REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 33 OF 2013

(An appeal from the Orders of the Senior Resident Magistrate, Runyenjes in SPMCR. Case No. 1012 of 2012 dated 18/6/2013)

PATRICK NJERU KAMUGANE............................... APPELLANT

VERSUS

PROSECUTION……..RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Senior Resident Magistrate in Cr. Case No. 1012 of 2012 delivered on 18/6/2013. The appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and he was sentenced to serve life imprisonment.

In his petition and in his submissions the appellant put forth the following grounds and arguments:-

1. *That the magistrate failed to consider that there was a grudge between the appellant and the complainant's family.*
2. *That the appellant was convicted on unsafe and incredible evidence.*
3. *That the magistrate erred in convicting solely on evidence of recognition.*
4. *That the magistrate failed to consider that a DNA test was not conducted.*
5. *That the evidence of the complainant was not corroborated.*
6. *That the complainant was examined by a private doctor as opposed to a government doctor.*
7. *That the appellant was not taken for medical examination.*
8. *That the defence was rejected without good basis.*

The appellant submitted that the prosecution failed to prove the case beyond any reasonable doubt. He alleged that his brothers framed the case against him so as to get a chance to grab his land. He also argued that PW5 was declared a hostile witness which fact the trial magistrate failed to consider. The appellant was not medically examined to procure evidence to connect him with the offence. It was contended that the charge was defective for it indicated the date of the offence as 2/8/2007 while PW4 testified that the offence was committed on 2/8/2012.

The State filed submissions in which it was argued that the prosecutions' case was proved to the required standards. The doctor confirmed that the complainant had bruises in her private parts and that her hymen was broken hence penetration. That PW2 testified that she went to the appellant's house with her father who left her there where she spent the night. The complainant was taken to her parent's home the

following day. The State further argued that although the complainant's father PW5 was declared a hostile witness, his statement was admitted in evidence. PW5 admitted having taken the complainant to the house of the appellant and leaving her there where she until the following day. The medical evidence was sufficient to corroborate the evidence of PW2 and PW5.

PW1 the doctor from St. Michael hospital examined the complainant who was aged 8 years at the material time. He testified that she had bruises on the introitus and that the hymen was broken which was evidence of penetration. PW1 produced the P3 form in evidence.

PW2 the complainant testified that on the 2/8/2007 at around 7.30 p.m. she went with her father PW5 to the house of the appellant to borrow salt. They found the appellant cooking chapati and there were two other people in the house. The appellant asked the complainant to be left behind so that he could give her chapati. Later in the evening, the appellant told PW2 to go and sleep but she refused. She stayed outside the house until later in the night when she decided to enter the house. The appellant took her to bed and removed her pants and started touching her private parts. He later had sexual intercourse with her for the better part of the night. The following morning the appellant escorted the minor to her family home and left her there. PW2 then told her mother what had happened. She was taken to St. Michael hospital by her guardian PW3 where she was examined and treated for the injuries she had sustained in her private parts.

PW3 testified that on 3/8/2007 she went to the home of PW2's uncle. The grandmother of PW2 brought her to PW3 and requested that the minor be taken to hospital because she had been defiled. The girl was walking with difficult and had no inner wear. PW3 informed the chief of the area about the incident and later went to Runyenjes police station where she reported the matter. She was issued with a P3 form and took PW2 to St. Michael hospital for examination. PW2 informed PW3 that the appellant who lives about 250 metres from her parent's' home had defiled her the previous night. The witness told the court that she knows the appellant well because she also stays in the neighbourhood.

At Runyenjes police station, the report was received and booked by PW4 PC Zachary Momanyi on 3/8/2007. He testified that the complainant, a minor was brought to the station by one Niceta Wawira PW3. Niceta told PW4 that PW2 had been defiled by the appellant the previous night. He issued her with a P3 form and referred her to the hospital. The appellant remained at large until 17/8/2007 when he was arrested. He learnt that the father of PW2 was jailed after the incident for a different offence.

PW5 testified that he was the father of the complainant. He told the court that on 2/8/2007 he was not with the complainant which was contrary to the statement he had recorded. The court declared PW5 a hostile witness and proceeded to admit his statement in evidence. In the statement, PW5 said that on 2/8/2007 at around 7.00 p.m. he went to the house of the appellant to borrow salt. His daughter PW2 followed him there. The appellant was preparing chapati in his house. As PW5 was leaving the house, the appellant requested that PW2 be left behind so that he could give her some chapati. The appellant promised to bring PW2 home later which he failed to do. The following day the appellant brought PW2 home in the morning. A short while later the mother of the complainant informed PW5 that the complainant had been defiled. PW2 was then escorted to the police station and to the hospital by PW3.

In his unsworn defence the appellant told the court that he did not defile the complainant and that the charge was framed against him. He further stated that the complainant did not go to his home on the material day.

The duty of the first appellate court was explained in the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was held as follows:-

> *"An appellant on first6 appeal is entitled to expect the e4vidence as a whole to 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 Vs. 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 Vs. Sunday Post, [1958] EA 424)".

The appellant is charged with the offence of defilement under Section 8(1) as read with 8(2) 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 eleven years or less shall upon conviction be sentenced to imprisonment for life.

The appellant argued in his submissions that the charge was defective in that it stated that the offence was committed on 2/8/2007 contrary to the evidence of PW4 that the date of the offence was 2/8/2012. The charge gives the correct date of the offence as 2/8/2007 which was supported by the evidence of PW2, PW3 and PW4. The evidence of PW1 and the history in the P3 form is very clear that the date of offence was 2/8/2007. The dates given by the investigating officer PW4 in his testimony indicated the year of the offence as 2012 instead of 2007. This must have been a topographical error that does not affect the evidence of the prosecution. I have perused the charge and confirmed that it outlines all the essential ingredients and particulars of the offence and it is therefore not defective.

The allegation that the case was framed against the appellant by his brothers so as to grab his land is not supported by any evidence. The appellant did not give any defence to that effect and neither did he cross examine any prosecution witness on that subject. The appellant also alleged that there was a grudge between him and the family of the complainant. Likewise this allegation has no bearing in the evidence.

The appellant further argued that a DNA test ought to have been conducted. It was held in the case of **FAPPYTON MUTUKU NGUI V REPUBLIC [2014] EKLR** the court of appeal held that:-

"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"

The appellant also raised the issue that PW5 was declared a hostile witness. The statement of the witness was admitted in evidence and its contents supported the case of the prosecution. Even if the evidence of PW5 was to be disregarded, the evidence of PW1, PW2 and PW3 was sufficient to support the case of the prosecution.

The appellant argued that he ought to have been medically examined to connect him with the offence. There is no requirement that the accused person undergoes a medical examination. The evidence of the complainant if trustworthy and corroborated by medical evidence to the effect that there was penetration is sufficient to sustain a conviction. It was held in the case of ***DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR*** in dealing with a similar argument that the only medical evidence required to proof defilement was that of the doctor who examined the complainant. In the case before me the evidence of PW2 was sufficiently corroborated by that of the doctor who examined her.

The complainant testified that she was about 13 years old when she gave evidence in court on 27/2/2013. this was 5 years after the offence was committed. From the lower court record, it appears that this case was first tried before D.O. Onyango Resident Magistrate Runyenjes in the year 2012 and concluded. I have not come across an order for retrial in the appeal record. However, the matter was tried and concluded by one J.P. Nandi Ag. Senior Resident Magistrate in year 2013. This explains that when the complainant testified the first time she was about 8 years old. The P3 form indicates that she was 8 years old at the time of examination. From this evidence the age of the complainant was proved to

be 8 years which is within the age bracket covered by Section 8(2) of the Act.

The evidence of the complainant was very clear and consistent and was well corroborated by the medical evidence which showed that there was penetration. The defence of the appellant was a mere denial. The complainant was left in the house of the appellant overnight by her father who did not seem to care about his minor daughter. When he testified before the court on 25/3/2013 he gave evidence that was contrary to his statement and was declared a hostile witness. The investigating officer PW4 told the court that he had since learnt that PW5 had been jailed. He was produced to court from prison remand in Criminal Case No. 423 of 2009 in which he was serving a maximum sentence.

The prosecution proved that the complainant was under the custody of the appellant in the night of the 2nd and the 3rd of August 2007 when she was defiled. This evidence was not controverted by the appellant in his defence. The father of the complainant confirmed that he left the child with the appellant in the evening of 2/8/2007 and that the child was brought to his home the following morning by the appellant himself. This evidence points guilt to no other person but the appellant.

It is my considered opinion that the prosecution proved their case against the appellant beyond any reasonable doubt. The conviction by the trial magistrate was safe and supported by cogent evidence.

The sentence of life imprisonment was within the law. It is hereby ordered that the conviction and sentence be and are hereby upheld.

The appeal has no merit and it is dismissed accordingly.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

The appellant

Ms. Matere for State