REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 34 OF 2012

(An appeal from the Judgment of the Senior Principal Magistrate, Siakago in CMCR. Case No. 310 of 2011 dated 20/2/2012)

PATRICK KINYUA…..... APPELLANT

VERSUS

PROSECUTION…….....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Siakago Senior Principal Magistrate delivered on 20/2/2012. The appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act with an alternative charge of an indecent act with a child contrary to Section 11(1) of the same Act. He was sentenced to serve life imprisonment. He lodged this appeal on 3/12/2012 relying on these grounds:-

i. *That the evidence was inconsistent and uncorroborated.*
ii. *That he was implicated and brought in as a suspect on the third day after the crime was committed.*
iii. *That a DNA test was not conducted to verify the truth.*
iv. *That the medical evidence was not consistent with the offence of defilement.*

In his written submissions, the appellant argued that the doctor who examined the complainant did not indicate the name of the suspect. When PW3 made the report at the police station he did not give the name of the appellant which means that the complainant did not know her attacker. The appellant further argued that the clothes worn by the complainant were not taken for laboratory examination and should not have been admitted as exhibits.

The appellant further argued that he was convicted on the evidence of a single witness which was full of contradictions. The defence was rejected by the magistrate without good grounds. The court failed to consider that there existed a grudge between the complainant's mother and the appellant.

The State Counsel Ms. Matere opposed the appeal on behalf of the respondent. She submitted that the prosecution proved the case beyond any reasonable doubt. The complainant knew the appellant well and positively identified him. The evidence of the prosecution was consistent and well corroborated. There is no evidence of the case being framed up against the appellant. The complainant only mentioned the appellant as the suspect. The medical evidence was clear that the hymen was broken and that there was blood in the private parts.

It was further submitted that the age of the complainant was proved as 4 years. The defence of the appellant was a mere denial and that the two witnesses he called could not account his whereabouts on the material day.

The duty of the 1st appellate court was explained in the case of ***OKENO VS REPUBLIC [1972] EA 34*** where it was held as follows:-

> *"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"*

The evidence of the prosecution consisted of 6 witnesses. PW1 the doctor, testified that she examined the complainant on the 3/6/2011 in the company of her mother. She had a history of sexual assault and had been treated at Mbeere District Hospital. The P3 form was filed based on the treatment notes and on further examination by the doctor. The underwear of the victim was blood stained, her petticoat and skirt were dirty and blood stained. There was presence of spermatozoa and infection. A post rape report indicated that there was blood stain and the hymen seemed interrupted. She found that there could have been penetration due to interruption of the hymen and the presence of the blood.

PW2 the complainant gave an unsworn statement after *voire dire* test was conducted. She told the court that she was aged 4 years and knew the accused well. On the material day she saw him at the bore hole point. He told her to go and urinate where as he followed her and removed her underwear. He inserted something in her private parts after covering her mouth with his hand. He later escorted her to their home. On arrival, PW2 fell sick with stomach pain and vomiting. She reported to her mother what had transpired who took her to the police station.

PW3 the mother of the complainant testified that her daughter is aged 4 years and produced a health clinic card. She told the court that on the material day she prepared the child for school and they parted. Later on she was informed that her child was sick. She escorted PW2 to Mbeere District Hospital for treatment. She complained of pain in the stomach, was vomiting and blood was oozing from her private parts.

PW3 further testified that she was informed by PW2 one Kinyua who worked for a neighbour had inserted an object in her private parts causing her to bleed. A parade was conducted at the police station where PW3 identified the appellant. However, PW2 knew the appellant and gave his name to her mother.

PW4 was doctor from Mbeere District Hospital filled a P3 in respect of the appellant. He testified that he was examined at the hospital on allegations that he had defiled a young girl. There was no medical done on his genitalia.

PW5 the father of the complainant testified that on 3/5/2011 he was working at a neighbour's place. He saw PW2 pass by the shopping centre on her way home. When he arrived home he found her sleeping outside. He enquired from her what the problem was because she had blood stained clothes. He later took the girl to the police station and later to Mbeere District Hospital. He identified the blood stained clothes which the complainant was wearing. The complainant told him that one Kinyua whom he knew had defiled her.

PW7 testified that he received the defilement report at Siakago police station on 3/6/2011 from the complainant's father. The appellant was brought to the station for identification parade in which the complainant identified him. He referred the complainant to Mbeere distrist hospital where she was

treated. He told the court that the complainant was traumatized. He later charged the appellant with the offence.

The appellant testified that he worked as a herds-boy and that on the material day he had been assigned duties to carry building blocks. Later in the day he took the cattle to the grazing field and went to fetch water at around 3.00 p.m. He denies committing the offence or meeting the complainant on the material day. He told the court that he was arrested by members of the public the following day and taken to the police station. He claimed that the case was framed up against him.

The appellant called two witnesses. DW1 testified that the appellant was brother in law and that on the material day he was at home carrying bricks. He told the court that the appellant did not leave the home other than the time he went to graze the animals.

DW2 told the court that she was the employer of the appellant. On the material day she assigned him duties of carrying building bricks. He also went to tether stock and assisted mason work. She further testified that there could be a grudge between PW2 and the appellant because the appellant had refused to fetch water for PW2.

The appellant is charged with defilement under Section 8(1) as read with 8(2) of the Act which provides:-

> *8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *8(2) A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.*

PW2 gave an unsworn statement due to her tender age. She told the court that she is aged 4 years and a nursery pupil in [Particulars Withheld] primary school. She met the appellant whom she knew before the incident at the bore hole point. He told her to go and urinate and then followed her. He removed her pants and then inserted something in her private parts after covering her mouth with his hand. He then escorted her to her home. On arrival at home she started feeling pain in the stomach and vomiting.

PW3 told the court that on the 3/6/2011 she parted with the complainant in the morning hours as she was leaving for school. PW3 went to Mbeere District Hospital where she was informed that her daughter the complainant was unwell. The parents (PW3 & PW6) escorted the girl to hospital after reporting the matter to the police station.

PW3 said that the complainant was bleeding from her private parts and had pain. She told her that one Kinyua who works for a neighbour had inserted an object in her private parts and caused her to bleed. The appellant was known to the parents of the complainant. After he was arrested the complainant identified him at the police station.

The appellant claimed that he was convicted on inconsistent and uncorroborated evidence. However, he did not point out the relevant witnesses and the parts of the evidence which were contradictory. On perusal of the evidence of the key witnesses, I find no contradictions.

The evidence of PW3 was corroborated by that of PW1 who examined the complainant at Embu Provincial hospital. PW1 testified that during examination, the complainant wore dirty and blood stained clothes. She was bleeding from her private parts and the hymen seemed interrupted which was evidence of partial penetration. Laboratory tests confirmed the existence of spermatozoa and infection.

Section 124 of the Evidence Act requires that the evidence of a minor in defilement cases will be sufficiently corroborated by medical evidence. The evidence of the complainant was clear and consistent. This evidence was well corroborated by the medical evidence..

The appellant contended that the medical evidence was not sufficient to prove penetration. As I have said

earlier in the judgment, PW1explained that the existence of blood on the hymen showed that there was interruption. The doctor formed the opinion that the interruption of the hymen and the blood stains were prove of partial penetration. The appellant did not controvert this evidence with other expert evidence. The doctor's evidence demonstrated penetration as required by the law.

It was not necessary to conduct DNA test in a case of this nature provided that the evidence of the PW3 and PW6 was corroborated by medical evidence. I rely on the case of ***FAPPYTON MUTUKU NGUI VS REPUBLIC [2014] eKLR*** where the Court of Appeal held:-

> "*In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her"*.

Contrary to the claim of the appellant that the blood stained clothes of the complainant should have been taken for laboratory examination, I find that this was not necessary because the specimen removed from the complainant were tested. The substances on the clothes were the same as those tested. PW1's report consisted of the laboratory examination.

The appellant alleged that the case was framed up against him by the complainant's parents. In his defence he did not explain whether there was a grudge and what it was all about. During cross examination by the prosecutor, the appellant said that there were allegations that he had let the animals stray in to the land of the complainant's parents. He was contradicted by his own witness DW2 who said that the grudge was caused by the appellant refusing to fetch water for the complainant's parents. It is important to note that there were other independent witnesses who testified in this case including PW5 and PW7. These witnesses had nothing to do with any differences that may have existed between the appellant and the complainant's parents. The evidence of the complainant was clear and consistent in relation to the incident. It is not possible that the child could have been used by her parents to frame the appellant.

It was contended by the appellant that the complainant did not know the person who defiled her for the reason that he was arrested 3 days later. This claim was dislodged by the evidence of PW7 who testified that the complainant and PW3 gave the name of the appellant when they made the report. The incident was reported the same date it took place.

PW3 testified that the complainants was aged 4 years and produced the Health Clinic card. Information from the card indicate that the child was born on the 10/1/2007 which confirms that she was slightly over 4 years at the time of the incident.

I rely on the case of ***RICHARD WAHOME CHEGE VS REPUBLIC [2014] eKLR*** where the Court of Appeal held that *"proof of age is not only by way of documentary evidence. The evidence of the mother on age is also sufficient"*. Section 8(2) of the Act covers age group of children aged 11 years and below. I find that the age of the complainant was proved.

The appellant contends that his defence was rejected based on weak reasons. He gave an alibi to the effect that he was engaged with work of carrying bricks and tethering animals on the material day, he called two witnesses who testified that he was at work on the material day. None of them could account for every minute and every hour that the appellant spent on the material day. They did not accompany the appellant to the place where he was carrying bricks or to the field where he was grazing the animals. I am in agreement with the learned magistrate that the alibi defence did not shake the overwhelming evidence of the prosecution and was rightly rejected.

It is my considered opinion that the prosecution proved the case beyond any reasonable doubt. The learned magistrate convicted the appellant on cogent evidence. The conviction was safe and should not be disturbed.

The sentence imposed was in accordance with the provisions of Section 8(2) of the Act. It was therefore

within the law.

I find the appeal not merited and it is hereby dismissed.

The conviction and the sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for respondent

The Appellant