



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 59 OF 2014

MAXWEL KIPLANGAT Alias LANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **Maxwel Kiplangat alias Langa** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been arraigned before the lower court on 1/8/2012 facing a charge of **Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act 2006**. The particulars of the charge were that:-

“On diverse dates between 4th day of July 2012 to 20th day of July 2012 in Njoro District within Rift Valley Province unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of VJK alias VCK a child aged 4 years which caused penetration.”

In addition to this main charge the appellant also faced an alternative charge of **Indecent Act With a Child contrary to Section 11(1) of the Sexual Offences Act 2006**.

The appellant entered a plea of **‘Not Guilty’** to both charges and his trial commenced on 15/3/2013. **Mr. Achola**, advocate represented the appellant. The prosecution led by **Inspector Chacha** called a total of six (6) witnesses in support of their case. The brief facts of the prosecution case were as follows:-

PW1, VCK who was the complainant was a 4 year old girl. She testified that on 6/7/2012 she was playing near her home. The appellant whom she knew very well as he was a neighbour whom she referred to as **‘Langa’** came and carried her to his house. He undressed the little girl and placed her on the bed. He then lowered his own trouser and proceeded to defile her. After the act the appellant dressed the child and warned her not to reveal to anyone what had happened or else he would kill her. The complainant left and went home crying due to the pain.

PW2, SC was an aunt to the complainant. She told the court that on the material date at about 5.00 p.m. the complainant came home crying. **PW2** tried to probe the child to find out what the problem was but due to the threats leveled against her the child declined to reveal anything. Thereafter the child used to complain of pain in her vagina and became incontinent, urinating and soiling herself.

PW3, EBC was the mother of the complainant. She told the court that on 17/7/2012 at about 6.30 a.m. the complainant finally revealed to her that she had been defiled by **‘Langa’**. She described to her mother in detail the ordeal she had undergone. **PW3** examined her child and noticed a raw wound on her genitals between the vagina and the anus. She then informed her husband and then reported the matter to the area

Chief and to police at Ngata Police Station. A female officer was assigned to take the child to Njoro Health Centre where she was treated. Later the complainant was admitted at the Nakuru Provincial General Hospital. Upon completion of police investigations the appellant was arrested and arraigned in court.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant decided to give a sworn defence in which he denied having defiled the complainant as alleged. On 6/12/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant of the main charge of defilement and thereafter sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal. The appellant was represented by **Mr. Kanyi** advocate who argued the appeal on his behalf. **Ms Nyakira** learned state counsel who appeared for the DPP opposed the appeal.

Being a court of first appeal this court is under a duty to re-evaluate the prosecution case and to draw its own conclusions upon the evidence presented. In the case of **Ajode vs Republic [2004]KLR 81** the Court of Appeal sitting in Kisumu held that:-

“In law it is the duty of the first appellate court to weight the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.”

In such a case falling under Section 8 of the Sexual Offences Act there are various factors that must be proved. I have carefully considered the submissions made by the learned counsel.

The first ground of appeal raised was that the accused was denied his right to be represented by an advocate of his choice contrary to the provisions of Article 50(2)(a) of the Constitution of Kenya. Counsel cites the fact that the complainant gave her testimony in the absence of defence counsel as evidence of the denial of this right. I have carefully perused the proceedings. I note that on the date allocated for hearing being the 15/3/2013, **Mr. Achola** advocate was present in court. The prosecution indicated that the complainant and one other witness were in court and were ready to testify. Defence counsel applied for an adjournment. The court rejected the application for an adjournment and directed that the hearing proceed at 12.00 noon. At 12.00 noon **Mr. Achola** was nowhere to be seen. The complainant who was a minor aged 4 years was in court ready to testify. I find that the appellant was **not** denied the right to legal representation. **Mr. Achola** who was acting for the appellant opted not to return to court at the time allocated for hearing. The advocate did not bother to ask another lawyer to hold his brief. Having been directed by the court on what time the hearing was scheduled to commence the lawyer refused and/or declined to return to represent his client. The court cannot be blamed for the irresponsible actions of counsel. I have no doubt that in so acting the lawyer was attempting to force the court's hand into granting an adjournment. I do not fault the trial magistrate in proceeding with the hearing given the circumstances. This was a case involving a vulnerable witness being a minor – the court was quite right to discourage any delays in the hearing.

I further note that on the next hearing date being 12/4/2013 **Mr. Achola** was present in court. He did not make any application to have the complainant recalled for cross examination. Indeed for the remainder of the trial the appellant was represented by an advocate who cross examined each witness. It is pertinent that on 29/7/2013 when the prosecution substituted a new charge sheet the appellant recorded a fresh plea. The court enquired from the defence whether they wished to recall any witness. **Mr. Achola** acting for the appellant stated at page 30 line 9:-

“MR. ACHOLA: I don't wish to recall any witness for cross-examination.”

Here again the appellant was accorded a chance to recall the complainant but declined through his lawyer to do so. It is clear that the fact that the child testified in the absence of counsel did not in any way prejudice the defence. His lawyer would have otherwise applied to recall the child. I find that there was no denial of the appellant's right to legal representation. The appellant was afforded and did enjoy the right to legal representation. This ground of the appeal is dismissed.

Counsel for the appellant also relied on the ground of a defective charge sheet as a basis of this appeal. Counsel took issue with the dates cited with charge sheet. He submitted that there was no certainty in the dates cited in the charge sheet a factor which he argued greatly prejudiced the capacity of the appellant to prepare his defence. I have carefully examined the charge sheet. I note that in the first charge sheet filed in court on 27/7/2013 the date of the offence was cited as follows:-

“On diverse dated between 6th day of July 2012 and 20th day of July 2012....”

Later on 29/7/2013 the court prosecutor applied to substitute a new charge sheet. The application was allowed and the new charge sheet was filed which indicated the date of offence as:-

“On diverse dates between 4th day of July 2012 to 20th day of July 2012....”

The evidence from the complainant and all the prosecution witnesses is that there was only **one** act of defilement which took place on one particular date. The complainant herself stated that the incident occurred on 6/7/2012. I find that the evidence clearly established that only one act of defilement occurred. The defect in the dates cited in the charge sheet did not in my view prejudice the appellant in any way. There was no uncertainty regarding dates in the evidence. In my opinion failure to cite the precise date in the charge sheet this was a minor defect which was not fatal to the prosecution case. I therefore dismiss this ground of the appeal.

Finally Mr. Kanyi for the appellant submitted that the leaned trial magistrate erred in convicting the appellant in the absence of sufficient evidence. He submitted that the complainant appeared to have been coached that her evidence may uncorroborated and that the prosecution evidence was contradictory.

The complainant testified as **PW1** in this case. As stated earlier she was a minor aged 4 years old. The prosecution produced uncontrovertible proof of her age being her birth certificate serial No.[particulars withheld] which clearly indicated that the child was born on 01/02/2008. Therefore in July 2012 when the incident is alleged to have occurred she had just turned 4 years old. The trial magistrate did conduct a voire dire examination on the child before recording her evidence. From the answers tendered by the child the trial court stated that:-

“COURT:

The minor understands that she is supposed to say the truth. Due to tenderness of her age she will give unsworn statement.”

The complainant proceeded to give a clear cogent and graphic account of what happened to her. She stated at page 13 line 5:-

“When he inserted his penis in my vagina I felt pain and I cried a lot. The accused slept on me while I was down on the bed. He defiled me several times. He had removed all my clothes and placed them on the bed while he had partly removed his trouser upto the knee.”

It is highly unlikely that a child could be coached to give such clear details of the incidence. The reason why the complainant was able to recall events so vividly is because this was an experience she herself underwent.

Indeed the terms used by the complainant in describing her ordeal to her aunt and mother were terms used by children. She described a penis to her aunt, **PW2**, as ‘**susu**’ i.e. the part of the body used by men to urinate. She told **PW2** that the appellant ‘**urinated**’ on her. Clearly the child had no appropriate words to describe the act of ejaculation so she only described what her young mind would comprehend i.e. to urinate. To her mother **PW3** the child said that the appellant’s penis felt ‘**as if it has a nail.**’ Again being so young the complainant had no words to describe an erect penis. She could only describe it as hard like a nail. I reject the theory that the complainant had been coached. I find that the complainant did undergo the defilement as she has described.

Counsel for the appellant submits that the trial magistrate ought not to have convicted on the basis of the complainant's evidence which was uncorroborated. Sexual offences do not occur in public. They are often perpetrated in dark rooms and corners. It is highly unlikely therefore that there would be any witness to a sexual offence. Counsel has cited Section 124 of the Evidence Act in support of his submission that the evidence of the complainant required corroboration. Section 124 provides:-

“124. Notwithstanding the provision of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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 convicted on such evidence unless it is corroborated by other material in support thereof implicating him....” (my emphasis)

The provisions of Section 124 do not mean that there must be evidence from another eye witness. What is required is ‘**other material**’ supporting the implication of the accused in the offence. In this case such other evidence abounds. **PW2** told the court how on the material day the child came home crying. Although due to fear of being killed the child declined to disclose to **PW2** what had upset her **PW2** noted certain pertinent changes in the complainant – she began to urinate on herself and soil herself. Finally the child revealed to her mother **PW3** what had happened. She told **PW3** exactly what she has told the court. **PW3** examined the child and noticed a wound between her vagina and anus. This is evidence of some interference with the child's genital organs.

There is also medical evidence to corroborate the testimony of the complainant. **PW4, Jacob Chelimo** is a Clinical Officer attached to Njoro Health Centre. He examined the child on 20/7/2012. He noted bruises on her external genitalia. The hymen was freshly perforated and there was a foul smelling discharge from the vagina. **PW4** concluded that the child had been defiled and he explained that her urinary incontinence was the result of injuries sustained due to penetration by the male organ. **PW4** produced the P3 Form as an exhibit **PExh.4**. Later the child was admitted at Nakuru Provincial General Hospital for treatment due to infection and fever. Her discharge summary from the hospital **PExh.2** clearly indicates a diagnosis of urinary tract infection due to sexual abuse. The child was discharged on antibiotics and referred to counselling. As I stated earlier evidence supporting the complainant's testimony that she was defiled abounds. The medical evidence corroborates her testimony.

Counsel for the appellant submits that the prosecution failed to call a crucial corroborative witness being a young brother of the appellant whose name was given as ‘**V**’. The complainant alleged that this young boy was peeping through the window and may have witnessed the defilement. Firstly, it is not clear what this boy may or may not have been able to see looking through the window. It is quite possible that he saw nothing and that is why the police did not bother to call him as a witness. Secondly, this boy being a brother to the appellant may have been reluctant to come forward and give evidence against his elder brother. Failure to call this ‘**V**’ does not in any way weaken the prosecution case in view of the strength of the corroborative evidence I have cited. Section 124 of the Evidence Act contains an important proviso that:-

“...provided that where in 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, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The learned trial magistrate in his judgment at page 46 line 15 commented on the demeanour of the complainant as follows:-

“PW1 was consistent in her testimony despite threats by the accused person.”

He found the complainant to be a reliable and believable witness. This was the trial magistrate who was best placed to observe and comment on the demeanour of the witnesses as he was able to see and hear them testify. I find that the complainant gave clear and consistent evidence regarding the events of the day. Her story remained unchanged even days later when she narrated her ordeal to her aunt and her

mother. She was in all likelihood telling the truth.

The next issue for analysis is that of identification. Having found that the complainant was indeed defiled, has it been proved that it was the appellant who defiled her? The incident occurred during the day time at about 4.00 p.m. when the complainant was playing outside. No doubt visibility was good and she was able to see the appellant very well. The appellant took the child to his house. They were alone together and in close contact. The incident took time. This was not a mere fleeing encounter. I find that the complainant had ample time and opportunity to see the appellant well. More importantly the appellant was not a stranger to the child. He was a neighbour and somebody whom she knew well. She gave his name as **'Langa'** which was his alias name by which he was commonly known. The complainant while reporting the incident to **PW2** and **PW3** and to the police gave the name of her defiler as **'Langa'**. She did not at any time waiver in her identification of the appellant. This was a case of clear recognition as opposed to mere visual identification. In the case of **Anjononi & Others vs Republic**, the Court of Appeal held that:-

“recognition of an assailant is more satisfactory more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

The appellant was a person whom the complainant knew very well. There is little possibility of a mistaken identity.

In his defence the appellant claims that he was not at the scene in Ngata Farm on the material day. He claims that he was away visiting his father in Kakamega from 6/7/2012 to 30/7/2012. The appellant further suggests that these charges have been fabricated due to a grudge between his family and that of the appellant. This defence is corroborated by **PW2, Mary Kabii** who is the appellant's mother. However a close look at this defence reveals certain inconsistencies. The appellant claims that he had been arrested and detained on another unrelated offence and was released from remand on 6/7/2012. He claims that he immediately left to go to stay with his father in Kakamega. Although the appellant claims to have been released from remand on 6/7/2012, he later admits at page 35 line 6:-

“I can't remember when I left prison.”

He is not sure of the date he left remand. No document has been produced to confirm the date when he left the remand prison. No documents/receipts are available to show what date the appellant travelled to Kakamega. The appellant's father with whom he claims to have been staying in Kakamega did not testify to confirm this. On the whole this defence appears to be a pure fabrication.

The appellant claims that there existed a grudge between his family and the complainant's family. **PW2** the appellant's mother stated that the appellant had earlier stolen a power saw from the complainant's father but that the latter had forgiven him for this theft. If the complainant's father had already forgiven the alleged theft of his power saw by the appellant why would he seek to frame false charges against the appellant. The issue of this alleged grudge was not raised at all during the cross examination of **PW2**. It is a mere afterthought. Finally, even if there existed a grudge between the two families I find it highly unlikely that a 4 year old child would be motivated to name the appellant as her defiler on the basis of the theft of a power saw. I concur with the learned trial magistrate's rejection of this defence as a pure fabrication an afterthought. The alibi defence is not persuasive at all and does not cast any doubt on the prosecution case. I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant

Based on the foregoing, I am satisfied that the prosecution mounted an overwhelming case against the appellant. The charge of defilement was proved beyond reasonable doubt. I uphold the conviction of the appellant by the trial court. The sentence of life imprisonment imposed by the trial court being the legally mandated sentence for defilement of a child under the age of 11 years as provided by Section 8(2) of the Sexual Offence Act is hereby confirmed. The upshot is that this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 23rd day of November 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Appellant – in person

Ms Mbiru holding brief for Mr. Kanyi