REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 16 OF 2015

PETER NGUI NYAMU ..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case No. 645 of 2012 of the Principal magistrate court at Mwingi)

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 24th October 2012 in Mwingi District of the Kitui County intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of M M a child aged 6 years. In the alternative he was charged with committing a indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the same day and place intentionally did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of MM a child aged 6 years. He denied both counts. After a full trial he was convicted on the main count and sentenced to life imprisonment.

Dissatisfied with the decision of the trial court the appellant has now come to this court on appeal. His grounds of appeal are as follows:-

1. That the particulars of the charge sheet was at variance with the evidence of the complainant with regard to the unlawful act alleged to have been committed against her hence the charge was defective in nature and the trial proceeded on a defective charge sheet.
2. The case for the prosecution was not proved beyond reasonable doubt as required by the law.
3. That the evidence brought forward by the prosecution was not sufficiently trustworthy to have been relied upon as the basis for a conviction.

The appellant also filed written submissions to the appeal. At the hearing of the appeal, the appellant relied on his written submissions. I have perused and considered the written submissions of the appellant.

The learned prosecuting counsel Mr. Wanyonyi opposed the appeal. Counsel argued that the state proved its case beyond reasonable doubt on the main charge. Counsel submitted that the mother of the complainant who was a witness stated that the complainant was aged 6 years. The complainant gave a description on the incident as well as the appearance of the appellant. After the incidence became known a report was immediately made to the authorities and the appellant arrested. Counsel further submitted that the complainant identified the appellant at the chiefs office as he wore the same torn trouser. In counsel's view, the evidence was corroborated by the Chief PW2 as well as the doctor PW5. Counsel

submitted further that the defence of the appellant was considered and the learned magistrate found it to be an afterthought. Counsel concluded by stating that the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel stated that the P3 form was properly filled and part B thereof was not filled because that was necessary.

In response to the prosecuting counsel's submissions, the appellant asked the court to peruse the record of the proceedings, the grounds of appeal and the submissions.

During the trial the prosecution called five witnesses. PWI was M M K the mother of the complainant. She stated that the complainant was born on 5th September 2006 and was in Std One. She produced an immunization card to support the date of birth of the complainant. It was a testimony that on 24th of January 2012 the complainant came back home from school at 2.00 Pm and proceeded to bed. She gave her fruits to eat. She later washed her and also washed her clothes and found nothing unusual. On the next day the complainant went to school and came back. The day after she also went to school and when she came back the mother PWI washed her and then the complainant complained that she was feeling pain in her genitals. After enquiring the complainant disclosed that on 24th of January 2012 as she was walking back home she met a person who was brown, wearing black torn trousers, bearded with stained teeth and who smelled of tobacco who grabbed and carried her to the bush and defiled her. PWI then checked the private parts of the complainant and noticed some injuries. She reported the incident to the chief and also to the police station. She took the complainant for treatment and a P3 form was filled. She later found the appellant at the chief's office and the complainant identified the appellant at the chief's office as the culprit. She stated that the appellant's home was 1 Km away from her home.

PW2 was Lawrence Ikuku the Chief. It was his evidence that on 26th October 2012 at 5.30 Pm, PWI reported an incident of defilement to him. PWI described the assailant as a person who wore torn trousers, a white shirt and had coloured teeth and a bearded. According to him the description fitted Peter the appellant. He thus instructed the Assistant Chief to arrest the appellant. The appellant was arrested when chewing miraa which fitted the description of the complainant. It was his evidence that after arrest the complainant identified the appellant at the chiefs office. In cross examination he stated that the appellant was arrested due to the description given and his habit of chewing miraa.

Pw 3 was the complainant. She was unsworn. It was noted by the trial court that she appeared afraid facing the appellant. She was six years old. She stated that the appellant carried her on the shoulders, removed her inner wear and had sexual intercourse with her and warned her not to tell anybody. She however later only informed her mother. She stated that she had seen the appellant before and described that he wore torn black trousers, had a dirty mouth and had a short beard. She stated that she identified the appellant as the culprit at the chief's office.

PW4 was corporal Purity Katui the Investigating Officer from Migwani Police Station. She stated that on 27th October 2012 the complainant and her mother went to her office with a complainant of defilement. She interrogated them and got the story. She stated that the complainant was taken to hospital on 27th october 2012 and that the appellant was arrested on 28th October 2012. In cross examination she stated that she did not visit the scene of the incident. She stated that she saw the appellant after he was arrested.

PW5 was Dr. Indumwa Edmond. He testified on behalf of Dr. Oketo who had been transferred from Migwani Hospital. He stated that he had worked with Dr. Oketo and that the record showed that on 21st November 2012 Dr. Oketo saw the patient. The doctor found that the hymen of the patient was broken but there was no laceration. It was his evidence that the complainant was treated on 27th October 2012 and that the P3 form was filled from the contents of the treatment notes. He produced both the P3 form and the treatment notes.

When put on his defence, the appellant tendered sworn testimony. He stated that he was employed by one Musyoka and had worked for him for about 2 years. It was his evidence also that he had planted miraa on his farm and that PW1 the mother of the complainant was not happy because according to her miraa was dangerous to her male children. He stated that PWI asked him to uproot the miraa but he refused. He stated that he was called to the chiefs office on 18th October 2012 and asked whether he had

committed an offence. His employer Musyoka was present. He denied committing the offence but the complainant was called into the office and started crying and stated that he was the culprit. In cross examination he stated that he did not cross examine PW1 on the issue of miraa.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to take in mind that I did not see witnesses testify to determine their demeanor see the case of ***Okeno -vs- Republic 1972 (EA) 32.***

I have re evaluated the evidence on record. I have also perused the judgment.

The appellant has complained that the charge sheet is defective in that the charge and the evidence on record are at variance. I have perused the charge and considered the evidence on record. The charge clearly stated the date of the offence The name of the appellant as accused is not in dispute. The name of the complainant is also not in dispute. The facts constituting the offence are also contained in the charge sheet. The evidence tendered by prosecution witnesses does not allege the commission of another offence. I thus find no defect in the charge sheet.

The burden of proof is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt. The accused does not have a burden to prove his innocence.

The evidence on record with regard to the identity of the appellant, is that of the complainant PW3, a child of six years. From the evidence on record the hymen of the complaint was broken. However there was no injury noted. That in my view was evidence of sexual activity but it does not prove when that incident took place and whether it was done by the appellant.

The description given by the complainant of the culprit was that he wore a torn trouser, had a dirty mouth and had a beard. He did not have a beard in court. However the chief PW2 and the mother of the complainant PWI confirmed in evidence that the description given by the complainant fitted the appellant and no other person in the local neighbourhood. I observe that the learned magistrate in the judgment appears to have somewhat shifted the burden of proof to the appellant and even gone on to say why the appellant did not have a beard, while there is no evidence to that effect. In my view that was a mistake.

Having said so, is the description given by the complainant sufficient to identify the culprit as the appellant? Is the evidence of the minor child believable? One has to take in mind that the appellant also gave a strong sworn defence alleging the existence of a grudge between him and the complainant's mother.

In my view with the evidence of the chief PW2 who was an independent witnesses, supporting the description as fitting the appellant, I have no doubt in finding that the appellant was indeed the culprit. The alleged identification of the appellant at the chiefs office by the complainant was not of any evidential value. No identification parade was held and therefore that cannot be taken to be an identification of the appellant. However the appellant had already been arrested because of a description given by the complainant, so in my view that mistake of purported identification of the appellant at the chiefs office did not prejudice the appellant.

In my view also the evidence of the minor complainant PW3 was believable and could be a basis for a conviction. I am of the view that the complainant had no reason to implicate the appellant if he did not commit the offence. I rely on section 124 of the Evidence Act (cap 80).

The defence of the appellant alleging a grudge against PW1 the complainants mother in my view was an afterthought. The appellant did not raise any such defence in his cross examination to any of the prosecution witnesses. In addition, he was arrested and taken to the chiefs office where he met his employer Musyoka. He was asked about the incident of alleged defilement by the chief in the presence of his employer. The appellant has not said that he mentioned that existing grudge regarding miraa between him and PWI either to the chief or to his employer. In my view if the issue of grudge was true, the appellant would at least have mentioned that to the chief or his employer or both, when a serious

allegation such as defilement was made against him.

In my view, from the evidence on record, the prosecution proved its case against the appellant beyond reasonable doubt for the offence of defilement. The sentence of life imprisonment is the sentence prescribed by the law and the court had no choice but to pronounce that sentence.

In the result I find no merits in this appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.

Dated and delivered at Garissa this 27th July 2015.

GEORGE DULU

JUDGE