On being told who the assailant was, he went in search for him. He found him hiding in the bushes. With the help of **PW3, Melita Sitoya** they arrested him. The Complainant was subjected to medical treatment, whereafter the appellant was charged.
3. When put on his defence the appellant denied having committed the offence. He stated that he worked for the complainant's brother as a herdsman and he was framed-up following his demand for payment of his dues.
4. The trial court evaluated evidence adduced and returned a verdict of guilty whereby it convicted the appellant and sentenced him to life imprisonment.
5. The appellant being dissatisfied with the conviction and sentence therefore appealed on the grounds that the trial magistrate erred in law and fact ;-
 - i. In failing to observe that the prosecution called an officer who was not a registered medical practitioner to adduce evidence;
 - ii. Evidence adduced was contradictory;
 - iii. No reasons were given why the defence was disregarded;
 - iv. The case was not proved to the required standard.
6. The appellant canvassed the appeal by way of written submissions. The State opposed the appeal. **Ms Kefa** learned State Counsel stated that the age of the complainant was proved; the act of penetration was proved which was proof of the charge beyond any reasonable doubt. She dismissed the defence adduced as not convincing

7. This being the first appellant court, I do appreciate its duty to re-look at the evidence afresh, subject to its evaluation and come up with its own conclusions, bearing in mind the fact that it neither saw nor heard witnesses tender evidence. (*See Okeno versus Republic [1972] E.A. 32*).
8. The trial magistrate is faulted for convicting on evidence of PW1, a minor which lacked corroboration. Evidence adduced of the age of the complainant was of a Child Health Card. According to the document, the complainant was born on 19th October, 2000. At the time the perpetrator acted by committing the offence she was eleven (11) years old. In the case of *Mohammed verses Republic[2008] 1KLR (G&F 1175* - it was held:-

“It is now settled that the court shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

9. In this case the court did not subject the child to *voire dire* examination probably because the children’s Act defines a child of tender years as a child below the age of 10 years. The Nursing Officer who filled the P3 form had estimated her age as 9 years. In as much as it is within my knowledge that a child being of tender years remains a matter of good sense of the court, it is advisable to put such information in writing to enable parties understand if indeed the child was seized of sufficient intelligence to testify or if she understood the nature of oath that was administered.
10. This being a sexual offence as provided by the proviso to **Section 124** of the **Evidence Act**, prior to convicting on the uncorroborated evidence of the complainant the trial magistrate was required to record reasons expressing the fact that he believed the complainant and found her truthful.
11. The complainant stated that the appellant penetrated her vagina and anus. She was subjected to treatment. **PW4, Richard Mwanja Muiruri** who examined her was a Nursing Officer. He stated that on examination he found seminal fluid at the opening of the vagina and signs of laceration and penetration and also on the anal region. He also filled the P3 form. It is not stated how he formed the opinion that the discharge he noted was seminal fluid. Such a witness is qualified to fill the Post Care Rape Form which can be produced in evidence. But for a P3 form having not been a qualified practitioner he was not a competent person to do so.
12. In the case of **Mujuni Appollo versus Uganda - Criminal Appeal No. 26 of 1999-** the court held:-

“It is clear to us that by basing this appeal on the absence of medical evidence... the court has discretion to reject it.”

Rivell [1950] Criminal Appeal R8; Mathson 42 Criminal Appeal R. 145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt....We would point out that the type of corroborative evidence will vary from case to case”.

13. Evidence on record to help sustain the conviction is evidence of the complainant, the victim of the offence. For the court to have based the conviction on the uncorroborated evidence it had to apply the test if the evidence was cogent. The issue of cogency of such evidence would require the learned trial magistrate to form an opinion that the witness was truthful. No reasons were recorded by the trial magistrate who took the evidence of the complainant that she was truthful. Similarly, the magistrate who eventually drafted the judgment was silent on whether or not the complainant was truthful. In the premises, the subsequent conviction was unsafe. The appeal therefore succeeds. The conviction is quashed and sentence imposed set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 20TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE