REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 81 OF 2014

NDOI SAMMY NGACHA ……..……...…… APPELLANT

VERSUS

REPUBLIC …….…….…….. RESPONDENT

(*From the conviction and sentence in Mwingi SRM Criminal Case No. 67 of 2014 M. W. Murage Ag. SRM*)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 27th January 2014 at [Particulars withheld] Village, Mumbuni Location, Mwingi Central District within Kitui County did an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of J N a child aged 3 years. In the alternative he was charged with indecent act with a child contrary to section 11 (1) of the same Act. The particulars of the offence were that on the same day and place committed an act which caused contact of his male genital organ namely penis to the female genital organ namely vagina of J N a girl aged 3 years. He denied both charges. After a full trial, he was convicted on the main count of defilement. He was sentenced to life imprisonment.

Aggrieved by the decision of the trial court, the appellant has filed the present appeal. He filed his initial grounds of appeal on 16th September 2014. Thereafter and with the permission of the court he filed amended grounds of appeal and written submissions. He relied on his amended petition of appeal. The grounds of appeal are as follows:-

1. That he did not understand the charge as read to him due to language barrier thus denying him an opportuyinty to prepare for his defence.

2. That the trial magistrate did not consider that he was a minor attending school while imposing on him a very harsh and excessive sentence.

3. That the medical evidence available failed to support penetration as the doctor failed to give remarks on whether or not the hymen was broken.

4. The trial magistrate erred in declaring the complainant to be vulnerable which denied him a fair trial contrary to the provisions of the Constitution in the bill of rights.

5. The trial magistrate failed to consider that the alleged admission was through coercion and by force.

At the hearing of the appeal the appellant relied on his written submissions, which I have perused.

The learned Prosecuting Counsel Mr. Orwa submitted that the three ingredients of defilement were be proved by the prosecution beyond any reasonable doubt. Counsel submitted that the age of the child was proved through an exhibit that was produced. In addition the mother of the complainant PW1 informed the court that the child was born on 26th December 2010. Counsel submitted that there is nobody who could give the age of a child more accurately than the mother.

On penetration counsel submitted that PW3 testified to the effect that the complainant had vaginal lacerations and discharge. This was evidence of traumatic vaginal assault. Counsel emphasized that the P3 form was produced. There was also evidence that the hymen was torn.

On identity, counsel submitted that there was sufficient evidence that the culprit was the appellant. Counsel emphasized that in his defence, the appellant admitted knowing the complaint as a cousin. They lived close by and the appellant knew the complainant since birth. There was thus no possibility of mistaken identity. Counsel also added that the magistrate was correct in the way he found the complainant to be vulnerable. The law allowed that approach.

Counsel lastly also submitted that the sentence was proper and asked the court to dismiss the appeal.

In response to the Prosecuting Counsel's submissions, the appellant submitted that he was forced to sit down when cross examining witnesses. He stated that it was PW2 who ordered him to sit down.

At the trial the prosecution called 3 witnesses. PW1 was B K M the mother of the complainant. She was called to testify on behalf of the complainant who at 3 years of age was declared by the learned magistrate to be a vulnerable witness. It was her evidence that on the 27th January 2014 she was in school where all her children learn. M was in Standard 1 while M was in nursery school. The complainant was also in nursery school. The children went home early. When she arrived at home she found the complainant missing. She asked the other child who said that the complainant had left with the appellant to check on goats after the complainant removed her uniform. Later the appellant came back carrying the complainant with three mangoes. He insisted that the complainant should eat all those mangoes alone. The complainant however did not want to continue eating the mangoes and gave them to her sister M. The appellant informed her that the child or complainant was sleepy and she put her on the sofa set to sleep. When she woke up, she started calling her and though she gave her bread to eat she did not want to eat. She also refused to take tea and appeared to be sleepy. When she removed her blouse and petticoat and trouser, she noticed blood stains between her legs. The complainant started crying. She then borrowed a phone and called her husband. The complainant stated that it was the appellant who had defiled her. She used his nickname to refer to him. The matter was reported to the chief, administration police and later to the police. The complainant was then taken to hospital for treatment and was admitted for three days. A P3 form was filled.

PW2 was PC Edward Muiruri. It was his evidence that on the 27th January 2014 he was on duty at Mwingi Police Station at 6.30pm when a report of defilement of a child was made. He assisted in taking the child to hospital. The appellant was later arrested and was charged.

PW3 was Dr. Mutsach Asina. She produced a P3 form which was filled by a medical practitioner Anne Mutua. The findings were that the inner wear had blood stains but was not torn. There were lacerations 1cm in length in the vaginal area. No other abnormalities were noted. She produced the P3 form.

When the appellant was put on his defence, he gave sworn testimony. He stated that he was 16 years old having been born in 1997. He stated that on 27th January 2014 he was not at home. He went home at 2pm and was sent by his mother to Mumbuini Town. He came back home at 7pm and one police officer and a village elder came and asked for people who had completed class 8. He was arrested with one Kimanzi and on the way to the police station his aunt made a call to complain. The police asked him

whether he had been involved. He denied defiling the child. The police beat him and he accepted and said yes he defiled the child. He stated that he had gone to school that day but was told to go home for school fees. He was cross examined by the prosecutor.

Faced with the above evidence the learned magistrate found that the prosecution had proved their case beyond any reasonable doubt. The court thus convicted and sentenced the appellant. He was sentenced after a medical report was produced which indicated that he was above 18 years of age.

This is a first appeal. As a first appellate court I am duty bound to re-evaluated all the evidence on record and come to m y own conclusions and inferences. I am required to take into account the fact that I did not see the witnesses testify to determine their demeanor. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. The appellant complains that the charge sheet was defective and that he did not understand the language of the proceedings. I have perused the charge. I find no defect on the charge sheet. The appellant fully participated in the trial. He cannot thus say that he did not understand the language of the proceedings.

The appellant has also complained that he was forced to admit the offence by the police. That line of defence was taken at the trial by the appellant. That was his testimony. The learned trial magistrate disbelieved him. On the evidence on record I also agree with the learned magistrate that the appellant was not saying the truth.

The appellant has complained that he was below 18 when he was convicted. The evidence on record shows that an age assessment was done on the appellant before sentencing. He was found to be above 18. He thus cannot be heard to complain regarding his age. In my view the learned trial magistrate did all that the court could do to ascertain the age.

The ingredients of the offence of defilement are three. Firstly the age of the complainant. In my view the age of the complainant was ascertained to be 3 years. That evidence was believable and was believed by the trial magistrate. Though the appellant complains that the magistrate was wrong in declaring the complainant a vulnerable witness, I hold the view that the magistrate was correct to protect the young child. In any event the evidence is that PW1 the mother of the complainant came to the home before the appellant brought the complainant. It was after he brought her that it was discovered that there was the complaint of defilement. The evidence of the mother was therefore direct evidence regarding the opportunity of the appellant to defile the complainant. No prejudice was caused to the appellant in this regard.

The second element of defilement is penetration. The evidence on record is that the young girl had lacerations in her vaginal area. The hymen was also torn. That in my view is evidence of penetration. So long as there is penetration, even if it is partial, defilement would have occurred.

The third element of defilement to be proved by the prosecution beyond reasonable doubt is the identity of the culprit. The appellant was the person who took away the child and brought her back to the home. There could be no other person who could have committed this offence. In my view the appellant is just creating stories by alleging that he was forced to admit the offence. Even if he didn't admit the offence, the evidence on record points to him as the culprit. All the circumstances lead to one conclusion that the appellant was the offender.

The sentence of life imprisonment was the sentence provided for by law. Indeed this is a serious offence committed on a young girl. The law considers such offences to be serious offences, and that is why the sentences are also appropriately severe.

On the totality of this mater, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered this 19th day of May, 2015

GEORGE DULU

JUDGE