



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.81 OF 2014

BETWEEN

S KAPPELLANT

AND

REPUBLICRESPONDENT

J U D G M E N T

Introduction

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that S K on the 15th December 2012 in Vihiga County within Western province intentionally and unlawfully had penetration by his genital organ namely penis into the genital organ namely vagina of M.K, a child aged seven (7) years.

2. In the alternative he was charged with the offence of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006, particulars of which were that S K on the 15th December 2012 in Vihiga County within Western province willfully and unlawfully caused his genital organs namely penis to make contact with a genital organ of a girl namely M.K aged seven (7) years.

3. The appellant pleaded not guilty to both the main charge and the alternative count. The Prosecution called five (5) witnesses while the accused was the only defence witness. The trial Court carefully considered the evidence on record and found that the Prosecution had proved the case against the accused person beyond reasonable doubt and convicted him of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was sentenced to life imprisonment.

Petition of Appeal

4. Being dissatisfied by the said judgment the appellant appealed against both conviction and sentence on the following home-made grounds:-

1. THAT the learned trial Magistrate erred in both Law and facts when he based the conviction relying on the sole evidence of PW1 under difficult and inconclusive circumstances.
2. THAT the learned trial Magistrate erred in both law and in fact by not evaluating that Section 124 of the evidence act stipulates that evidence of children of tender age is not to be acted upon unless corroborated by other material evidence.
3. THAT the learned trial Magistrate erred in both law and facts when she failed to observe that

- forensic examination report was necessary in this case to establish truth in between.
4. THAT the learned trial Magistrate erred in both law and facts by not observing the contradictory evidence among the Prosecution witnesses.
 5. THAT the learned trial Magistrate erred in both law and fact when she failed to consider that no investigation was conducted thus the Prosecution relied on information of PW1.
 6. THAT the trial Magistrate erred in both law and fact by not complying with the provisions of Section 324 as read with Section 329 of the C.P.C.

He prays that the appeal be allowed conviction quashed and sentence be set aside.

Submissions

5. The appellant relied on his written submissions to support his appeal whereas Mr. Oroni for the State submitted orally in opposing the appeal. Mr. Oroni submitted that they relied wholly on the evidence of the complainant who identified the appellant as a person well known to her and who was a regular person around the home. He submitted further that the fact of defilement was confirmed by the doctor PW4 and that the Court rightly convicted the appellant after a thorough analysis of the evidence that was before the Court. He maintained that the sentence herein was adequate and was meant to discourage would be rapists and defilers. He asked this Court to dismiss the appeal.

6. The appellant in a short rejoinder submitted that the complainant was a child to his in law and was playing with others. He added that they had a family dispute following the death of his father in 2010. He maintained that he belongs to the second house of his father which had a big dispute with the 1st house hence the frame-up. Lastly he submitted that the trial Court did not consider the dispute he explained to it.

7. Being the first appeal, this Court has the duty to re-evaluate the evidence on record and come up with its own conclusions bearing in mind that it was not at the trial Court to hear the witnesses or even see their demeanor as they testified. This Court is also duty bound to rely on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Okeno –vs- Republic [1972] E.A 32** and **Pandya –vs- R [1957] E.A. 366**.

The Prosecution Case

8. PW1 the complainant in this case was taken through a voir dire examination by the trial Court since she was a child of seven (7) years. The trial Court observed that she did not know the meaning of giving an oath or the difference between telling the truth and a lie. She therefore gave unsworn evidence. Briefly, PW1 told the Court that on 15/12/2012 while she was cleaning utensils behind their kitchen, the appellant called her by name and asked her to go and collect sugarcane from him.

9. The appellant went with her to his sugarcane plantation as he is a sugarcane farmer. PW1 explained that the appellant removed her panty and also removed his black trousers and T-shirt and lay on her. She was lying on the ground facing up as she was told by the appellant. The appellant removed his penis and put it in her vagina and she felt pain. She was promised Kshs.10/= and “mutura”. After sometime the appellant told her to go. She put on her pant and went home. She said that she met J her friend but she did not tell her anything. Her mother had gone to a neighbours funeral so she was called by J who told her what had happened to PW1. Her mother then asked her to tell her what had happened and she told her it was the appellant. PW1 also told the Court that she was taken to Vihiga district hospital by her mother and was treated. They then went to the Police. It was her first to have such an experience. She said time the appellant gave her 3 sugarcane stocks and no money. She gave the sugarcane to her friend as instructed by the appellant. She identified the patient’s record book given to her from VIHIGA DISTRICT HOSPITAL “MFI – 1” and P3 “MFI – 2”.

10. PW2 F M a 14 years old child was also taken through a voir dire examination by the trial Court. The Court found that she was possessed of sufficient intelligence and that she knew the difference between lying and telling the truth. She gave sworn evidence. She told the trial Court that she was a standard 7

student at [particulars withheld] Primary School and that she knew the appellant herein as S who lived near where they repair bicycles. She explained to the trial Court that on the 15/12/12 at around 11.00a.m she was at home playing with PW1 and B when the appellant came around and called PW1 to go and get some sugarcane from him. She testified that the appellant grew sugarcane and also sold them.

11. Later she then went to look for PW1 and found the accused appellant lying on top of her. When the appellant saw her he ran away. She explained that the appellant had removed PW1's pant and that PW1 was lying on her back. After the appellant ran away, PW1 stood her up and thereafter PW 2 went and called her mother E K who was attending a burial for her uncle A. She told her mother what she had seen and asked her to ask PW1 what she was doing with the appellant. PW1 then told her mother that the appellant told her to lie on the ground and that she would be given kshs.10/= and "mutura". PW2 told the Court that the appellant gave PW1 sugarcane and 5 maize cobs. PW2 identified the appellant at the dock and stated that they did not have any grudge with him.

12. On cross examination by the appellant PW2 explained that she was told by her brother B that the appellant called PW1 to go with him so he would give her sugarcane. PW2 reiterated that she found the appellant lying on top of PW1. She also confirmed her earlier testimony that the appellant gave some sugarcane to PW1 and that he ran away when he saw her. She also told the trial Court that her mother told her to call the appellant who she found in his home but he refused to follow PW2. On cross examination PW2 confirmed to the trial Court that she told her mother what she saw.

13. PW3 E K the mother to the complainant told the Court that on the 15/12/2012 at 11.00 a.m she was at a burial for one A K when she was called by her daughter F who told her that she had found the appellant who is her in law lying on top of PW1 and on seeing F he ran away. She was also told by F that the appellant had removed PW1's pants and was having sex with her. She then asked PW1 who told her the same story. She then checked her daughter PW1 and found that her vagina was larger than usual. She then asked the appellant whether what PW1 and PW2 told her was true, but he denied it.

14. She took the child to Chavakali Police station and to Vihiga district hospital where the child was treated. PW3 testified that she gave birth to PW1 on 25/09/2005 as per in the Birth Certificate MFI - 3. She also told the Court that she had no grudge with the appellant who was her husband's brother.

15. On cross examination by the appellant, PW3 explained that PW1 and PW2 were her daughters and she believed what they told her. She reiterated her earlier statement and added that the doctor told her that her daughter had been defiled. She could not understand why the appellant defiled her daughter.

16. PW4 SAMMY CHELULE Senior Clinical officer at Vihiga district hospital testified that he treated PW1 who he said was seven (7) years old. He explained that she was taken to hospital on 13/12/12 and he did fill the PRC form and P3 form on which he summarized the matter. He explained that PW1 was taken to the hospital 72 hours after the incident and she had changed her clothes. On physical examination he observed that she was frightened though clinically stable and was not intoxicated. He estimated her age to be seven (7) years which was confirmed by the Birth Certificate.

17. On physical examination of her genitalia, he observed that her hymen was torn, there was visible inflammation, it was tender to touch and was slightly swollen on the inner side of the vagina and there was bleeding. There were no visible tears. The laboratory tests showed that HIV was negative but syphilis was positive and there were active sperm cells noted.

18. PW4 concluded that there was intentional, unlawful and forceful penetration to a minor. He concluded it was incest because the defiler was an uncle. He produced the P3 form – Pexh 2, treatment notes - PExh 1, PRC form – Pexh 4 and laboratory tests results – Pexh 5. He also examined the appellant who was brought to him by Police from Chavakali Patrol Base. He did medical routine test and estimated his age to be 23 years and normal physically. HIV test was negative but syphilis tested positive. He filled, signed and stamped the P3 form – P Exh 6, treatment notes as PExh 7 and laboratory tests as PExh 8. He concluded that the appellant was the one who defiled the minor due to the syphilis noted in both the appellant and the minor.

19. On cross examination by the appellant PW4 maintained that laboratory tests were conducted and that the PRC forms were clear on the tests to be conducted. He confirmed that he also examined the appellant and conducted tests on him. On re-examination by the trial Court PW4 confirmed that PW1 was taken for examination on 15/12/2012 while appellant was taken there on 17/12/12. PW5 No.51207 PC MULI MUTISO attached to Chavakali Police Patrol base investigated this case. He testified that on the 15/12/12 he received a report from the complainant who was accompanied by her mother that she had been defiled by the appellant. He recorded the same in the Occurrence Book and referred them to Vihiga District Hospital for checkup. He later issued them with a P3 form which was filled and returned to him.

20. PW5 testified further that the appellant was brought to Station after the report was made and that he was brought by members of the public. PW5 identified the appellant at the dock and added that he used to see him walking outside the patrol base as he was coming from the market and had no grudge with him. He produced PW1's birth certificate which was marked as PExhibit 8 and told the Court that PW1 was born on the 25/9/2005. He also visited the scene where the defilement occurred and verified that there was a bush in the place.

21. On cross examination PW4 confirmed that the complainant reported the matter and that the appellant did not take himself to the patrol base but was taken there by members of the public after they arrested him. He also confirmed that he took appellant to the hospital for testing and that the complainant knew appellant well. He explained to the Court that he was not present during the defilement but believed that the appellant defiled PW1 after the doctor verified the same. The Prosecution then closed its case. In its ruling the trial Court found that the prosecution had established a prima case against the appellant. The Court complied with Section 211 of the CPC after which the appellant opted to give a sworn statement.

Defence Case

22. The appellant introduced himself as S K a farmer from Chavakali. He testified that on 17/12/12 while removing cow dung at his home the complainant's mother approached him and told him that he had trespassed on her land. A dispute then arose and they argued about it and the complainant's mother told him that she would teach him a lesson. He stated that she told him to go to the Police to resolve the issue. At the Police station, the Police took his finger prints and then he was taken to hospital where they took his blood and urine for conducting tests which tests he did not know. The next day he was taken to Court and charged with this offence and later remanded at Kodiaga prison.

23. The appellant claimed that they had a land dispute at home and that is why he was framed. On cross examination by the Prosecutor he explained that he was told that the girl was seven (7) years old. He also stated that he did not have land of his own but lives on his parents land. He explained that his father is deceased and that his brothers were also farming on the same land. He claimed to have reported the land dispute to the Chief and the elders and maintained that he did not defile PW1.

Analysis of the Evidence

24. PW1, the complainant told the trial Court how the appellant lured her to the sugarcane plantation and defiled her. Her evidence was corroborated by the evidence of PW2 who said she found them in the act. PW2 explained how she got information from her brother that PW1 had been called by the appellant who was to give her some sugarcane. PW2 later followed them to the sugarcane plantation and found the appellant lying on top of PW1 but on seeing her, the appellant ran away. PW1 was candid in her testimony as she explained how the appellant removed her pant and told her to lie on her back and how appellant removed his clothes and defiled her. PW2 also told the trial Court that she went to call PW3 their mother who was at a burial and explained to her what she had seen. PW4 examined the minor and prepared the P3 form "PExh -2 and the PRC from "PExh - 4." He made his findings and concluded that the minor had been defiled. The minor PW1 was first treated at Vihiga district hospital see "PExh - 1." PW1 was taken to hospital in the company of her mother PW3. PW4 also found that PW1 had syphilis and that there were active sperm cells in her vagina.

25. PW4 also tested the appellant and found that he too had syphilis. PW4 performed the general tests on

the appellant and concluded that the appellant must have defiled the minor since both of them had syphilis.

26. In his defence appellant claimed that he had been framed by the family of the complainant because of the land dispute they have in the family. He claimed that the complainant's mother approached him and asked him why he had trespassed on their land. They quarrelled and had an argument and it was after the quarrel that he was asked to accompany the complainant's mother to the Police to resolve the land dispute but instead, he was arrested and taken to the hospital. All this happened on 17/12/12. The appellant did not call any witnesses. The age of the minor was confirmed to be seven (7) years as she was born on 25/09/2005 see PExhibit 5.

27. In her judgment the trial Magistrate found that the minors (PW1's) vagina was penetrated which satisfied the first ingredient of the offence of defilement. She also found that the age of the minor was proved by the Birth Certificate PExhibit 8 and lastly that the appellant was positively identified as the circumstances were favourable for positive identification. She thus found that the Prosecution had proved the case as against appellant beyond reasonable doubt.

Issues for Determination

28. From the above analysis and looking at the petition of appeal the following are the questions which fall for determination by this Court.

1. Did the trial magistrate base the conviction on the sole evidence of PW1 under difficult and unconducive circumstances?
2. What does Section 124 of the Evidence Act provide?
3. Did the trial Court consider Forensic Examination Report?
4. Was the evidence by the Prosecution contradictory?
5. Were there any investigations conducted in this case?
6. Was it necessary for the trial Magistrate to comply with Section 324 as read with Section 329 of CPC?

29. On the first issue and considering the judgment in its entirety I find that the trial Magistrate based her conviction on the evidence of all the Prosecution witnesses. Her analysis of the evidence was above board. The ground therefore fails.

30. On the second issue, I am guided by the provisions of Section 124 of the Evidence Act. The trial Magistrate dwelt at length on this particular provision which states as follows:-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15) where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the Prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:-

Provided that where a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

31. The effect of the proviso to Section 124 is to create an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years where the case in hand involves a sexual offence. In **JACOB ODHIAMBO OKUMU –VS- REPUBLIC CR.APP. No.80 OF 2008 KISUMU** Court made the same point that **“though Prosecution's evidence was that of a child of tender years, the Court can convict on it by virtue of the proviso to Section 124 of the**

Evidence Act Cap 80 Laws of Kenya as amended by Act No.5 of 2003". Earlier in MOHAMED – VS- REPUBLIC [2006] 2KLR 138 the Court asserted" it is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a Sexual Offence is a child of tender years if it is satisfied that the child is truthful."

32. In the present appeal, the trial Magistrate conducted a *voire dire* examination and directed that PW1 should give unsworn evidence. PW1 identified the appellant as the person who defiled her. She knew the appellant before. The trial Court recorded its findings and stated as follows:

"In this particular case, I did conduct voire dire examination and I am satisfied that although the complainant and her sister J told the truth though they were not under oath. I am convinced that the two were truthful."

33. Thus as explained above evidence of children of tender age can be acted upon without corroboration by other material evidence as long as the trial Court is convinced and satisfied that the child is telling the truth and records the same. The trial Court in this case was satisfied that PW1 told the truth and made a record of the same. For the reasons set out above the second ground of appeal must fail.

34. On the 3rd issue the trial Court relied on Medical reports, P3 form and the PRC Form produced by PW4 the Clinical Officer who treated the complainant to come up with its conclusion. The observations in the said reports were sufficient to enable the trial Court come to that conclusion. The appellant was found to have syphilis and the complainant too had syphilis. The complainant was seven (7) years old and contracting syphilis at that age was not normal She must have contracted the disease from the appellant. There was no need for a further forensic examination report to conclude that the appellant was the one who defiled the complainant. Other sufficient evidence was there before the trial Court.

35. Having heard the Prosecution witnesses, the trial Court found that their evidence was consistent. This Court finds the same to be true. There were no contradictions and the investigations by PW5 were sufficient in my considered view. PW5 while taking statements from the Prosecution witness properly interrogated the evidence before making the decision to charge the appellant with the offence herein. His decision was buttressed by the doctor's report who made the finding that PW1 was defiled and that she must have been defiled by the appellant because the two of them were found to have syphilis.

36. For the foregoing reasons grounds 4 and 5 of the appeal must fail. Lastly the appellant complained that the trial Magistrate erred in not complying with Section 324 as read with Section 329 of the Criminal Procedure Code. Section 324 of CPC gives power to an accused person before sentence to arrest judgment on the ground that the information does not state an offence which the Court has power to try. It was necessary for the appellant to invoke the said provisions of Section 324 of the Criminal Procedure Code during the trial. He did not do so then and cannot do so now. As for Section 329 the record shows that the appellant was allowed to mitigate and the mitigation was duly considered by the trial Magistrate.

Conclusion

36. In conclusion and for all the reasons above stated, I find that the appellant's appeal lacks merit and the same is hereby dismissed in its entirety. I uphold both conviction and sentence by the learned trial Magistrate. Right of Appeal within 14 days.

37. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 27th day of November 2015

RUTH N. SITATI

JUDGE

In the presence of:

Present in Person for Appellant

Mr. Omwenga (present)for Respondent

.....Court Assistant