



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 83 OF 2012

BETWEEN

J O O APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SPM's court at Migori in

criminal Case No.689 of 2010 – by Hon. S.M. Shitubi, (SRM) dated 8th June, 2011)

JUDGMENT

Introduction

1. The appellant herein, J O O was arraigned before the Principal Magistrate's Court at Migori on one count of defilement of a girl under the age of 18 years contrary to **section 8 (1) (2)** of the **Sexual Offences Act, 2006**. The particulars of the offence are that on the 1st day of July 2008 at Godi Beach in Migori District within Nyanza Province caused penetration of genital organ of D A [minor] a girl aged 4 years. The appellant pleaded not guilty and the case proceeded to hearing.

The facts and the Evidence by Prosecution

2. The complainant, a child aged about 7 years (though she said she was aged 11 years as at 17th March 2011) testified that on a day she could not remember, the appellant herein put her on her mother's bed and defiled her. That she felt pain during the ordeal. After the incident, she informed her mother who took her to the house and then to hospital at Sori (Karungu) Sub District Hospital. She also testified that the matter was reported to the police.
3. PW2 was D A M, the foster mother to PW1. She testified that on 1st July 2008 at about 8.00 a.m., she went to Sori to sell omena fish and left PW1 with another younger child at home. The appellant was also left in the home. The younger child was aged 2 years. The appellant is PW2's inherited husband; after the death of PW2's own husband, one B M died.
4. On coming back from the market, PW2 started cooking while the appellant was lying on the bed. Later when she went to bathe PW1, she noticed that PW1's private parts were swollen and there was a bloody discharge. On enquiring from PW1 what had happened, PW1 at first was hesitant to say what had happened to her, but with prodding, PW1 told PW2 that the appellant had defiled her.
5. PW2 called other women to come and help her discern whether what PW1 was saying was true. The matter was also reported to the beach chairman who came to the scene together with the

- village elder. Upon examination of PW1, the appellant was questioned about the allegations, and while admitting that he had defiled the child, the appellant told the people interrogating him that Satan had tempted him to defile the child as he also asked for forgiveness.
6. Thereafter, PW2 took PW1 to the hospital at Sori. At the hospital, PW1 was treated by Leonard Omweri, a clinical officer who testified as PW4. PW4 filled the Post Report care Form (PRCI) and treated PW1 under outpatient No.1053/2008.
 7. On examination of PW1, PW4 established swelling of the vaginal valve and saw abdominal vaginal discharge. Urine and blood tests were carried out on PW1. A High vaginal swab was also done. The examination revealed deposits of semen and spermatozoa in Pw1's vagina, but there were no blood cells and no HIV. PW1 was given post exposure preventive drugs and antibiotics to prevent bacterial infection. The P3 form duly filled and signed by PW4 was produced as **P. Exhibit 1**. PW4 also testified that the vaginal swelling was only superficial and at time of examination (10.00 p.m. on 1st July 2009) the injuries on Pw1 were only some hours old. The PRC forms were produced as **P. Exhibit 2**.
 8. During cross examination by the appellant, PW4 stated that he also tested the appellant's urine and blood. There were blood cells in the urine which meant there was an infection. A syphilis test carried out was negative while the HIV test revealed the appellant was HIV positive.
 9. The report of the incident was made to Karungu police post on 2nd July 2008 at about 2.30 p.m. The appellant was also escorted to the police post by APs based at the D.O.'s Office Karungu. The report was received by Number 88677 Police Constable Mohamed Abdulai of CID Migori who testified as PW3. On receipt of the report, PW3 booked the appellant in the cells while PW1 was escorted to the hospital for examination.
 10. PW3 later visited the scene of crime and took statements from both PW1 and PW2. The appellant was subsequently charged with the offence.

The Appellant's case

11. On being put on his defence, the appellant elected to say nothing in his defence.

The Judgment of the Lower Court

12. After carefully analyzing the evidence on record, the trial court was satisfied that the prosecution had proved its case beyond any reasonable doubt against the appellant, found him guilty as charged, convicted him and sentenced him to life imprisonment.

The Appeal

13. Being dissatisfied with both conviction and sentence, the appellant who obtained leave to file appeal out of time on 27th March 2012, has appealed to this court for reprieve on grounds that:-
 1. *The learned trial magistrate erred in both law and fact by convicting the appellant on the basis of medical evidence that did not incriminate the appellant;*
 2. *The learned trial magistrate erred in law and fact in convicting the appellant on the strength of hearsay evidence;*
 3. *The learned trial magistrate erred in both law and fact in convicting the appellant despite the fact that some crucial witnesses did not testify;*
 4. *The learned trial magistrate erred in both law and fact in failing to analyze the evidence on record;*
 5. *The learned trial magistrate erred in both law and fact in convicting the appellant on flimsy and contradictory evidence.*
14. Reasons wherefore the appellant prays that the appeal be allowed, the conviction quashed and the sentence of life imprisonment set aside.

The duty of this Court, Analysis and Issues for Determination

15. This appeal is before this court as a first appeal. In the circumstances, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, however only remembering that the privilege to see and hear witnesses was that of the trial court. See generally **Okeno –vs- Republic [1972] EA 32; Selle & another –vs- Associated Motor Boat Co. Ltd. & Others [1970] EA 123**. In reconsidering and evaluating the evidence, this court must not merely scrutinize the evidence to see if there is some evidence to support the prosecution case. This court's duty is to rehear the case.
16. After hearing the submissions that were made before me, at the hearing of this appeal, and after carefully reconsidering and evaluating the evidence afresh, and also after weighing the judgment of the trial court, the issues that arise for determination are the following:-
 1. *Whether the evidence of PW1 was properly taken by the trial court;*
 2. *If the answer to (1) above is in the negative, whether the failure to observe the rules for taking the said evidence is fatal to the prosecution's case;*
 3. *Whether the charge sheet upon which the appellant was convicted was defective; and*
 4. *If the answer to (3) above is in the negative; whether the prosecution proved its case beyond any reasonable doubt against the appellant;*
 5. *Whether the trial court properly analyzed the evidence and set out the issues for determination.*

Findings and Conclusions

17. Regarding the first issue, which concerns the manner in which the trial court took the evidence of PW1, it is clear from the record of proceedings that the trial court estimated the complainant to be aged 7 years old and therefore a minor. The trial court correctly conducted a *voire dire* on the complainant and indicated that she did not possess sufficient intelligence to understand the significance of an oath. Therefore, the complainant gave unsworn testimony. However after the complainant gave her unsworn testimony, the trial magistrate unprocedurally allowed the appellant to cross-examine her. In **Christine Nchagwa Chacha –vs- Republic – Criminal Appeal NO.9 of 2009** (unreported) Muchelule J sitting in Kisii persuasively held:-

“The court in accepting the evidence of PW1, found him eloquent and consistent. The witness, however gave his testimony while not sworn or affirmed. This was because of his age. The court unprocedurally asked the appellant to cross-examine him. She indicated she had no question of him. This was held against her in the judgment. Evidence that was given by a child who is not sworn or affirmed is not supposed to be cross-examined.”

18. It is my considered view that it was improper for the trial court to allow cross-examination of the complainant when the evidence the subject of the cross examination was an unsworn testimony. It follows therefore that though the complainant gave unsworn evidence and was thereafter cross examined, there was no prejudice to the prosecution's case.
19. Regarding the third issue, PW1 gave an unsworn statement in which she indicated that the appellant who was not a stranger to her by virtue of being his step daughter put her on the bed and defiled her. She later told her mother (PW2) the identity of the person who defiled her. Although she was unprocedurally cross-examined by the appellant (as I have indicated above), her evidence remained unshaken and in my view she was eloquent, consistent and truthful. Infact, the appellant had nothing to say in answer to those allegations.
20. PW2 the mother to the complainant told the court of how she observed the complainant's vaginal area and found it swollen and bloody. On asking the complainant what had happened to her, the complainant indicated that the appellant had defiled her. She resolved not to bathe the complainant and even invited the Beach chairman and village elder who interrogated the appellant as to what he had done to the complainant. The appellant stated that he did not know what Satan had prompted him to do that to the child.
21. PW4 the clinical officer on examining the child found that indeed she had been defiled, he found

- spermatozoa and pus cells present in her vagina. He even did an age assessment on the complainant and found her to be 4 years old. He also classified the degree of injury on complainant as grievous harm.
- 22.PW4 also conducted an examination on the appellant by taking his blood and urine sample. The appellant was found to be HIV positive. PW3 was the investigating officer who upon medical examination on both complainant and appellant being conducted, arrested the appellant and filed the present charges against him.
- 23.Although PW4 clearly stated that he did not know who the spermatozoa found on the complainant's vagina belonged to, the complainant clearly stated that the appellant defiled her. The defilement took place during the day and the appellant was no stranger to the complainant. **Section 124 of the Evidence Act Cap 80** states 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

- 24.From the evidence on record, and as correctly submitted by counsel for the respondent, the evidence of Pw2 and PW4 corroborates PW1's unsworn testimony that she was defiled, although the identity of PW1's defiler was not known to anyone else apart from PW1 herself. **Section 124** therefore is applicable to this case as the only eye witness to what took place is the complainant herself. I have warned myself of the dangers of convicting on the evidence of a single identifying witness, and I am satisfied that PW1's testimony was consistent, credible and believable. I would reiterate the words of the trial court in part of its judgment:-

“He is an adult and infact at the time was a guardian of this child aged 4 years being her guardian's husband. He abused the trust bestowed on him to take care of the minor and turned against her risking infecting her with HIV.”

- 25.The above being my findings, I have reached the conclusion that, the present appeal is unwarranted and it is hereby dismissed for lack of merit. The appellant shall continue serving his life sentence. R/A within 14 days.
- 26.It is so ordered.

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

R. N. SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk