REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 175 OF 2012

(An appeal from the Judgment of the Ag. Principal Magistrate, Runyenjes in CMCR. Case No. 757 of 2012 dated 20/11/2012)

J K N..... APPELLANT

VERSUS

PROSECUTION…….....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Senior Resident Magistrate delivered on 20/11/2012. 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 and sentenced to serve life imprisonment. He lodged this appeal on 3/12/2012 relying on these grounds:-

i. *That the magistrate erred by failing to consider that the appellant was not taken for medical examination before he was charged.*
ii. *That the magistrate erred in dismissing the appellant's defence.*
iii. *That the magistrate erred in failing to consider that the medical evidence in the P3 form was insufficient.*
iv. *That the magistrate erred when he failed to consider that there was no eye witness.*
v. *That the prosecution failed to prove the case beyond any reasonable doubt.*

In his submissions the appellant argued that the magistrate misdirected himself by relying on inconsistent evidence to convict him and that the case was framed against him due to a domestic conflict. Further that victim did not testify in court nor record a statement at the station. A lady called Lydia who was mentioned by PW2 was not called to testify. The medical evidence was insufficient in that it did not state the status of the hymen and condition of the clothes worn by the victim at that time. The prosecution failed to conduct a DNA to connect him with the offence. Further that the language used by the court was not indicated and no interpretation was provided.

The appeal was opposed by the State who argued that the case was proved beyond any reasonable doubt. Regarding the failure by the complainant to testify, the State Counsel Ms. Matere submitted that it was clear from the evidence of the prosecution that she was aged 3 years and was not capable of giving testimony. PW1 and PW4 clinical officers from Karurumo Health Centre confirmed penetration and the age of the complainant as 3 ½ years.

Although there was no eye witness, the State opined that the evidence of the complainant's mother PW2 was sufficiently corroborated by the medical evidence. The magistrate considered the defence of the appellant which he found to be a mere denial. He also commented on the demeanor of the appellant

stating that he ran away from home after the offence. It was further argued by the state that the case was not framed up against the appellant since there was no evidence to that effect.

The duty of the appellate court was explained by the Court of Appeal in the case of ***KARIUKI KARANJA VS REPUBLIC [1986] KLR 190*** that:-

> *"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."*

PW2 testified that she left her home early in the morning to attend some cores leaving the appellant at home with the children. When she returned the complainant told her that she had some pains in her private part and that it was the appellant who had inflicted the pain. PW1 called a neighbour who assisted her to examine the complainant. It was confirmed that she had a tear on her private part. She was told by the other child that the appellant had used his penis to injure the complainant. The complainant who was aged 3 years was taken to Karurumo Health Centre. On her return she found that the appellant had locked the door of the house and disappeared. PW2 told the court that the appellant was her husband but he was not the biological father of the children.

On 4/8/2012, PW3 Cpl. Kathure received the report of the sexual report at Runyenjes Police Station at the Gender Crime Section. The complainant was brought to the station by her mother. PW2 made the report that the step father of the child had defiled her while she was away. PW3 issued her with a P3 form and the child was taken to the hospital. PW2 handed over the birth notification to PW3 showing that the child was born on 26/12/2008 and which was later produced in evidence.

PW1 the clinical officer examined the complainant at Runyenjes District Hospital. She testified that she noted that the child's clothes were torn. On examination she found a tear in her private parts. The child was crying throughout the examination period and had pain on movement of the lower limb. The degree of injury was classified as harm and was one day old. She had a whitish discharge on her genital. PW1 confirmed that there was penetration.

PW4 a clinical officer at Karurumo Health Centre examined the complainant who had a a history of sexual assault. A vagina swob revealed some pus cells prompting PW4 to send the complainant to Runyenjes District Hospital for further examination and treatment.

The appellant gave an unsworn statement of defence in which he denied the offence. He told the court that his wife made a false report to the police and that she was using the case to ran away from him. He further claimed that PW2 had said that she will not remain the appellant's second wife and had even carried away his property. He challenged the medical evidence from Karurumo Health Centre as insufficient.

The appellant was charged with defilement under Section 8(1) and 8(2) which provide:-

Section 8(1)

> *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

Section 8(2)

> *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

It is not in dispute that the complainant was aged less than 11 years thus affirming that the appellant was charged under the correct provisions of the law.

It was not necessary for the appellant to be taken for medical examination. The evidence adduced by the prosecution to connect the appellant with the offence was sufficient. It was held in the case of ***DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR*** that the appellant had contended that there was no medical evidence linking him to the defilement. The court held that such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the complainant was defiled and that her evidence was trustworthy as to the identity of the person who defiled her.

The appellant complained that the complainant did not testify. Considering the tender age of the complainant and the lack of capacity to testify, it is not a requirement that her evidence be on record in order to sustain a conviction. It was held in the Court of Appeal case of ***M.M. VS REPUBLIC [2014] eKLR*** that a child of tender years need not testify and that the evidence of her parents coupled with the medical evidence is sufficient to link the appellant to the offence. The court observed that:-

> *"any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice".*

The appellant contended that the age of the complainant was not proved. PW2, the mother testified that the child was aged 4 years and produced a birth notification certificate. PW1 assessed the age of the complainant as 3½ years. This evidence was more than sufficient to prove age of the complainant.

It was argued that the medical evidence was insufficient. The evidence of PW1 was that the complainant had a tear as well as whitish discharge in her private parts which was proof of penetration. She also had pain on movement of her lower limb. The clothes she was wearing were torn at the time of examination. This was evidence of force used during the sexual assault. The P3 form was produced and it contained all the relevant medical findings. Contrary to the assertion by the appellant, it is not a requirement that spermatozoa be present for penetration to be proved.

The prosecution called 4 witnesses whom it found relevant and sufficient to support their case. It was not necessary to call the lady who assisted PW2 to examine the complainant since PW2 was a witness. The evidence of PW2 sufficiently covered what had transpired during the informal examination of the complainant.

The trial magistrate considered the defence of the appellant and found it not plausible. He observed that the defence was a mere denial and that it did not challenge the evidence of the prosecution which had remained consistent. It is therefore not correct for the appellant to claim that his defence was not considered.

The evidence of the prosecution established that the complainant was defiled by the appellant. The evidence of PW2 was sufficiently corroborated by the medical evidence which prove that penetration had taken place. The evidence points at no other person but the appellant under whose custody PW2 had left the child. At no time did the appellant deny that the victim was in his custody or claim that she had been left to be under the care of another person.

It is my finding that the trial court considered all the evidence and reached the correct finding that the appellant had committed the offence as charged.

The sentence was lawful and ought not to be interfered with. I find no merit in this appeal and ii dismiss it accordingly.

The conviction and the sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

The Appellant