



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 121 OF 2013

ABDULLAHI GALGALLO DODI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Abdullahi Galgalo Dodi 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 2/3/2012 at Jangwani area of Isiolo County, intentionally caused his genitalia to penetrate that of H.N., a child aged 7 years. In the alternative, he faced a charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**. He denied the offence and it proceeded to full hearing with the prosecution calling a total of seven (7) witnesses.

The appellant testified on oath in his defence but did not call any other witness. The appellant was convicted and sentenced to serve life imprisonment. The appellant is aggrieved by the said conviction and sentence and preferred this appeal based on the following grounds:

- 1. That the conviction is based on a single identifying witness;**
- 2. That the medical evidence did not support the complainant's evidence;**
- 3. That his defence was not considered and no reason was given for rejecting the defence;**
- 4. That the conviction went against the weight of the convictions;**
- 5. That the appellant's fundamental rights under Section 72 (3) (b) of the Constitution were violated.**

The appellant's prayer is that the conviction be quashed, the sentence be set aside and he be set at liberty forthwith. In support of the grounds, the appellant filed written submissions.

The appeal was opposed by the Learned Counsel for the State, Mr. Mungai. He submitted that the prosecution adduced overwhelming evidence against the appellant; that the complainant picked out the appellant from 2 boys after she led her parents to the place where she was defiled; that the defilement took place during the day; that the complainant who was then 7 years was able to recognize the appellant; that at the Police Station, the complainant again identified the appellant to the Police; that the Doctor confirmed that there was penetration of the complainant which was corroborated by the complainant's

parents; that the court considered the defence because the appellant alleged that it was a frame up but the appellant was not known to the complainant's parents.

The court conducted a *voire dire* examination on the complainant who was said to be aged 7 years old and formed the opinion that she did not understand the meaning of the oath and she therefore, gave unsworn evidence.

The complainant **PW1 H.E.** recalled that she left school at *[particulars withheld]* ECD at 12.30 p.m. on 2/3/2012 when she met 3 boys at the gate. One wore a white T-shirt and he told her that they go to the house. She followed them and then he gave her a sweet; that the house which is wooden is near the school. The one with the white T-shirt took her to his bed, removed her school uniform, pant, removed his penis and put it in her private parts. She cried but he held her mouth and threatened to kill her. After he finished, he told her to pick her clothes and go home slowly. She found her mother near a salon and went home but neighbours who noticed how she was walking informed her mother, PW3. They examined her and found that she was bleeding from the private parts. Her mother asked what was wrong and when she refused to say. She was then taken to Dr. Mwiti's Clinic but she did not disclose what happened to her. They went to Police Station, then she was taken to the Health Centre. She never told them what happened till her father came. She agreed to go to the house where she was defiled. They did not find anybody but there was blood on the bed. They went to the Police Station again, then went back to the house with Police officers where they found 2 people who were taken to Police Station and one was released while the appellant who had worn a white T-shirt was arrested. She identified the appellant as the one who defiled her. She had worn a checked brown uniform, white pant on that day and that they were soiled with blood after she was defiled. She admitted that when she was taken to the Doctor, she said she had been hit by a metal in school which was not true because she feared that her mother would beat her.

PW3, L K M is the mother of the complainant. PW3 said that the complainant went to school in the morning but she did not return home at lunch time as she usually did; that the complainant returned about 3.00 p.m. and she noted that she was walking in unusual way with her legs apart; that complainant refused to say what was wrong with her. Some neighbours who saw the complaint go to the toilet called PW3 to observe the child. She observed the complainant and found her pant stained with blood and on observing her private parts, it was injured and she was bleeding; the complainant was taken to Dr. Mwiti. He also told her she was defiled and he advised her to take her to a Government Hospital. She enquired from school and the teachers said she left school about 1.00 p.m. Complainant still refused to tell her teachers what happened till her father was called that she owned up and agreed to go and show where that was done to her. They found nobody in the house and reported to Police Post. They went back to the said house with Police, found 2 men and three girls and that the complainant pointed at the appellant as the culprit. She later escorted her child to Isiolo District Hospital.

PW4 D G, the father of the complainant was called home by the wife PW3 and was informed of what they had observed on complainant. He said that she explained to him how she was lured by three men, went to their house where one of them defiled her. She told him the incident happened near the school and she took them to the said house. He observed that she was walking in unusual way and her dress was blood stained at the back. She led them to a small house, near the school but found nobody inside. They later went back to the house where they found 2 men and 2 ladies; that the complainant pointed to the appellant as the assailant. He did not know the appellant before and they left the 3 men at Police Station.

PW6 CPL Kizito Mutende of Isiolo Police Station, interrogated the complainant after which she led them to a one roomed house near Pepo la Tumaini School where the appellant was pointed out by PW1 from one other men and 2 ladies. The 2 men were arrested for interrogation. He took the accused, his roommate and complainant to Isiolo Medical Centre for further investigation.

PW7 Mohamed Ruba, a Clinical Officer at Isiolo Hospital examined the complainant on 6/3/2012 and he found blood stains on her uniform; her whitish underpant; had broken hymen, laceration to the genital area and a bloody discharge, a high vaginal swab was done and spermatozoa were found and pus cells which was evidence of defilement. He said that accused's urine was also examined.

PW2 Paul Waweru Kangethe, A Government Analyst received specimens including the blood sample of the appellant, a dirty underpant of the complainant, checked brown dress with a Memo Form which he was requested to examine if there were spermatozoa on the clothes and their source. After examining the samples, he was not able to implicate accused because the DNA profile generated was partial and not complete and that for them to match, it should have been 99.9%.

In his sworn defence, the appellant denied committing the offence and that he was just arrested from the house at 8.00 p.m. after he returned from work.

As is required of the first appellate court, I have considered and examined all the evidence adduced in the trial court, will analyze and arrive at its own independent conclusions (*see Okeno v Rep 1972 KLR 32*).

There is no doubt that the complainant was defiled. PW1 narrated in detail how she was lured into a house and defiled; PW1's mother, PW3 was the first to examine the child and noticed that she was injured in her genitalia. PW1 was examined by PW7 who confirmed that on examination, complainant was injured in her genitalia. There was presence of spermatozoa in the vaginal swab taken from PW1 and the hymen was broken which was evidence that the complainant had taken part in a sexual activity. The Government Chemist, PW2 also examined the complainant's clothing where he found that there was presence of spermatozoa on the specimen taken from PW1's clothing. The complainant who is a child of tender age was defiled. The only question is who committed this heinous offence?

PW2 examined the specimens taken from complainant's clothing and the appellant's blood said the evidence did not conclusively implicate the appellant as the perpetrator because the DNA profile generated was partial but not 99.9% as required. The medical evidence did not connect the appellant to the offence.

Whether appellant's Constitutional rights were violated: the offence herein was committed in 2012. By then the New Constitution had come into force. By 2012, **Section 72 (3) (b) of the Constitution** no longer existed. In the submissions, the appellant did not explain what right it is that was breached. That ground cannot be sustained.

To prove an offence of defilement, under Section 8 (1) and (2) of Sexual Offences Act, ingredients have to be established:

1. **That there was penetration of the child;**
2. **The age of the child – that the child was aged 11 years old or less.**

The complainant was said to be 7 years old. She told the court as much and so did the mother, PW3. PW1 gave unworn evidence because she was found to be unable to understand the meaning of the oath. The court did not indicate whether or not she was of tender age. All in all the prosecution did not attempt to establish the age of the complainant. The prosecution should have the complainant's age assessed by a specialist or produce her birth certificate or birth notification. In the trial court's judgment, the magistrate stated that she saw the child and that she was aged less than 10 years. The court's opinion on the age of PW1 is not binding because it is not from an expert. The age has to be established in the ways I have stated above as the court is not expert. Failure to prove one of the key ingredients of the offence is fatal to the charge. This is because the age determines what sentence the court will impose upon a conviction.

The complainant gave unsworn evidence but she was cross examined by the appellant. She remained consistent and unshaken that it is the appellant who defiled her. It is PW1 who led to the house where she had been defiled which is near her school and later that same night identified, the appellant in the same house. The offence had taken place in broad daylight. The complainant had walked with the assailant to their house, where she was defiled in broad daylight. Though she did not know the assailant before because of the close contact during the commission of the offence and time spent together, I am satisfied that the complainant was able to identify her assailant. She did not hesitate to point out the appellant though he was with another man in the said house. She also identified him as the one who wore a white T-shirt. The trial court believed the complainant to be truthful and consistent. The court also

found that the defence, though sworn, was a bare denial. **Under Section 124 of the Evidence Act**, the court can rely on the uncorroborated evidence of a child, provided that the court believes the child is telling the truth and gives reasons for its findings. I have already stated that PW1's evidence was unshaken and consistent even on cross examination and she impressed the court as a credible witness. I have no reason to find otherwise. The appellant was not a person known to the complainant or her parents and there is no reason to frame a stranger with such a serious offence.

In her evidence, the complainant did admit that she refused to tell her mother what had happened to her and even told Dr. Mwiti that she was injured at school. Her explanation for this is that she feared that she would be beaten. It was not until her father was called that she agreed to show where she was defiled. She admitted that fact and it was corroborated by the mother that it was not until PW1's father was called that she revealed where she was defiled. I have no doubt that the complainant was truthful. **Under Section 143 of the Evidence Act**, a fact can be proved by a single witness unless a particular statute requires that there be more than one. The court did not err in relying on the evidence of PW1 alone.

I have earlier found that the offence of defilement was not proved for the failure by the prosecution to establish PW1's age. For that reason, I find the conviction to be unsafe and it is quashed and appellant is acquitted of the offence of defilement under **Section 8 (1) and (2) of the Sexual Offences Act**. I, however find that the complainant took part in a sexual act with the appellant. She was a child who could not have given her consent. Under **Section 186 CPC**, where a person is charged with defilement of a girl under 14 years and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence under the Sexual Offences Act, he may be convicted of that offence though he was not charged with it. For the reason that PW1's age was not proved, I will find the appellant guilty of the offence of Rape **contrary to Section 3 (1) (a) and (c) of the Sexual Offences Act** and I convict him accordingly. Because of the tender age of the child, I sentence the appellant to life imprisonment. Right of Appeal – 14 days.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

17/12/2015

PRESENT

Mr. Mulochi for State

In Person, for Accused

Ibrahim/Peninah, Court Assistants