



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CR.A. NO.296 OF 2012**

**BETWEEN**

**HEZRON NYANGAU ANDAI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the original conviction and sentence of the Hon. G.A. Mmasi, PM in Vihiga  
PMC Cr. Case No.1018 of 2008 delivered on 8.11.12)**

**J U D G M E N T**

**Introduction**

1. The appellant herein was arraigned before the Principal Magistrate's Court at Vihiga on a charge of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No.3 of 2006. The particulars of the charge are that on the 21<sup>st</sup> March 2008 at in Emuhaya district within western province, intentionally and unlawfully had penetration by genital organ namely vagina of M A girl aged 5 years.
2. In the alternative, the appellant was charged with indecent act contrary to Section 2(1) as read with Section 11(1) of The Sexual Offences Act, No.3 of 2006, the particulars being that on the 21<sup>st</sup> day of March 2008 in Emuhaya district within western province, intentionally and unlawfully caused his genital organ namely penis to make contact with the genital organ namely vagina of a girl namely M A aged 5 years. The appellant denied both the main and the alternative charge.

**The Prosecution Case**

3. The Prosecution called 5 witnesses. The complainant testified as PW1 and she told the Court that on the material day in the evening she was playing with her friends when the appellant called her to his house and gave her a banana to eat. That after she had eaten the banana the appellant lifted her and put her on his bed where she lay with her face upwards. He then removed her clothes removed and then his penis and inserted it into her vagina as he lay on her. As he defiled her, she said she felt pain and started crying. Afterwards, the appellant told her that when she goes home, she was to tell her mother that she had been pricked by a stick. The time of the incident according to PW1 was 5.00p.m and it was also raining.
4. PW1 also stated that after the event she went home and reported the incident to her mother M A S, who testified as PW2. When PW2 checked the complainant she saw blood oozing from the vagina of the complainant. PW2 reported the matter to her mother-in-law and thereafter to the police. Efforts to trace the appellant at his home that evening were fruitless as he had apparently

- disappeared from home. Both PW1 and PW2 identified PW1's blood stained underpant (MFI – 2). PW2 also identified the complainant's treatment notes from Vihiga District Hospital.
5. Tom Otieno, a Clinical officer at Emuhaya District Hospital testified as PW3. He examined the complainant on 24/03/2008 following allegations that the complainant had been defiled. On general examination the Clinical officer noticed multiple soft tissue injuries all over the body but most remarkably on her chest. He also found several bruises around the vagina and on the thighs. The hymen was ruptured, showing there was penetration. The Clinical officer also carried out laboratory test which revealed the presence of red blood cells and epithelial cells which was a clear indication that there was forced penetration. The HIV test was negative. The Clinical officer filled the P3 form on 10/07/2008. He produced the medical documents as Exhibits MFI – 1 (a), (b) and Exhibit 3. According to the Clinical officer the child was aged 5 years and that all the evidence pointed to the fact that the complainant was defiled.
  6. PW4 was L O K. She testified that after she received a report from M, PW2 the two women decided to report the matter to the area assistant chief and that when she saw the complainant the complainant could not talk.
  7. The Investigating officer in this case, was number 65410 Police constable Arbanus Kivindyo. He recalled that on 22/08/2008 at around 3.20p.. the complainant and the mother M, PW2, went to the Police station at Kilingili and made a report of the incident. PW5 issued the complainant with a P3 Form and also accompanied them to the scene but could not trace the appellant who had disappeared. The appellant was not arrested until 03/08/2008 at around 10.00pm in Thika town. PW5 stated that during investigations he recovered the white underpant which the complainant had worn on 21/03/2008 although by the time of his testimony, he did not have the underpant.

### **The Appellant's Case**

8. The appellant gave unsworn evidence and told the Court that this case was planted on him. He testified that in August 2008, he got a job in Thika and while he was working there, he was arrested on allegations that he had defiled the complainant. He denied committing the offence, but admitted that the complainant and her family are his neighbours.

### **Judgment of the Trial Court**

9. After a careful analysis of the evidence on record, the learned trial Magistrate reached the conclusion that the Prosecution had proved its case against the appellant beyond any reasonable doubt on the main count and proceeded to convict him of the same. The appellant was sentenced to life imprisonment in accordance with the law as provided under Section 8(2) of the Sexual Offences Act No.3 of 2006 (The Act).

### **The Appeal**

10. The appellant was aggrieved by both conviction and sentence. He filed this appeal based on the following home-made grounds:
  1. That the learned trial Magistrate erred in law and in fact by relying on evidence of tender age notwithstanding that the same was null and void.
  2. That the learned trial Magistrate erred in law and in fact in not evaluating evidence of PW3 who alleges that she was forced by PW2, mother of PW1 to give false evidence.
  3. That the learned trial magistrate erred in law and fact when he failed to consider the examination report produced before Court clearly indicating that PW1 was HIV positive and I was HIV negative.
  4. That the trial Court failed to comply with Section 324 as read with Section 329 of the Penal Code.
  5. That the trial Court failed to consider alibi defence statement that was to secure an acquittal.
  6. That I pray to be present at the hearing of the appeal and also wish to be furnished with certified Court proceedings and judgment.
11. The appellant therefore prays that his appeal be allowed, the conviction quashed and sentence set

aside.

## **The Submissions**

The appellant relied on his written submissions and also made some oral submissions in which he urged this Court to find that the case against him was not well founded and should have been dismissed by the Trial Court. Mr Ngetich Counsel for the respondent opposed the appeal and submitted that the appeal has no merit and ought to be dismissed on both conviction and sentence.

12. Before proceeding further, I take this early opportunity to state that the appellant was present at the hearing of his appeal, and further that on 17/04/2013 an order was made for the supply of proceedings to both the appellant and the State and that was done on the same day. Ground 6 of the appeal is therefore no longer relevant.
13. As I now proceed with the rest of the judgment I am aware of the duty cast upon this Court being the first appellate Court. I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter, only remembering that this Court has no opportunity of either seeing or hearing the witnesses as did the trial Court. There is therefore need for caution in dealing with the appeal, so that unless it is shown that the conviction by the trial Court is based on wrong principles or that the conclusions reached by the trial Court are not supported by the facts and the evidence, this Court should be hesitant to interfere with the judgment of the learned trial Magistrate. See **Ngui –vs- Republic [1984] KLR 729** and **Mwangi –vs- Republic [2004] 2KLR 28**.
14. After carefully analyzing the evidence on record in addition to a careful reading of the judgment of the learned trial Magistrate and the submissions made by both the appellant and Counsel for the respondent the issues to be determined by this Court are:-
  - a. Whether the Prosecution proved the age of the complainant.
  - b. Whether there was penetration.
  - c. Whether the act was intentional and unlawful.
15. With regard to the first issue touching the complainant's age, the complainant herself told the Court both during the voir dire examination and during her evidence in chief that she was 5 years old. A close look at the evidence of the complainant reveals a child who was very intelligent and self confident. She expressed herself clearly and I do wholly agree with the trial Court's assessment of her that she was very intelligent and fully understood the duty to tell the truth although she did not know the meaning and implication of an oath.
16. Though the complainant's mother, PW2 does not give the complainant's age in her own evidence, both in chief and on cross examination PW3, the Clinical officer, told the Court that the complainant was 5 years old, although on Form DTC1 – Pexh 1(a) the age of the complainant is given as 6 years. The P3 form – P Exh 1(b) gives the age of the complainant as 5 years. There is really no discrepancy between the two documents because PExh 1(b) was filled on 22/03/2008 while the DTC, was filled on 13/08/2009. PW5 also told the Court that when the complainant was taken to Kilingili Police station, her mother M, PW2 told him that the complainant was 5 years old. It is thus my considered view that the age of the complainant been proved beyond doubt, both by oral and documentary evidence.
17. I have also taken another look at both PExh 1(a) and PExh 1 (b) in light of the appellant's ground 3 of the Petition of appeal in which he complains that the learned trial Magistrate erred in law and fact when he failed to consider the examination report produced before Court which allegedly show the complainant was HIV positive while the appellant was HIV negative. On Form DTC1 the test result indicates that the complainant is HIV negative. The P3 Form does not show anywhere that the complainant was HIV positive nor is there any P3 Form in respect of the appellant to show his HIV status. Ground 3 of appeal is therefore not well founded and the same is rejected.
18. The second issue for determination is whether there was penetration. In my considered view, there is enough proof that there was penetration. The appellant submitted that the absence of spermatozoa meant that there was no penetration. It is not always the case that every sexual

intercourse results in deposit of spermatozoa. In any event, the medical documents given by the Clinical officer, PW3 show the complainant's hymen was ruptured which signified penetration by an object. PW3 also stated that the presence of epithelial was a sign of penetration. From the evidence on record, the penetration was caused by the appellant in the circumstances described by the complainant. The complainant stated in her evidence that the appellant instructed her to tell her mother that she had been poked by a stick. The truth of the matter is that it is the appellant who poked the complainant's hymen.

19. As for the third issue, namely whether the act by the appellant was intentional and unlawful the answer to the same is in the positive. The appellant lured the complainant into his house by offering her a banana. His intention was to have intercourse with the 5 year old. He did so. It is not normal for a grown-up man to have intercourse with a child of 5 years. What the appellant did was unlawful and against the dictates of human dignity. It was also intentional as he chose a moment when it was raining and when he knew nobody would probably want to go out the rain to find out what was happening between him and the complainant.
20. Finally I have carefully considered the other five grounds of appeal raised by the appellant and find that they have no merit. I have already dealt with the complainant's testimony which was given in a candid and intelligent way. The trial Court considered the said evidence to the required standard. I also find that the appellant's contention that PW3 was forced by PW2, the mother of PW1 to give false evidence against the appellant is not true. The appellant cross examined PW3 at length and nowhere during cross examination did the appellant suggest to PW3 that he was testifying because PW2 had forced him to do so.
21. Regarding the allegation that the trial Court failed to comply with Section 324 as read with Section 329 of the Penal Code, I can only reiterate the submissions by Counsel for the respondent that the appellant should have raised his concerns during the trial and not on appeal. In any event, it is my finding that the said provisions are irrelevant to this case.
22. In ground 5 of appeal the appellant has complained that the learned trial Magistrate failed to consider his alibi defence. It is my considered view that this complaint is unfounded because in the penultimate paragraph of the judgment, the trial Court stated as follows:

**“The accused’s defence that he has just been incriminated is not true. The accused of learning that he was being sought for escaped to Thika and that is where he was arrested from and brought to Vihiga Police Station. There is no reason why PW1 or her mother would incriminate the accused. He was their closest neighbour and even related to them.”**

23. I have myself considered the appellant's alibi defence but find that it is lacking in force against the Prosecution evidence against him. I also note that during the hearing of the appeal, the appellant contended that there was a grudge between his family and that of the complainant. In my view, the whole of the appellant's defence contained nothing of substance and was a mere afterthought.
24. In conclusion, I find and hold that the appellant's appeal on both conviction and sentence is lacking in merit and is accordingly dismissed. The judgment of the learned trial Court is upheld. The appellant still has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.
25. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 28<sup>th</sup> day of September 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Okoiti - Court Assistant