REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 166 OF 2013

JOSPHAT KANUKU NGUI NZOKA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of V. A. Otieno Ag. Snr Resident

Magistrate Criminal case No. 300 of 2013 at Mwingi).

JUDGMENT

The appellant was charged in the subordinate court with defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 13th June 2013 at [particulars withheld] in Mwingi Central District within Kitui County did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of JMK a girl of the age of six 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 the contact of his male genital organ namely penis to the female genital organ namely vagina of JMK a child aged 6 years. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to serve life imprisonment.

Dissatisfied with the decision of the trial court the appellant preferred present appeal to this court. His initial petition of appeal dated 29th November 2013 was filed by his Advocate Kinyua Mwaniki and Wainaina Advocates. Before the hearing of the appeal however, the appellant filed his own amended petition of appeal which he relied upon. His grounds of appeal are as follows:-

1. That he was denied his fundamental rights during the trial as well as during execution of the judgment.

2. That the examination of the intelligence of the complainant was done after the same complainant had already been sworn and therefore the appellant was prejudiced.

3. That the trial magistrate erred in convicting him without considering that the medical report done on him was not supportive of the charge.

4. The prosecution evidence was full of contradictions contrary to Section 163 of the Evidence Act.

5. The prosecution case was not proved beyond reasonable doubt.

The appellant also filed written submissions to the appeal which I have perused. The appellant relied on the written submissions and added that he was merely implicated in the case by a neighbour and that he informed the trial court as much.

Learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the language used in court was Kiswahili which the appellant had used in court during the appeal. The trial court record also showed that he participated fully in the trial proceedings. The appellant also tendered his own defence and as such he could not claim not to have understood the language used in court.

With regard to examining the intelligence of the complainant, counsel submitted that there was no standard format of such examination. Counsel submitted that the trial magistrate complied with requirement of Section 19 of the Oaths and Statutory Declaration Act and as such no miscarriage of justice was occasioned to the appellant. There was also no evidence that the prosecutor and the court colluded to deny the appellant justice.

With regard to medical evidence, counsel submitted that PW6 examined the appellant. DNA test was not a mandatory requirement under Section 36 of the Sexual Offences Act. Counsel submitted also that the age of the complainant was confirmed by PW2 the mother. A clinic card was also produced which established that the complainant was aged 6 years. Counsel emphasized that the evidence on record established that there was sexual actual penetration. The appellant was also positively identified as the culprit as the incident occurred during broad day light and the complainant knew the appellant before as a neighbour.

In response to the prosecuting counsel's submissions, the appellant stated that he was framed by the grandmother of the complainant who wanted him to be her lover because her husband had been away for a long time and he refused.

During the trial the prosecution called 6 witnesses. PWI was the complainant. After her intelligence was examined by the magistrate, she tendered evidence without any indication as to whether or not it was sworn evidence. She stated that on that day, she was at home when the appellant came and carried her to a nearby farm where he removed her clothes and defiled her. In cross examination she stated that the time was about 4.00 Pm.

PW2 was E M the mother of the complainant. She stated that she came home at about 5.00 Pm and saw PWI the complainant crying. That the complainant had a blood stained blouse and skirt. She then examined the genital organs of the complainant together with the grandmother of the complainant. They noted some swellings and decided to take her to hospital. They tried to enquire from the complainant what had happened to her but she was initially reluctant to tell them. She however later revealed that the appellant had defiled her. The witness stated that the complainant was aged 6 years.

PW3 was M M. It was her evidence that she served the complainant with food at around 4.30 Pm and proceeded to church. She was later informed that the complainant was sick and assisted in taking her to hospital on a motor cycle.

PW4 was Administration Police Constable Jacob Mulwa. It was his evidence that he was at the AP Camp on 13th May 2013 at night when two ladies M and E reported a defilement in the company of a 6 year old child. He went and arrested the appellant.

PW5 was Corpral Lucy Mutira the Investigating officer. She was assigned to investigate the case on 14th May 2013 and visited the scene together with the complainant. She stated that the complainant cried uncontrollably at the scene. It was also her evidence that the clothes of the complainant had already been washed.

PW6 was Dr. Joseph Mutua. He testified that he examined the complainant. He noted swollen genitalia and the hymen was broken. He also noted some traces of spermatozoa and blood on the complainant.

When put on his defence, the appellant gave sworn testimony. He stated that he was a labourer who dug trenches. He denied committing the offence. In cross examination he stated that the complainant was a neighbour. He called 3 witnesses.

DW2 was S N who testified that on the day of the alleged offence he was together with the appellant until 6 pm when they parted.

DW3 was M K the Assistant Chief who testified that the appellant had no pending case in her office.

DW4 was M N the mother of the appellant. It was her testimony that the appellant had a clean record and that she was surprised when he was arrested.

This is a first appeal. As a 1st appellent court I am duty bound to evaluate the evidence on record afresh and come to my own conclusions and inferences. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re evaluated the evidence on record. The appellant has complained about violation of his constitution rights regarding the language used in court. From the record, it is clear that the language used at the trial was English and Kiswahili. The appellant participated fully in the trial by cross examining witnesses. Besides, he has used the same Kiswahili language when arguing his appeal. I find no violation of his Constitutional rights due to the language used in the trial court.

The appellant has also complained that the examination of the complainant to determine her intelligence was not properly done. My perusal of the record shows that the learned magistrate did conduct examination to find out the intelligence and understanding of the complainant who was a minor**.** The complainant then testified and was cross examined. From the totality of the evidence of the complainant on record, and the cross examination thereof, I find no miscarriage of justice visited upon the appellant due to the procedure adopted. The evidence tendered by the complainant was clear. The answers to the cross examination were also clear. I dismiss that complain.

On the age of the complainant, it was said to be 6 years and her clinic card was produced in evidence. It was not contested. The mother who was PW2 confirmed that the age of the complainant was six years. In my view the age of the complainant was established beyond any reasonable doubt.

The appellant has stated on appeal that the charge was a frame up caused by the grandmother of the complainant, from whom he had resisted sexual advances. In my view that line of argument is an afterthought. There is no indication at all that the appellant raised the issue of an existing grudge or frame up at any point during the trial. I thus find no basis for that argument I dismiss that complaint.

On the identity of the appellant and proof of the case, I find that the incident occurred during broad daylight. The complainant and the appellant knew each other before. There is thus no possibility of mistaken identity. The Doctor found lacerations in the vagina of the complainant and the hymen was also broken. He also found traces of blood and spermatozoa. In my view all this evidence points to the fact that there was sexual intercourse with the complainant. The person responsible is the appellant. The complainant would in my view not have any reason to implicate him if he did not commit the offence. I will thus dismiss the appeal on conviction.

The sentence of life imprisonment is the punishment prescribed under the law. As such I have up hold the same.

Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal of the appellant and uphold the conviction and sentence of the trial court. Right of appeal explained.

Dated and Signed at Garissa this 29th day of June 2015.

GEORGE DULU

JUDGE