REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 98 OF 2012

From Original conviction and sentence by the Principal Magistrate at Mwingi (H.M. Nyaberi, PM) in Mwingi Principal Magistrate's Court Criminal Case No. 111 of 2010

JOHN MUSYOKI MUSYOKA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

John Musyoki Musyoka, the appellant in these proceedings, was charged with defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. It is alleged that on the 11th February 2010 at [particulars withheld] village in [particulars withheld] location of Mwingi District within Eastern Province committed an act which caused penetration of his male genital organ to the female genital organ of M.M, a girl aged 12 years.

He faces a second charge of deliberate transmission of life threatening sexually transmitted disease contrary to section 26 (1) of the Sexual Offences Act. It is alleged that on the 11th February 2010 at the same place as in Count 1 having actual knowledge that he was infected with venereal disease willfully had unprotected sex with M.M which infected M.M with the said sexually transmitted disease (sic).

He faces an alternative count to count 1 of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars read that on the same date and place as in count 1 the appellant committed an indecent act by touching the private parts of M.M, a girl aged 12 years.

The appellant denied all the charges and the case was subjected to full hearing. At the end of the trial the appellant was found guilty on counts 1 and 2. He was sentenced to serve 20 years imprisonment on each count and the sentences to run concurrently.

Petition of Appeal

The appellant is aggrieved by the conviction and sentence and has, through his counsel Mr. Mbaluka, filed this appeal. Mr. Mbaluka filed the following grounds of appeal:

i. The trial magistrate failed to appreciate that the appellant did not commit the offences.
ii. The trial magistrate failed to appreciate and consider the appellant's defence.
iii. The sentence is harsh and excessive.

iv. The trial magistrate misdirected himself in relying on contradictory evidence.

The appellant had prepared other grounds of appeal before his counsel filed the above grounds of appeal. He claims that the evidence is false and fabricated by the family of the complainant and that the trial court shifted the burden of proof to him.

Submissions

Counsel for the appellant has identified three issues for determination, namely;

i. Whether the prosecution has proved the case to the required standard.
ii. Whether the medical evidence supports the charge as framed.
iii. Whether the evidence convicting the appellant was contradictory and inconsistent.

Counsel submitted that the appellant could not have gone to the Chief's Office after committing the offence; that the evidence by PW1 that complainant had injuries on her hands is not supported by medical evidence; that the complainant told the trial court that an elderly woman, PW3, appeared causing the appellant to leave her but PW3 told the court that she did not see any other person at PW2's home; that the language of the court is not indicated in the proceedings and because of this the appellant did not understand the proceedings; that PW6 Dr. Allan testified on behalf of Dr. Masinde but produced a P3 Form completed by a Dr. Kyalo.

Counsel further submitted that both the appellant and the complainant were found with sexually transmitted diseases but of different types confirming that the appellant did not have sexual intercourse with the complainant and that there was no medical evidence to support defilement.

The appellant relied on the following cases:

a. David Turupon Kiprono v. Republic, Criminal Appeal No 180 of 2006;
b. Dennis Abuya v. Republic Criminal Case No 164 of 2009; and
c. J.M.A v. Republic Criminal Appeal No 348 of 2007..

Submissions by Respondent

The appeal was opposed by the respondent. The learned state counsel submitted that the production of the P3 Form was in order by dint of section 72 and 77 of the Evidence Act. Counsel cited **Criminal Appeal No 200 of 2005 Boniface Owino Oloo versus Republic [2006] eKLR** in support of this argument.

Counsel for the respondent further submitted that the trial court acted on the evidence on record to arrive at its findings; that the sentence is not harsh or excessive; that the authorities cited by the respondent in support of his appeal are not helpful to his appeal. Counsel asked the court to dismiss the appeal.

Evidence.

The prosecution case was supported by evidence of seven witnesses and the defence case by three witnesses. At the time the alleged offences were committed M.M was aged 12 years as per her child health card (Exhibit 3) that gives her date of birth as 22nd February 1998.

The trial magistrate conducted a *voire dire* examination on her and was convinced that she understood the nature of oath and could testify under oath. She testified as PW2 and told the court that she was at home with a baby aged 2 years on 11th February 2010 when around noon the appellant went there. He entered her brother's room and put the phone on a charger. He asked her for drinking water and food. She gave him water to drink and told him that there was no food. He carried her to the sitting room where he removed her pants and opened the zip of his trousers. He forced her to lie down on the floor. He defiled her causing her pain. She screamed in pain and this caused their dogs to start barking. The appellant started beating her with a shoe telling her to show him where her mother kept money. The appellant saw

her grandmother M M (PW3) approaching the homestead. He let go of her and went to lie on her mother's bed. She ran towards PW3 carrying the baby and told PW3 to take her to where her mother was at [particulars withheld]. They left the appellant at home but he followed them telling her to go back and close the house. She informed her mother what had happened and the matter was reported to the police. She was taken to hospital.

The evidence of PW3 is that on 11th February she was going to the Chief's Office at Kasalani to collect relief food when PW2, who was carrying a baby on her back, called her and told her that she wanted to go where her mother was; that the girl accompanied her to the Chief's Office where her mother was; that PW3 enquired and found the mother and she left PW2 with her mother.

J.R.M, PW1 who is the complainant's mother testified that on 11th February 2010 around 1.00pm she was at the Chief's Office at Kasalani when her daughter M.M was brought to her by PW3; that PW3 told her that she was passing by PW1's home when she heard noises from the homestead of M.M crying and dogs barking; that M.M ran towards her and told her to take her to her mother; that PW3 saw the appellant coming from PW1's home telling PW2 to go back and close the door.

She testified further that PW2 told her that the appellant had defiled her; that PW1 checked her daughter and found that she did not have pants on and had discharge on her private parts but not bleeding; that PW2 had injuries on her hands. She reported the matter at the Chief's Office and was told to go for the pants. She found the pants in the sitting room and picked it. On returning she found PW2 had been taken to the police station and later to hospital and the appellant had been arrested and taken to the police station.

Alice Kasyoka, PW4, the Assistant Chief who was chairing the *baraza* for relief food confirmed that PW1 reported to her a case of defilement of her daughter; that the girl, PW2, was taken to her and told her that the appellant had defiled her; that PW4 directed a village elder Patrick Kimanzi, PW5, to look for and arrest the appellant. PW5 arrested the appellant behind the Chief's Office and handed him over to PW4. PW5 told the court that the appellant was among the people who had attended the meeting.

Dr. Allan Barongo, PW6, testified on behalf of Dr. Masinde who examined and filled P3 Form for the Complainant and Dr. Kyalo who had examined and filled P3 Form for the appellant. Both doctors were not available to testify having been transferred from Mwingi District Hospital.

PW6 told the court PW2 was examined by the doctor on 15th February 2010. She was found with a sexually transmitted disease known as Trichomonas Vaginalis. The doctor did not make a finding as to whether there had been penetration or not. The appellant was found to have a sexually transmitted disease known as Gramme Positive Diplococci. PW6 told the court that both infections are different, Trichomonas Vaginalis being a parasite and Gramme Postive Diplococci being bacteria and that both bear no similarities.

Police Constable Nathan Wasilwa, PW7, testified that he was instructed to go to the Chief's Office at [particulars withheld] Location on 11th February 2010 to collect a suspect who had defiled a child. He went there and found the appellant detained. He took him to Mwingi Police Station and later to hospital for examination after the complainant was found with a sexually transmitted disease. He also recorded statements from witnesses.

The appellant testified that he was arrested at the Chief's Office where he had gone to meet a client; that he heard screams and went to find out what was happening and that is when someone pointed at him saying he was the one; that he was arrested on allegations of defilement which he denied; that he was charged; that the parents of the complainant demanded that he pays them so that they do not testify in court and he paid them seven goats but they went ahead and testified. He told the court that he had been employed at the complainant's homestead for eight months but harboured no grudge with the parents.

Richard Maundu Mutemi, DW2, testified that he was at the Chief's Office for the meeting on relief food when he heard people making noise and saying the appellant had defiled a girl; that the appellant was

arrested by the police.

Waiki Muli, DW3, told the court that the appellant requested her to testify; that on 11th February 2010 she had arrived at the Kasalani Chief's Office for relief food and she saw a commotion of people. On enquiring she was told that the appellant had been found raping a girl.

The trial magistrate considered the evidence before him and was satisfied that the appellant was guilty in both main counts. He convicted him.

Determination

This court is alive to the duty placed on it while sitting on first appeal to submit all the evidence to a fresh and exhaustive examination, weigh any conflicting evidence and make its own conclusions whether to support or not to support the trial court's findings (**see Shantilal Maneklal. Ruwala v. Republic [1957] E.A 570** and **Dinkerrai Ramkrishan Pandya v. Republic [1957] E.A 336)**.

I note that the case was handled by two different magistrates. Before Resident Magistrate W.J Gichimu, two witnesses (PW1 and PW2) were heard. He last handled the file on 22nd September 2010 when he fixed the matter for further hearing on 30th November 2010. On the latter date, Mr. H.M Nyaberi explained to the appellant of his rights under section 200 (3) of the Criminal Procedure Code. This section requires re-summoning and re-hearing of the witnesses who have testified before an earlier magistrate upon application by an accused person. The appellant was agreeable that the hearing should proceed without re-summoning the witnesses who had already testified.

The trial magistrate, in my view, did not critically analyze and evaluate the evidence of the prosecution witnesses, especially the medical evidence and the complainant's evidence. He considered the behaviour of the appellant in compensating the complainant's parents with seven goats as an admission of guilt. He also found the evidence of the complainant, PW2, corroborated by that of PW3 and the medical evidence. I have misgivings in this reasoning. The trial magistrate ought to have cautioned himself on the reliance of the complainant's evidence as evidence of a single witness and give reasons for believing her evidence.

The complainant, PW2, is the sole witness to the allegations of defilement. She was with her two-year-old sister who by reason of age did not testify. It is to her evidence I wish to turn to before analyzing evidence of the other witnesses.

The appellant was known to PW2. She said the appellant used to work at their home. This was confirmed by her mother PW1 who told the court that the appellant was her relative and she had employed him in 2004. The appellant too told the court that he had been employed by PW2's parents. The time of the alleged defilement is 12.00 noon. PW2 gave a clear description of what happened; that the appellant went to their home and entered the room belonging to her brother known as N to charge the phone and then asked her for water and food. She gave him the water but said there was no food. This is when he carried her to the sitting room and removed her pants and defiled her. She said her screams made their dogs start barking.

According to PW1, the mother, she found PW2 crying in a group of people at Kasalani where the Chief's meeting was being held. PW1 found out from Mutio PW3 that she had heard noises at PW1's home as she passed by and heard the dogs barking and PW2 crying; that PW2 ran to her and asked her to take her to her mother at the Chief's meeting.

PW1 further said her daughter told her what had happened and on checking her she found she had no pants and had injuries on her hands.

This evidence on PW3 hearing noise of PW2 crying and the dogs barking is not confirmed by PW3. She however testified to seeing PW2 carrying a baby and that PW2 told her to take her to her mother. PW3 also said that PW2 was crying when she saw her.

PW2 told her mother that the appellant had defiled her. She told PW4, the Assistant Chief, that John Musyoka had defiled her. There is therefore no confusion as to the identity of the person who had attacked her. The trial court, having formed an opinion that PW2 understood the nature of oath and should give evidence under oath is sufficient to show that she was intelligent enough to understand the importance of telling the court the truth. The trial magistrate however misdirected himself in finding corroboration of PW3's evidence with that of PW2.

This court has considered the evidence of PW2 on what happened in line with the proviso to section 124 of the Evidence Act which states that:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."**

In **Chila v. Republic [1967] E.A 722 at 723** the court dealing with the issue of corroboration held that:

> **"The judge should warn the assessors and himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."**

The trial magistrate did not caution himself. Instead he found there was corroboration.

The evidence of PW2 ought to be considered alongside that of the other witnesses. PW3 saw her crying but said she did not see the appellant. PW3 did not confirm the evidence by PW1 that the noise of dogs barking and PW2's crying drew her to PW1's home. For some reason the prosecution did not lead evidence on this issue.

The medical evidence is more disturbing. Dr. Allan Barongo who testified on behalf of the Dr. Masinde told the court that he could not state whether there had been penetration or not. The P3 Form, exhibit 2 did not show any evidence of penetration as it is silent on the state of PW2's hymen. The evidence however revealed presence of a sexually transmitted disease (Trichomonas Vaginalis). The appellant was found with a different sexually transmitted disease (Gramme Negative Diplococci). According to the doctor both are different types of diseases and though venereal diseases they have no similarities.

This court has no reason to doubt this expert opinion. It would seem therefore that if the appellant had sexual contact with PW2, she would have contracted the bacterial infection the appellant was suffering from. I am not a medical expert but my view is that the prosecution required more expert medical opinion on this issue to make a concluding finding.

One thing is for sure, the trial magistrate misdirected himself and erred in fact and law in finding that the appellant infected PW2 with a sexually transmitted disease. He also erred in law in finding count two proved beyond reasonable doubt. With this medical evidence, count two has not been proved and the appellant ought to have been acquitted forthwith.

I find the evidence of defilement not supported by medical evidence. I however find that PW2 could not have fabricated the evidence. It is too detailed and consistent on her part to be a fabrication. I find that she positively recognized the appellant who was known to her prior to this date. Her behaviour of crying when PW3 saw her and when she arrived where her mother was, coupled with her telling PW4 the name of the appellant as the person who had attacked her is clear indication that she knew him well.

It was submitted that the allegations of bruises on her hands was not supported by medical evidence. I have noted that she was taken for examination and filling of P3 Form on 15th February 2010 four days after the alleged defilement. Evidence shows that she was taken to hospital on 11th February 2010 and

there must have been treatment notes. These records were valuable evidence but were not produced in evidence.

I have considered this appeal. If the charges in counts 1 and 2 had been proved, the sentence would not be termed excessive or harsh as it is within the law. I also found that there is no evidence that the trial court shifted the burden of proof to the appellant. I find the evidence was not fabricated as I have shown in this judgement. The claim that the appellant did not follow the proceedings due to failure to understand the language of the court was not included in the grounds of appeal and is therefore an afterthought. Despite this I find that the language indicated on the court record on the date of the plea is Kikamba and I have no reason to doubt that the trial court changed this. The appellant cross examined the witnesses in a manner that indicated he understood the charges he was facing.

The record of the trial court is clear that two P3 Forms were produced by PW6. Exhibit 2 was in respect of the complainant. It was filled in by Dr. Masinde and exhibit 3 was in respect of the appellant. It was filled in by Dr. Kyalo. There is no confusion and counsel for the appellant must have misunderstood the record.

I have cautioned myself on the dangers of relying on the evidence of PW2 alone and having taken into account of all the circumstances of this case, including appellant's admission that he gave the parents of PW2 seven goats to stop them from testifying, I come to a conclusion that the appellant attacked the complainant as evidence shows. I have considered the grounds of appeal and the authorities cited. While I find that due to lack of confirmation medically that the offence committed was defilement, I find that an offence of indecent assault was committed. There is evidence as shown in this judgement that PW2 was agitated when PW3 and PW1 saw her. PW2's behaviour of asking PW3 to help her get to her mother points to a child scared. She was aged 12 years and their home was said to be between 800 metres to 1km from the Chief's Office according to the evidence of PW4 and PW5. She could have easily walked there without help. That she sought help from PW3 in and was crying at the time shows she was scared of something or somebody.

This appeal succeeds only as far as count 2 is concerned in that there is no medical evidence supporting that charge. The appellant is acquitted of the count two. In respect of count 1, I find the offence of defilement not supported by medical evidence and convict the appellant on the alternative charge of indecent assault. The conviction of the charge of defilement is quashed and sentence of 20 years set aside. I substitute it with a conviction on indecent assault contrary to section 11(1) of the Sexual Offences Act. The appellant is sentenced to 10 years imprisonment from the date he started serving sentence. I so order.

Dated, signed and delivered this 27th January 2014.

S.N.MUTUKU

JUDGE