



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 182 OF 2014

WESLEY KIPNGENO CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **Wesley Kipngeno Chirchir** has filed this appeal challenging his conviction and sentence by the Action Senior Resident Magistrate sitting at Molo Law Courts. The appellant was first arraigned before the lower court on 15/2/2012 on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:-

“On the 9th day of February 2012 at [particulars withheld] Village of Molo District within the Rift Valley Province intentionally and unlawfully caused the penetration with his genital organ penis into the genital organ vagina of N C K a girl aged 12 years.”

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. His trial commenced on 12/9/2012. The prosecution led by **Chief Inspector Tanui** called a total of five (5) witnesses in support of their case.

PW1, N C was the complainant. She told the court that she was 13 years old and was in Class 6 at **[particulars withheld]** Academy in **[particulars withheld]** Village. On 9/2/2012 **PW1** left school at 5.00p.m. and went home. She later left to go to her grandmother’s homestead in order to collect a book. At 7.00 p.m. as she was leaving her grandmother’s home the accused who worked there told him to wait for her. They left together. As they walked past a thicket the appellant directed her to enter the bushes. He then ordered her to undress. The child obeyed. The appellant then proceeded to defile her and after the act he warned her not to reveal to anyone what had happened. The complainant went home.

The next day, 10/2/2012, **PW2, N K** who is the mother of the **PW1** told the court that she questioned **PW1** about why she had returned home late. **PW1** then revealed to her mother what had happened. The matter was reported to police who arrested the accused. The complainant was taken to a clinic for a medical examination which confirmed that she had been defiled. The appellant was then arraigned in court and charged.

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 gave a sworn defence in which he denied having defiled the complainant. He insisted that the allegation of defilement were fabricated by the child’s father due to a grudge. On 7/8/2014 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of defilement and sentenced him to serve twenty (20) years imprisonment. Being aggrieved

the appellant filed this appeal. **Mr. Ombati** Advocate argued the appeal on behalf of the appellant. **Ms Ngovi** learned state counsel opposed the appeal and urged this court to uphold both the conviction and sentence of the lower court.

Being a court of first appeal I am obliged to re-consider and re-evaluate the evidence adduced during the trial and to make my own conclusions thereon. (see **Ajode vs Republic [2002]KLR**).

Counsel for the appellant raised the following as grounds of appeal:-

1. Defective charge sheet;
2. Failure to prove the age of the victim;
3. Insufficiency of evidence;
4. Failure to consider the appellants defence.

Regarding the charge sheet counsel submits that the same is fatally defective in that the appellant is charged with contravening section 8(1) & (2) of the Sexual Offences Act. The correct citation ought to have been Section 8(1) and 8(3) of the said Act. Whilst it is true that no application was made by the prosecution to amend the charges, I do not find that this defect was fatal to the prosecution case. The charge sheet contained the correct provision of defilement being Section 8(1). The penalty clause being Section 8(3) was however misquoted. This in my view is a human error and does not render the charge sheet fatally flawed. No prejudice was suffered by the appellant due to this error. The appellant mounted a strong defence to the charge. I have no doubt that he fully comprehended the charge which he faced. I find no merit in this ground of the appeal and the same is hereby dismissed.

On the question of the age counsel submits that in the absence of an age assessment report confirming the age of the complainant the conviction was invalid and cannot stand. He cites the authority of the Court of Appeal decision in Malindi **Criminal Appeal No.504 of 2010, Kaingu Elias Kasomo vs Republic**. In that case the Court of Appeal held that the ‘age’ of a victim of a sexual assault under Section 8(1) is a critical component of the charge and one which requires conclusive proof. Nowhere in this judgment does the superior court declare that the only acceptable means of proof of age is by an age assessment report. The court merely stated that:-

“Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim....” (own emphasis).

A simple interpretation of the above is that the prosecution must adduce credible evidence to prove the age of the victim. In this case the child’s mother **PW2** told the court that her child was born in 1998. The child herself during the *voire dire* examination before the trial court gave her age as 13 years.

PW5, Joel Kosgei who testified for the Investigation Officer produced as exhibits a copy of the child’s Birth Certificate and Immunization Card **PExh.2**. A Birth Certificate is an official document which provides credible and conclusive proof of the complainant’s age. The Birth Certificate indicates that **PW1** was born in Soliat on 22/9/1998. The Immunization Card confirms this information on the date of birth. Thus having been born in September 1998 she was aged 13½ years old in February 2012 when the incident occurred. **Mr. Ombati** for the appellant took issue with the fact that the Birth Certificate was tendered into evidence not by the child or her parents but by the investigating officer. As I have stated earlier a birth certificate is an official Government document. The same is prepared and issued by the Registrar of Births. As such the birth certificate cannot be said to be only valid if identified by the complainant and/or her parents. Any person such as a police officer conducting investigation may obtain and produce such a document in court. The defence have not challenged the **contents** of the birth certificate. There is no allegation that the entries in the birth certificate were false and/or misleading. The investigating officer was competent to produce this proof of the victim’s age as it is a document he would have ordinarily obtained in the course of his investigations. I therefore find that the birth

certificate was validly and properly produced and it provided conclusive proof of the age of the child. The failure by the complainant and/or her parents to identify the document does not invalidate it.

The complainant gave clear consistent and cogent evidence regarding her defilement. As with most sexual offences the act was committed in private with no witnesses present. The appellant was a person whom she knew well. He was her grandfather's employee she gave his name as 'Wesley.' The complainant had spent enough time with the appellant. He had requested her to wait for him as she left for home. PW1 suspected nothing sinister and did as the appellant asked. They walked home together. The appellant diverted with her into a thicket and raped her. He then warned her not to tell anyone what had happened. The child positively identified the appellant. The defilement occurred at 7.00 p.m. No doubt it was dark. However the two had been walking together and at no time did appellant leave her side. The appellant was the only person with the complainant and at the time she never lost sight of him. Defilement is a 'contact' offence and thus there can be no possibility of a mistaken identity. She remained unshaken under cross examination. Even when upon application by the appellant PW1 was recalled for cross examination she remained steadfast. Her testimony did not change. The next day when PW1 reveals the incident to her mother she named 'Wesley' (the appellant) as her defiler. A medical examination conducted by PW3, Richard Chepkurui Chesire confirmed the absence of the child's hymen a true indication that penetration had occurred. PW3 also told the court that she noted a whitish discharge from the child's vagina which was a pointer to some sexual infection – again an indication that penetration had occurred. I find there to have been a clear and positive identification of the appellant by PW1. The evidence in my view was overwhelming.

The final ground for this appeal is the alleged failure by the trial court to consider the appellant's defence. This is not factually correct. The appellant had in his defence claimed that the child was coerced to name him as a defiler due to her father's desire to settle personal scores with the appellant. In her judgment at page 41 line 13 the learned trial magistrate stated as follows:-

“I have considered the defence given by the accused, stating that he believed the same was fabrication owing to some feeling of jealousy towards him by the complainant's father after he bought a pool table. The complainant was very elaborate in her testimony and I do not believe the father would have asked her daughter to go through the heinous act to punish the accused for his perceived success.... The defence by accused has not poked any hole in the prosecution's already water tight case”

By so saying the learned trial magistrate did consider the appellant's defence but dismissed the same. I too find it highly unlikely that the complainant's father would put his child through the court case just to settle scores with the appellant. The appellant claims that the child's father failed to pay him his wages for 11 months. There is no proof that appellant was ever employed by PW1's father and denied this allegation. Further the appellant did cross examine the complainant and the child totally denied having been forced to testify against him. All in all I find the defence to be totally unbelievable.

Based upon the foregoing I am satisfied that the prosecution proved their case against the appellant to the standard required in law. I find no merit in this appeal and the same is dismissed in its entirety. The conviction of the appellant is upheld and the twenty (20) years sentence is confirmed.

Dated in Nakuru this 11th day of December 2015.

MAUREEN A.ODERO

JUDGE

PRESENT:

Ms Ngove for the State.