



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 54 OF 2011

WENDOH J.

DAVID MUTUGI KAMWARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein is David Mutugi Kamwara who was convicted of the offence of defilement contrary to section 8(1) and (2) of Sexual Offences Act (SOA) 3 of 2006. It was alleged that on 5.2.2011 at Thiiti Location, he defiled F M, a child aged 8 years. In the alternative, he was charged with the offence of indecent Act to a child contrary to section 1(1) of the SOA. No finding was made on the alternative charge. The appellant was sentenced to serve life imprisonment. He is aggrieved by the conviction and sentence and he filed a petition of appeal dated 18.6.2012 citing 6 grounds and a supplementary petition of appeal dated 2/10/2013. The grounds can be summarized as follows;

1. **That the conviction was based on uncorroborated evidence of PW1;**
2. **That there were material contradictions between the evidence of PW1 and 2 which the trial court failed to consider;**
3. **That the court erred in convicting the appellant without establishing the age of the complainant;**
4. **That the trial court erred by relying on a defective P3 form;**
5. **That the trial court erred by failing to consider the appellant's defence.**
6. **That the conviction went against the weight of the evidence on record.**

The appellant urged the court to quash the conviction and set aside the sentence. Mr. Mureithi, counsel for the appellant argued that the evidence of a minor does not require corroboration. However, PW1's evidence materially departed from that of PW2 as regards what happened on the material date and there was need for corroboration. Counsel also submitted that the complainant's age was not established and yet age is a primary factor under the SOA.

Thirdly, counsel argued that the P3 form was not produced by the maker and in addition, it had material

defects and the person who produced it concurred that indeed there were anomalies and some of the sections of the P3 form were not filled; that the court failed to consider the contradictions between PW1 and 2's evidence and lastly, the court did not make any reference to the defence.

The complainant F M a child aged 8 years was subjected to a *voire dire* examination and was found intelligent enough to give sworn testimony. She recalled that on 5/2/2011, she was accompanied by her friend F G (PW2) to go and study at [Particulars withheld]. On their way home, they passed by the butchery owned by PW2's father, they were given some meat to eat then PW2's father asked the appellant, who worked at the said butchery to escort the girls home on a bicycle. According to PW1 when they reached a church, the appellant left the bicycle with PW2 and said that he wanted to show PW1 how to mend the bicycle. He pushed PW1 through the window of the church which was open. He jumped into the church through the same window. Inside the church, the appellant produced a knife and threatened her if she screamed, removed her clothes and lay on her. After he finished, he told her to dress and passed her through the same window and they went home. She did not inform the mother what happened but after 2 days, she informed the father because she was feeling pain in the private parts. The matter was reported to Gatunga Police Station. She was taken to Marimanti District Hospital. PW1 told the court that she had not known the appellant before but saw him for the first time when he escorted them. She is the one who led police to arrest the appellant at the butchery.

PW2 F G reiterated what she did with PW1 on 5/2/2011. She did admit that indeed the appellant escorted them but she denied that the appellant ever left her with the bicycle as she went away with PW1 into the church. PW2 also denied that PW1 ever told her of being defiled on that day but did tell her another day.

PW3 M K, the mother of PW1 recalled that on 5/3/2011, PW1 and 2 returned home from school and PW1 informed PW3 that she had stomach pains. Next day, PW1 did not go to church because she complained of stomach pains. On 8.2.2011, PW3 noticed blood coming from the complainant and at 8.00 pm she started bleeding profusely and that is when they decided to take her to hospital. At 3.00 am, PW2 heard the complainant tell the father what happened and they then went to report to Kirundi AP Camp and went to have the appellant arrested at the place of work.

The P3 form was produced by Dr. Lincoln Njogu (PW4) but it was filled by a clinical officer by name, Wahu who found that PW1's hymen was perforated and had lacerations; she had a whitish discharge and blood. PW4 confirmed that the P3 did not have a reference number. Part 3 of the P3 form was not filled. The P3 did not indicate the age of the injuries and the sex of the complainant was said to be a 'male'

PW5 APC Alex Saitoti is the one who arrested the appellant upon receiving a report on 8.2.2011. PW6 PC Peter Lemojong of Gatunga Police Station re-arrested the appellant.

The appellant testified on oath in his defence. He admitted to have been at work at the butchery on 5.2.2011 when he was asked to escort the 2 girls on his bicycle (PW1 and PW2) after he had given them food. On the way, the bicycle got a puncture, he repaired it after borrowing an air pump. He continued the journey and when he got another puncture, he left the girls about 400 meters from their home and went back to the butchery. He was not arrested till 8th when at work and it was alleged that he defiled the girl. His defence is that he was framed.

To establish an offence of defilement, under section 8 of SOA, two ingredients have to be proved, Penetration and the age of the complainant. In this case, it seems there is ample evidence in support of PW1's allegation that she was defiled. As per the P3 form, the hymen was perforated she had lacerations, there was blood and whitish discharge from her private parts. Penetration was proved. Age is a primary determinant of the sentence to be meted upon conviction. In this case, PW1 said that she was 8 years at the time of trial. The mother did not tell the court how old her daughter was. The P3 form indicates that her age was estimated as 8 years. The prosecution did not produce the birth certificate, notification of birth nor was PW1's age assessed by a dentist or radiologist. PW1's age was not ascertained and one of the key ingredients of the offence of defilement S 8(2) was not proved.

PW4 Dr. Njagi is not the one who examined PW1 and filled the P3 form. I note from the record that the prosecution did not apply to the court to have the P3 form produced by PW4 who was not the maker and did not explain where the maker was. The appellant should have been given a chance to agree or object to the production of the P3 by PW4. There was no reason given why the maker could not be called to produce it. I do agree with the defence that the P3 was produced in evidence irregularly. PW 4 only alluded to the Clinical Officer unavailability during cross examination.

The counsel has pointed out several anomalies in the P3 form. The treatment notes were not produced in court and PW4 admitted that section A, the reference, Section B of the P3 which are normally filled were blank; the sex of the complainant was indicated as 'male' yet the complainant was female. There were glaring defects in the P3 form that required the maker to explain. The trial court should have addressed the issue of production of the P3 form which it did not.

To crown it all, there were glaring contradictions between the evidence of PW1 and 2. Whereas it was agreed that the two went to school together, passed by PW2's father's butchery and they were escorted by the appellant on his bicycle, the point of departure is where PW1 said that PW2 was left looking after the bicycle as the appellant took PW1 to a church where he defiled her. PW2 totally denied that PW1 was ever left alone with appellant. The question is who defiled PW1 or at what time was she defiled or was PW2 lying? PW1 had met the appellant once and there is totally no reason why she could have framed him. PW1 took 3 days before disclosing to the father that she had been defiled. She did not tell her mother. Once she told her father 3 days after the incident, she led them to the butchery and pointed at appellant. PW1 claimed to have been threatened with dire consequences if she disclosed who defiled her and that is why she took the 3 days to disclose the offence. Under section 124 of the Evidence Act, there is no requirement that a minor's evidence in a sexual offence be corroborated but the court has to give reasons for believing the minor. In light of the contradictions in the evidence of PW1 and 2, and the fact that the offence was not reported immediately, it is my view that PW1's evidence should have been corroborated by some other evidence as to who the assailant was. The trial court did not consider the contradictions in the testimonies of PW1 and 2 which was an error.

Having considered PW1 and PW2's evidence, I am convinced that the Appellant is a prime suspect and it is likely that he is the perpetrator but in the light of the contradictions in the evidence, failure to ascertain age of complainant and failure to call the maker of the P3, the defects in the P3 form, I find that the prosecution failed to prove the charge against accused to the required standard. There are still doubts in the prosecution case and I resolve the doubts in favour of the appellant. I allow the appeal; I acquit the appellant of the offence of defilement and the alternative charge of indecent act.

He is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 20th DAY OF APRIL 2015.

R.V.P. WENDOH

JUDGE.

Mr. Mulochi for state

Mr. Murithi for Appellant

C.C. Kirimi Court Assistant

Appellant present