



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 207 OF 2012

SAMUEL MAINA KIBOI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the judgment of the Principal Magistrate, Othaya dated 15th September, 2010 in Criminal Case No. 386 of 2012)

JUDGMENT

1. The Appellant, **Samuel Maina Kiboi**, was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 8th day of September, 2012 in Nyeri South District within Nyeri County, the appellant intentionally caused his penis to penetrate the vagina of **BWN** a child aged seven (7) years.
2. The alternate charge was the Committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act; the particulars of the offence were that on the 8th September, 2012 at the aforementioned village intentionally touched the vagina of **BWN** a child aged seven (7) years.
3. A brief overview of the case is as follows; The evidence of the complainant (**PW2**) was on the fateful day she was watching TV with **MM (PW3)** and two others known as Brian and Waruguru; that the appellant came and took her to the bedroom where he proceeded to remove his trouser and also removed her panty; the appellant made her lie on the bed and proceeded to put his '**myonyo**' in her private parts.
4. The evidence of **PW3** saw the appellant taking the complainant to the bedroom; that he peeped through the door way and saw the appellant taking off his trousers and inserted the '**thing that urinates**' inside the private parts of the complainant; he ran and went to inform **L N (PW4)** the complainants' mother what he had seen.
5. **PW4** was in the company of a friend **Lucy Njoki Kariithi (PW6)** when she received the information and they ran towards the house and at the door they met the appellant with his trouser half way up and he was carrying his gumboots; the appellant ran away; they found the complainant on the bed half naked and she was crying; she then went to report the incident to the police; and took the complainant for treatment; at the trial she produced the complainants' birth certificate that established that the complainant was born on the 13/01/2005.
6. The appellant was arrested by members of the public; PW1 charged him with the offence of defiling a child. The prosecution called a total of seven (7) witnesses; the appellant was put on his defence after he was found to have a case to answer; the Appellant was found guilty and was convicted and sentenced to life imprisonment.
7. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Amended Grounds of Appeal which grounds are summarized as follows;
 - i. That the trial magistrate erred in law and in fact by failing to make inquires on the appellants

- reasons for not cross-examining the prosecution witness;
- ii. That the appellant was convicted on unproved charges;
 - iii. That the trial magistrate erred in law and in fact in rejecting the appellants sworn defence;
8. At the hearing hereof the Appellant relied on his written submissions in support of his appeal and Mr. Njue learned Prosecuting Counsel for the State made oral submissions in response. Hereunder is a brief summary of the submissions made by both parties.

APPELLANTS SUBMISSIONS

9. At the hearing the appellant never asked a single question because he was not fully conversant with the language of the court; the clothes worn by the complainant were never produced as exhibits; that the trial magistrate disregarded his brief sworn defence; that the charges were not proved to the required standard.
10. The appellant urged the court to re-evaluate the evidence on record and to allow his appeal in its entirety.

RESPONDENTS SUBMISSIONS

11. The appeal was opposed; that in his defence the appellant stated that he knew the charges preferred against him; he also stated that he had heard what the complainant and the witnesses had told the court; which then showed that he had followed the entire case and appreciated the evidence tendered against him; that the reason the appellant did not cross-examine the prosecution witnesses was not because he did not understand the language of the court but was out of his own choice not to do so; therefore this ground of appeal could not succeed.
12. Counsel conceded that the complainants clothes were not produced as exhibits; and that the Investigating Officer failed to visit the scene; but the omissions were not fatal to the prosecutions' case as the evidence on record confirmed that the complainant was defiled; that the evidence of **PW2, PW3** and **PW5** was corroborated by the evidence of **PW1, PW4** and **PW6**.
13. On the third ground of appeal Counsel submitted that he supported the trial court's rejection of the appellants' defence; that the defence was a mere denial of the commission of offence and when considered alongside the fact that the appellant did not cross-examine the prosecution witnesses the trial court found that the defence evidence did not displace the prosecutions' case.
14. Counsel prayed that the conviction and sentence be upheld

ISSUES FOR DETERMINATION;

15. After taking into consideration the submissions of both the Appellant and Respondent this court finds the following issues for determination;
 - i. Whether the trial was conducted in a language that the appellant understood;
 - ii. Whether failure by the investigating officer to visit the scene was fatal to the prosecutions' case;
 - iii. Whether failure to produce the clothes worn by the complainant was fatal to the prosecution case;
 - iv. Whether the trial court erred in fact and in law in disregarding the defence tendered by the appellant;

ANALYSIS

16. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.
17. The appellant claims in his first ground of appeal that the trial court conducted the proceedings in a language that he did not understand therefore he could not and was not able to cross-examine the witnesses.
18. Upon perusal of the court record it is noted that when the plea was taken, the record indicates that

- the substance of the charge and every element was stated to the appellant in a language he understood; No mention is made on record by the trial court as to which language was used; the appellant pleaded not guilty to the main charge as well as to the alternate charge; This court opines that had the plea been one of guilty, the issue of language used would have been crucial and would have been addressed conclusively at this stage.
19. Continuing with the issue of language used by the trial court; On the 2nd October, 2012 the hearing of the case commenced with **PC Philip Lodupai (PW1)** testifying; the record indicates that the language used was English with a Kikuyu interpretation; On the 1st November, 2012 the Complainant (**PW2**) and **MM (PW3)** gave their testimonies and the record shows the language as English with a Kikuyu interpretation;
 20. **L N (PW4)** and **Lucy Njoki Kariithi (PW6)** gave their evidence in Kiswahili. The record shows that when the clinical officer **Ian Ngumo (PW5)** who examined the complainant gave evidence there was an English/ Kiswahili interpretation.
 21. The record indicates that the appellant chose to make his defence in Kiswahili; the record clearly indicates that in his opening remarks in defence the appellant stated that he knew the charges made against him; and that he remembered what the witnesses had said.
 22. There is nothing on the court record that shows that the appellant was not comfortable with the English/Kikuyu interpretation or the English/Kiswahili interpretation; nor is there any indication to suggest that the appellant did not understand the Kikuyu language nor did he raise this as an issue with the trial court; the appellant cannot claim not to understand Kiswahili as this was his language of choice when he was called upon to defend himself;
 23. The court record clearly indicates the language used by the trial court to conduct the proceedings; the appellant confirmed that he understood what the witnesses had told the court; he was at all times aware of the charges against him; and when invited to cross-examine the record reflects that no questions were put to any of the prosecution witnesses; the exact words recorded by the trial court are **“NIL”**.
 24. It is this court's considered view that the appellants' failure to cross-examine and participate in the trial was not due to lack of comprehension of the Kikuyu or Kiswahili language; but that it was out of his own choice not to do so.
 25. This court is satisfied that the court record indicated the language used by the trial court to conduct its proceedings; and that the appellant understood the language used and reiterate that he did not effectively participate in the trial out of his own choice.
 26. This ground of appeal is found lacking in merit and is disallowed.
 27. The next two (2) issues will be addressed simultaneously; they relate to failure by the investigating officer to visit the scene of crime; and failure to produce the complainants clothing as evidence; the appellant contends that this omission is fatal; Counsel for the State conceded that this was not done but the failure did not water down the evidence on record.
 28. The evidence of investigating officer **PC Philip Lodupai (PW1)** who was the first witness that was called by the prosecution was that; he received the defilement complaint; he accompanied the complainant and her mother to the hospital for examination; he stated that he got information that the appellant had been arrested by members of the public; and that he was the one who charged the appellant with the offence.
 29. It is obvious from the reading of the record that the investigating officer did not visit the house where the incident took place; further the record shows that no clothes were tendered in evidence as exhibits; On these omissions Counsel conceded that the prosecution failed to do so; but that the omission was not fatal to the prosecutions' case.
 30. It is this court's considered view that such failure error or omission must create or raise a doubt in the prosecutions' case; one of the key ingredients of the offence of defilement is **penetration**. In this instance there was no dispute as to identification of the appellant as the perpetrator. The evidence on record shows that the complainant identified the appellant as the person who defiled her; he was a neighbor and she recognized him; this is corroborated by the direct evidence of **PW3** who was at the house and witnessed the incident and informed **PW4**; **PW4** confirms in her evidence that the appellant was a neighbor; and that together with **PW6** caught him red-handed as he emerged half dressed from the bedroom and fled; after a medical examination **PW5** concluded that the complainant had been defiled and tendered the P3 Form in support.
 31. In this case the evidence on record shows that there was proper identification of the appellant as

- the person who defiled the complainant. There was also proof of penetration and another key ingredient being the age of the victim was also proved.
- 32.The record reflects a clear and logical sequence of events that transpired that establishes the appellants' guilt. The evidence of the prosecution witnesses is properly corroborated in material particulars; and her evidence was properly corroborated.
- 33.This court is satisfied that there was overwhelming evidence on record and that the prosecution made out a strong and watertight case as against the appellant; and that the failure to visit the scene or produce the clothes did not create or raise any doubt in the prosecutions' case; and is satisfied that the record does not show that the failure occasioned any failure of justice.
- 34.These two grounds of appeal are found to be lacking in merit and hereby disallowed.
35. The final issue to be addressed is whether the trial magistrate disregarded the defence tendered by the appellant; the duty of the trial magistrate is to look at the evidence as a whole and then consider whether or not the defence case casts any doubt on the prosecutions' case.
- 36.The judgment of the trial court shows that it considered the evidence of the appellant viz-a viz that of the prosecution and found that the evidence of the appellant was a mere denial and that it did not raise any reasonable doubt against the prosecution's case.
- 37.After re-evaluating the evidence on record this court is satisfied that the trial magistrate made a decision based on the totality of the evidence placed before it, took into consideration the appellants defence alongside the fact that he did not cross-examine the prosecution witnesses and came to the proper conclusion that the defence did not cast any doubt on the prosecutions' case.
38. This ground of appeal is found lacking in merit and is hereby disallowed.

FINDINGS

39.In the light of the forgoing this court makes the following findings;

- i. This court finds that the language used by the trial court to conduct the trial was reflected on the court record and further finds that it was a language that the appellant understood; and that the failure to participate in the trial was out of choice.
- ii. This court finds that from the facts on record the prosecution made a strong and watertight case against the appellant and finds that failure to visit the scene or produce the clothes did not create or raise any doubt in the prosecutions' case; and further finds that the failure is found not to be fatal to the prosecution case.
- iii. This court finds that the trial magistrate made a decision based on the totality of the evidence placed before it and that it did not disregard the appellants' defence.

DETERMINATION

- 40.The appeal is found lacking in merit and is hereby dismissed.
- 41.The conviction is found to be safe and is hereby upheld.
- 42.The sentence is hereby upheld.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 30th day of November, 2015.

HON A. MSHILA

JUDGE