REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 97 OF 2014

MM…… APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

(from the conviction and sentence in Mwingi Senior Resident Magistrate's Criminal Case No. 552 of 2013 – G. W. KIRUGUMI – RM).

J U D G M E N T

The appellant was charged 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 9th October 2013 in Migwani District within 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 RKM a child aged 8 years 11 months and 23 days. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place did an act which caused the contact of his male genital organ namely penis with the female genital organ namely vagina of RKM a child aged 8 years 11 months and 23 days. He was also charged with a second count of escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code. The particulars of the offence were that on 10th October 2013 in Migwani District within Kitui County being a remandee at Migwani Police Station in miscellaneous Application number 32 of 2013 and under the custody of No. 91120 PC Steven Leting escaped from such custody.

He pleaded guilty to count II and was convicted and sentenced to serve six (6) months imprisonment.

With respect to Count 1 and the alternative charge, he pleaded not guilty. After a full trial, he was found guilty of defilement. He was sentenced to serve life imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. The appellant filed initial grounds of appeal. However, before the appeal was heard, he filed amended grounds of appeal which he relied upon. His grounds of appeal are as follows:-

1. That the trial magistrate erred in law and fact in finding him guilty in the absence of DNA test report from the Government Chemist which was very crucial to the just determination of the case, despite the fact that the analyst had apologized for the delay by a letter Ref 5204/13.
2. The trial Magistrate failed to consider his defence which was cogent and strong to rebut prosecution evidence.
3. The Learned trial magistrate erred in law and fact to convict him without considering that the

allegations of defilement was a frame up and concocted figment from the complainant's Auntie PW3.

4. That following medical evidence produced before court the trial magistrate introduced extraneous matters on interpretation of the P3 form.
5. That the learned trial magistrate erred in law and fact to convict him without considering that prosecution evidence was not corroborative where the same was contradictory and inconsistent contrary to section 163 of the Evidence Act.
6. That upon scrutiny of the prosecution case it is evident that the same was not proved beyond reasonable doubt contrary to section 109 and 110 of the Evidence Act.
7. That the trial magistrate failed in law and fact by not putting into consideration the circumstances in which the alleged offence is said to have been committed.

The appellant also filed written submissions, which he relied upon during the hearing of the appeal. I have perused and considered the said written submissions. He further stated orally during the hearing that the evidence of PW5 did not tally with that of PW6. He denied that he was aged 32 years. He further stated that the trial court was not fair as his defence was not considered. He emphasized that the evidence of PW6 and the contents of the P3 form were clear that he was not involved in the commission of the offence – as there were neither injuries nor presence of spermatozoa on the complainant. He also submitted that the complainant said she did not know the culprit. He pointed out that while PWI said that the incident occurred at 8.00 am PW3 said the time was 11.00 am.

Learned Prosecuting Counsel Mr. Wanyonyi opposed the appeal and stated that the complainant PW1 stated that she was lured to the appellants house and the appellant closed the door removed her clothes, defiled her and gave her two shillings and warned her not to tell anybody. The complainant however gave the money to PW2 to buy sweets. Counsel submitted that PW2 had peeped at the door and seen what happened in the house. PW2 informed the mother of the complainant about the incident, and the evidence of PW2 was not challenged.

Counsel further submitted that villagers even tried to have the complaint withdrawn which confirmed the occurrence of the incident. Counsel submitted that the testimony of PW3 the Assistant Chief corroborated that of the relatives of the complainant. In addition, the sweater used to wipe out the private parts of the complainant was recovered and handed over the police.

Counsel submitted also that the evidence of PW4 the Clinical Officer confirmed penetration, as the hymen of the complainant was broken and there were minor lacerations in the genital parts of the complainant. Counsel submitted also that there was no delay in taking the complainant for medical treatment as alleged by the appellant.

Counsel also submitted that the investigating officer conducted in depth investigations and produced exhibits. It was thus not true that the case against the appellant was a frame up.

With regard to variation of time for the occurrence of the offence, counsel submitted that none of the eye witnesses had a watch, and as such differences of the exact time were likely to occur.

In response to the prosecuting counsel's submissions, the appellant submitted that if the two minors forgot the real time of commission of the offence, why did they not forget the incident. He emphasized that a DNA test was not conducted, though there was opportunity to do so. He sated also that PW2 did not give the distance between the bed and the door from which he allegedly peeped.

During the trial, the prosecution called seven (7) witnesses.

PW1 was the complainant. It was her evidence that she was in class 3 at [Particulars Withheld] Primary School, having joined the school on 9/10/2013. She testified that on the day in question, she was instructed by her uncle M (the appellant) to get a rope for tying goats. She did so and then her uncle told her to take his coat from her grandmother's house to his house. When she did so, he closed the door, laid her down on the bed, removed her inner wear and did ***"tabia Mbaya"*** and then used a black sweater to

wipe her and gave her Kshs 2/= and warned her not to tell anyone.

It was her evidence that during the incident she screamed. She later narrated the story to J (PW2)who informed her auntie who informed the grandmother about the incident. They then called the uncle (M) and he came. They proceeded to Migwani Hospital. According to her, she handed over her blood stained panties to the police. She stated that the appellant (uncle) denied the incident when her aunties asked him about it.

In Cross-examination, she stated that J heard the screams. She maintained that she was stating the truth and that she could identify the coat the appellant wore on that day. She stated that M was told by her Auntie to go to Kasila's house. She maintained that the appellant put his thing inside her. She said that she informed J about the incident but did not tell F, J's mother. She stated that she could identify the sweater used to wipe her private parts.

She was later recalled and she identified the pantie she wore on that day,

and the sweater used in wiping her private parts.

PW2 was JN a class 3 pupil at [Particulars Withheld] Primary School. It was his evidence that on 9/10/2013, he was not in school and at 11.00 am he was at home with M and the complainant, when his uncle AM, the appellant arrived. The appellant asked the complainant to get him a rope to tie a goat. The appellant then followed the complainant to the grandmother's house.

The witness also followed them and when he was behind the house he heard someone crying, though there was no one in the grandmother's house. He peeped under the door of the appellant's house and saw the appellant lying on top of R the complainant. He then ran and informed M about the incident.

He then ran to his auntie M's place and met his mother. As they proceeded home, he informed her about the incident, and that the appellant had given the complainant Kshs 2/= to buy sweets. He then went with R the complainant to his grandmother's farm and ate mangoes. Thereafter they went to the appellant's house and found him already sleeping. According to him, the appellant on being asked about the incident denied the same.

In cross-examination, he maintained that the appellant followed the complainant and that he heard the complainant crying. He stated that the appellant wanted to beat both the complainant and himself. He maintained that he saw the complainant and the appellant on the bed, as the curtain had been pulled up. He stated that he left M with the goats. He stated that initially the appellant sent M for the ropes, but she refused. He stated that the appellant also told the complainant to take a coat from the grandmother's house to his house. He admitted that he was related to the complainant as a cousin. He did not know if appellant had fought with his mother. He denied being told what to say. He maintained that the complainant gave out the Kshs 2/=.

In re-examination, he stated that the door of the house was not completed to the ground and that he went down his knees and peeped and could see clearly inside the house.

PW3 was Faith Mawia Ndavi a teacher at [Particulars Withheld] Pre-Primary School. It was her evidence that on 9/10/2013 at 11.30 am she left work and went to a shop owned by a cousin at Makalani when she saw J her child running. The child (her son) came to the shop and ordered glucose and two sweets. She asked him where he got the extra two shillings to buy sweets as she had given him only Kshs 5/= and said he would tell her outside the shop, where he told her that the appellant who was his uncle went home and asked the complainant to bring ropes and then followed her. It was her evidence that he also followed them, but did not see anyone. He moved on and heard screams inside the house and peeped through the door and saw the uncle (appellant) on top of the complainant. It was her evidence that when he informed an older daughter of the witness about the incident, she advised him to tell the mother.

She then informed an uncle who said he would report the incident to the clan first. At about 4.00 Pm, the uncle came home and then she found the complainant sitting under a tree crying. When she enquired from her, she stated that her uncle M had sent her for ropes, and a coat, then locked the house and laid her on the bed and did ***"tabia Mbaya"*** to her and then gave her Kshs 2/= to buy sweets.

She then called her mother in law who woke up the appellant, who denied committing the offence. They then examined the complainant with the wife of the appellant and mother in law, and found the pantie had red and whitish stains. People made a lot of noise and the appellant agreed that he committed the offence and said that they take the child to hospital at about 5.00 Pm. It was her evidence that they sold a goat and take the child to hospital. When they went to Kanyaa, the appellant said the hospital was not working and advised that they go to Migwani hospital and they went there. However, the child was not treated and they went to the police. An officer accompanied them and the child was treated. She stated that on Friday 11/10/2013 she recorded her statement but did not know about the P3 form. She stated that the appellant was taken to the hospital later.

She stated that she lived with the complainant who was born in 2004. She relied on a Clinic card. She identified the panties won by the complainant on the day in question. She stated that the sweater was taken from under the mattress. She identified the sweater.

In cross- examination, she stated that she was the sister in law of the appellant. She stated that she was not present during the incident. She said she saw the appellant pass the shopping centre with goats, while she was in school. She stated that J used the Kshs 2/= to buy sweets. She denied asking the grandmother of the appellant to convince him to accept the offence. She denied forcing the appellant to agree to the offence. She stated that she wanted to withdraw the case after village people intervened. She denied that the appellant was owed Kshs 12,100/= by her. She denied framing him. She denied owing the appellant any money.

PW4 was Fred Mbilu Nzili Assistant Chief of Mathunzini Sublocation. It was his evidence that on 9/10/2013 at 4.00 Pm while at work, he was called by a village elder James Kaunange who informed him that the appellant, who was a pastor, had raped the complainant. He proceeded to the scene arriving at 5.30 Pm, and found the child and her auntie F at Makalani market.

He looked for the appellant but did not find him. He advised that the child be taken to hospital. On 10/10/13 at 10.00 am he took the child to Migwani Police Station and to hospital. He was asked to go and recover the sweater that was used to wipe the child. At the house of the appellant, they met his wife and the child showed them the sweater under the mattress and they took it.

In cross examination, he stated that the appellant was a pastor. He stated that the appellant wanted the child to be examined because she was lying. He said he did not know why the appellant accompanied the child to hospital.

He said that the child pointed out the sweater under the mattress. He agreed that the appellant went in person to the police.

In cross examination, he stated that he only took the child to recover the sweater, but did not interrogate her.

PW5 was Thomas Gichohi a Clinical Officer at Migwani District Hospital. It was his evidence that he treated the complainant on instructions from Migwani Police Station on 9/10/2013. She had bruises in the vagina. Hymen was broken. She had minimal bleeding. There was bacterial infection. She had been penetrated vaginally. He produced the treatment notes. He also treated the appellant on 10/10/13. He had bacteria infection similar to that of the girl. He was diagnosed with diabetes.

In cross examination he stated that he could not remember the colour of the pantie of the complainant. He said it had blood stains.

PW6 was Dr. Joseph Mutua of Migwani District Hospital. He produced P3 forms filled by Dr. Mutisya who had been transferred to Kitui. He produced the P3 form for the complainant. It was a finding that the hymen was broken and there were bruises in the genitalia. There were no traces of sperms. He produced the P3 form.

In cross examination, he stated that he trusted his colleague. He stated that no sperms were noted. He stated that what was in the P3 form was not a lie.

PW7 was PC Sosten Leting from Migwani Police Station. It was his evidence that on 9/10/2013 at 7.40 Pm the appellant came to the station with the complainant and an auntie. He interrogated them. The complainant described the incident. He called Cpl Katui to check the private parts of the complainant. He locked up the appellant in the cells. The appellant later escaped from custody. He recorded statements from witnesses. He sent exhibits to the Government Analyst. The report was not ready by 4/8/2014. He produced a dark sweater, pantie and letters or correspondence with the Government Analyst as exhibits.

In cross-examination, he stated that the first report to the police was about 7.00 Pm. He maintained that the appellant later escaped from custody. He maintained that the sweater and pants had blood stains.

When put on his defence, the appellant gave unsworn testimony. It was a long defence describing what he did from 15th July 2013. It was his story that she was given a job to do by FM PW3. He did the job and was to be paid Kshs 12,100/= for bricks and terraces. She did not pay him.

He stated that on 9/9/13 after tying the goats and cows, he went home only for the complainant, F and others to come and the complaint that he defiled her. They then went together to hospital and to the police station and the complainant did not implicate him. However, while at the police station, the complainant and F went back and talked to the investigating officer, and he was put in the cells.

At the hospital the doctor said he should admit the offence, but he refused. He stated that PW3 had framed him several times and even told his wife that he had defiled a girl called J. He insisted that he was framed.

This being a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences – see the case of ***OKENO –VS- REPUBLIC (1972) EA 32.***

I have re-evaluated the evidence on record. The appellant has raised several grounds of appeal. The grounds can be collapsed into two. Firstly that the prosecution did not prove its case against him beyond reasonable doubt. Secondly, that the trial court did not consider his defence.

The contention of the prosecution was that the appellant defiled the complainant PWI. He was seen in the act by PW2 and a report was made to PW3 who reported the matter to relatives, the police and also took the complainant to hospital.

The appellant on the other hand stated that he was framed up by PW3 due to a debt owed to him by the said PW3 OF Kshs 12,100/=. He stated that PW3 had implicated him in a number of other issues falsely. He stated that the complainant, PW2, PW3, the police and medical personnel all colluded to implicate him. In addition, no DNA test was conducted and the Government Analyst did not come to testify in court.

Indeed, the appellant denied committing the offence. He personally proceeded to the hospital with the complainant. He also personally went to the police station with the complainant and PW3 on the day of the incident.

In my view, the evidence of the prosecution witnesses is consistent. PWI the complainant and PW2, both children of tender years, were very clear and candid on what happened that day. PW3 was not present at the scene and there is no suggestion as to how she could have influenced PWI and PW2 that particular day to implicate him with defilement.

The incident was also reported to the police and the complainant was taken to hospital and treated the same day. She was found with lacerations in her vagina, hymen was broken and had bacterial infection similar to that of the appellant. Though the appellant said the medical personnel colluded to implicate him, the medical practitioner who treated the complainant testified in court and the appellant did not put questions that would suggest that collusion. The P3 form was filled by the doctor who did not treat the complainant, so he must have relied on treatment notes which were produced in court.

Though the Government Analysts report was not produced, in my view the evidence on record was sufficient to prove the case against the appellant. In my view, the defence of the appellant was an afterthought meant to deflect the attention from the real issue, which was defilement. I agree with the trial magistrate that the defence did not shake the prosecution evidence. In my view, the age, penetration and the identity of the culprit were proved against the appellant beyond reasonable doubt in this defilement case. I will thus uphold the conviction.

With regard to sentence, life imprisonment is the mandatory sentence provided for by law for a victim who is less than 11 years. The sentence cannot therefore be said to be either harsh or excessive.

In the result, I find no merits in the appeal. I dismiss the appeal and uphold both conviction and sentence.

Dated and Delivered at Garissa this 22nd day of October 2015.

GEORGE DULU

JUDGE