



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 311 OF 2010

(From original conviction and sentence in Criminal Case No. 225 of 2007 of the Chief Magistrate's Court at Nakuru, E. Tanui, R. M.)

JACKSON ANUNDA SOLOBEA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Jackson Anunda Solobea (*the Appellant*) was charged convicted and sentenced to fifteen years for the offence of defilement of a child under the age of eighteen years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006 (*No. 3 of 2006*).

2. Aggrieved both with his conviction and sentence the Appellant came to this Court on appeal, and cited five grounds of appeal in his Amended Petition of Appeal dated 10th October 2013 which may be summarised as -

1. ***that the trial magistrate failed to comply with the provisions of Section 124 of the Evidence Act, (Cap. 80, Laws of Kenya) before convicting the Appellant,***
2. ***that the Appellant also failed to comply with the requirements of Section 33 of the Sexual Offences Act regarding the circumstances of the offence,***
3. ***that there was no evidence of defilement as envisaged by Section 8(1) of the Sexual Offences Act,***
4. ***that the conviction was against the weight of the evidence, and***
5. ***that the trial court failed to take cognizance of the Appellant's evidence/defence which raised a reasonable doubt.***

3. Counsel for the Appellant argued all the five grounds, while learned Prosecution Counsel for the Republic opposed the appeal. I will therefore consider the respective arguments, but before I do so, I will set out the provisions of the law cited by Counsel for the Appellant and subsequently relate them to the evidence before the trial court.

4. The proviso to Section 124 of the Evidence Act, enables a trial court to convict an accused person on

the evidence of a victim of a sexual offence, without the necessity of corroboration where the court for reasons to be recorded, is convinced that the victim is speaking the truth.

5. On the other hand, Section 33 of the Sexual Offences Act provides as follows -

“33. Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving an alleged commission of a sexual offence where such offence is tried in order to prove -

(a) whether a sexual offence is likely to have been committed -

(i) towards or in connection with the person concerned;

(ii) under coercive circumstances referred to in Section 43; and

(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

And Section 43 provides -

43(1) An act is intentional and unlawful if it is committed-

(a) in any coercive circumstances,

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

2. **The coercive circumstances, referred to in sub-section (1)(a) include any circumstance where there is -**

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person,

(b) threat of harm against the complainant or any other person or against the property of the complainant or that of any other person, or

(c) - (inapplicable).

6. By reference to the above provisions, we are concerned only with the evidence of the victim of a sexual offence. PW1, was the victim of the Appellant's offence. She was then fifteen years of age when the offence was committed. She was seventeen years of age when she testified. As it so happens in our rural estates such as Umoja in Nakuru District, not every house is connected with a water tap. The residents fetch water from a common well or use a common tap which often is located next to another neighbour's house, or nearby. This was the situation in the case of the house of PW1's parents. They did not have a tap of water in their house. They fetched water from a common or community tap.

7. On the material day PW1 along with a younger sister, went to draw water from the common tap. PW1 noticed the Appellant hanging around the door of the house next to the tap where the Appellant was the caretaker. As PW1 and her sister reached the tap to draw water the Appellant approached her and pulled her towards the house. PW1's scream and those of her sister went unheard. The Appellant succeeded in pulling her into the house and with other hand, locked the door behind her.

8. Once inside the house, PW1 testified the Appellant threatened to kill her if she continued to scream. She was afraid. The Appellant pulled her clothes, threw on the bed, she climbed down but the

Appellant took her up and threw her onto the bed again, and despite a struggle, the Appellant “overpowered me, removed my skirt, bicker, and pant and then defiled me. I got injuries in my private parts.”

9. It was PW1's further testimony that after the ordeal, she did not fetch water again, she took the empty water containers and returned home. Her sister had already gone home. She did not tell anyone of her ordeal when she returned home. Her mother was on safari and her father was too drunk to comprehend her ordeal. Her mother returned on 25th September 2007.

10. It was PW1's further testimony that she was in school on 25.09.2007 when she felt a lot of pain in her private parts as well as stomach. She decided to confide in her guiding and counseling teacher, one Thairu, who in turn informed Mr. Kirui, the Head Teacher. It was at that stage that a report was made to Menengai Police Station by the two Teachers, after taking PW1 to Mema Dispensary where she was given pain killers. The Police accompanied them to the scene of the crime but the Appellant was not available, but was arrested the next day according to the information given to her. PW1 was ultimately taken to Nakuru Provincial General Hospital where the P3 Form issued to her was completed.

11. When cross-examined by counsel for the Appellant who purported to attribute her ordeal to her paternal uncle, PW1, was quite candid in her answers. She denied any suggestion that her uncle had sexual relations with her. She reiterated her evidence in-chief, that she did not tell anyone of her ordeal on the material day, but while in pain in school informed her teacher the next day. She was also candid that she did not give the Police her bicker which was torn, nor her pant which was also torn at the front. She denied having a boyfriend or ever having sexual relationship before the day she was defiled, and insisted - “*what I am saying is the truth*”.

12. Again she was equally candid in re-examination. The house where she was defiled was quite far from their own house. She estimated it as 30 metres. Her uncle stayed about 100 metres away from their home, and reiterated that she never had any sexual encounter with her uncle, or anybody else before the material day when the Appellant defiled her.

13. PW1's little sister and her companion to the tap to fetch water was PW2. She too was candid. The Appellant was their neighbour. She put the time at about 6.00 p.m. She and her sister had gone to fetch water at the Appellant's place. She corroborated PW1's evidence on how the Appellant pulled her sister (PW1) to his house and how they screamed but nobody answered to their screams as neighbouring homes were about 2kms away. She screamed and ran back home, but there was nobody to help her sister or her. Her mother had gone to see their grandmother and did not return until the next day.

14. PW2 testified that she had known the Appellant for a “*long time*”, and the Appellant was not a friend of PW1. Her sister never visits the uncle alone.

15. On cross-examination, PW2 testified that she saw PW1's clothes on the material day, they were blood-stained, her petticoat and pant had blood. The same were torn, and that their mother PW3, threw them away. She heard the Appellant say in a loud voice telling her sister (PW1) that he would kill her.

16. PW3 reiterated the information given to her by PW1's teachers and testified that she took PW1 to Nakuru General Hospital, and testified that the uncle, her brother-in-law is like a father to PW1 and they had no sexual relationship.

17. PW5, the Investigating Officer, testified that after investigations he established that the Appellant defiled PW1, and consequently charged him.

18. PW6, was the Doctor who examined the victim, PW1 and produced the P3 Form and upon cross-examination testified that “*on examination, I found evidence of penetration, the hymen was missing*”.

19. Upon being put to his defence the Appellant gave an unsworn statement blaming the defilement on PW1's uncle one Karanja, and alleging that PW1's father had asked for shs 50,000/= to drop the charges

against him.

20. After analyzing the evidence, the trial court found the Appellant guilty of the offence and sentenced him to fifteen years imprisonment. The question before this court is whether there was evidence proving beyond reasonable doubt the commission of the offence by the Appellant, and not any other person.

21. Despite learned counsel for the Appellant's spirited submissions that there was no evidence upon which to found a conviction, I am satisfied and in agreement with the learned Senior Principal Prosecution Counsel, that there was overwhelming evidence upon which to found the conviction.

22. **Firstly**, even without the aid of medical evidence, (*and therefore corroboration*), the proviso to Section 124 of the Evidence Act donates to the trial court the jurisdiction to convict an accused person of a sexual offence upon the evidence of the victim provided that the court is satisfied that the alleged victim is telling the truth.

23. Having examined and re-evaluated the evidence of PW1 and PW2, and the Appellants' unsworn statement, I am satisfied that the victim is telling the truth. The evidence of PW1 and PW2 is conformity with the provisions of Sections 33, the evidence of the surrounding circumstances, clearly shows that a sexual offence was committed, and in respect of Section 43, that the act of pulling PW1 to his house, and using both coercion, with threats to kill PW1, and the act of tearing clothes, skirt, pant and biker, clearly showed the use of force against the complainant (PW1).

24. **Secondly**, in addition to the evidence of PW1 (*in relation to Section 124 of the Evidence Act*), there was the evidence of PW6, the Doctor who upon cross-examination by counsel for the Appellant at the trial, testified that he found that the complainant (PW1) had been defiled. There was penetration as the hymen was missing.

25. Counsel for the Appellant relied upon my decision in the case of **JOHN LETEIAN VS. REPUBLIC** (*Nakuru HC. Criminal Appeal No. 29 of 2010 (unreported)*) where I held that no offence of defilement could have taken place in the circumstances, described in that case, a class-room with large windows with no curtains, without lockable door from the inside, where teachers and pupils come and go. The circumstances in this case are very different, as described in the evidence of PW1 and PW2.

26. The case of **MWANGI VS. REPUBLIC [1984] KLR 595** concerned the failure by the prosecution to call either Mrs Thairu or Mr. Kirui the teachers to whom PW1 complained that she was unwell, and who initiated the course of reporting the incident to Menengai Police. With respect, I do not think that any adverse inference or doubt may be inferred or arise by such failure. It is both usual and common for pupils to complain and confide in their teachers their circumstances at home or personal problems such as illness or pain.

27. In this case it was the evidence of PW3 (*PW1's mother*) that she met the Principal of [particulars withheld] Secondary School while they were on their way to her home and they informed her they had come to inform her that her daughter had informed them that she had been defiled, and that they had already reported the matter to Menengai Police Station. It is the same information or report PW1 told her mother, who on the next day took her to a doctor at Nakuru Provincial General Hospital, and the results of the examination was the evidence of PW6. I do not therefore think that either Mrs Thairu or Mr Kirui were vital witnesses, and no adverse inference may drawn for failure by the prosecution to call the said persons as witnesses.

28. Similarly, the case of **PAPPYTON MUTUKU NGUI VS REPUBLIC [2012] eKLR** is not of any help to the Appellant. The *ratio decidendi* of that is that the trial court has jurisdiction to convict an accused in a sexual offence on the evidence of a victim of the sexual offence where the court is satisfied that the victim of the sexual offence is telling the truth. In addition, the architecture and structure of our law, (*the Sexual Offences Act, 2006*), creates a strict liability regime (*upon the production of evidence*) and with great respect **J Keyden Evidence – Cases and Materials 2nd Edn.** (*Butler worths London 1994, at p. 84*), regarding corroboration of a child's evidence has no or little application in light of the

clear provision of Section 124 of the Evidence Act, (*supra*).

29. Lastly, the Appellant relied on the case of **OUMA VS REPUBLIC [1986] 619** where the Court of Appeal held inter alia -

“At the time of evaluating the prosecutions evidence, the court must have in mind the accused person's defence and must satisfy that the prosecution had by its evidence left no reasonable possibility of that defence being true. If there is doubt, the benefit of that doubt always goes to the accused person ...”

30. The Appellant's unsworn statement was quite a weave, an allegation that there had been amorous relationship between the complainant (PW1), and her paternal uncle a Mr. Karanja, that there had been a meeting between family members to discuss such an issue. The Appellant did not specify which family members, of PW1 - PW3 or whether he was in attendance. He attributed the information to PW1.

31. That scenario was most unlikely. These were two young rural girls going to fetch water from a common tap next to a house where the Appellant was a care-taker. The time was anywhere between 4.00 – 6.00 p.m. They were just about to draw water when the Appellant grabbed the elder of the girls and locked out the other little girl. Both girls scream to no avail in remote farm lands with distant homesteads. The Appellant coerces the girl to have sexual intercourse with her. He reaps the girl's inner wear and defiles her. The girl takes off, and even forgets to fetch water. She tries to explain her ordeal to her drunken father. He remains in a drunken and takes early next morning. Her teachers become her only source of refuge. If the uncle had done to PW1 what she allegedly told him, the chances and probability is that she would have informed her teachers, as she did in respect of her ordeal with the Appellant. PW1 denied being a girlfriend of the Appellant. Her sister PW2 corroborated her evidence. So the Appellant's story that PW1 confided in him such information was a good imaginative story, but entirely not worthy of credibility as the learned trial magistrate found, and with which finding I entirely agree.

32. Being therefore of the above mind, I confirm both the Appellant's conviction and sentence. I dismiss the appeal as having no merit at all.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 30th day of January, 2014

M. J. ANYARA EMUKULE

JUDGE