REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NUMBERS 15 & 16 OF 2012

(Appeal from Original Conviction and Sentence in Kyuso Principal Magistrates Criminal Case No. 38 of 2011 (B.M. Mararo))

S M K……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

S M K, referred to as the appellant in this judgement, was charged before the Principal Magistrate at Kyuso with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars of the charge state that on diverse dates of December 2010 and January 2011 at [particulars withheld] Market in Kyuso District of Kitui County committed an act which caused the penetration of his male genital organ into female genital organ of M. S. a girl aged 13 years.

The record of the lower court dated 7th March 2011 shows there was an alternative count. My careful perusal of the entire lower court record including the judgement reveals no such alternative count of whatever nature. The trial magistrate does not mention it in the judgement at all. To me it seems like an oversight on the part of the lower court because the record clearly shows the appellant pleading not guilty to the main and alternative count. In the absence of such alternative count therefore, I will proceed to determine this appeal on one count, that of defilement.

The trial court was convinced that the appellant committed the offence and convicted him. He was sentenced to twenty one years' imprisonment. He is dissatisfied with the conviction and sentence and has come before this court on appeal.

Grounds of appeal

The appellant had prepared the appeal in person before Mr. Mbaluka came on record to represent him. In his self-made grounds of appeal, the appellant states that the trial court failed to consider that the case was fabricated due to a grudge between him and his estranged wife. He is unhappy about the medical report which he says has no merit and that his defence was not considered.

Mr. Mbaluka filed a Petition of Appeal containing nine grounds of appeal which can be summarized as follows:

i. That the charge sheet is defective.

ii. That the trial magistrate misdirected himself in finding that the evidence was consistent.
iii. That the trial magistrate misdirected himself in law and fact by relying on medical evidence made two months after the alleged defilement and one that was not made by a doctor.
iv. That the evidence of the complainant, a minor, was not corroborated.
v. That the trial magistrate based his decision on extraneous matters.
vi. That the trial magistrate misdirected himself in finding the appellant's defence wanting and unconvincing.
vii. That the trial magistrate misdirected himself in finding the prosecution's case credible and unchallenged.
viii. That the trial magistrate did not give reasons for the sentence he imposed on the appellant.

Submissions

The appeal was disposed of by way of written submissions. The appellant has identified the following issues for determination:

i. Whether there was sufficient evidence to convict the appellant on a charge of defilement.
ii. Whether the trial magistrate offered an opinion if he believed the testimony of the minor which would have enabled him to convict the appellant without necessity of corroboration.
iii. Whether the prosecution's case was credible, strong and unchallenged by the appellant's defence.
iv. Whether the trial magistrate sentenced the appellant without giving reasons.

It was submitted that the prosecution evidence amounted to hearsay and was not sufficient to sustain a conviction; that the medical report was prepared two months after the alleged defilement; that the evidence of the minor was not corroborated by medical evidence; that the trial magistrate did not offer any opinion whether he believed the testimony of the minor; that the appellant's defence was strong and challenged the prosecution evidence and that the medical report was not made by a doctor. The appellant urged the court to allow the appeal and set him free.

The respondent, in opposing the appeal, has submitted that the evidence was flowing and congruent enough to be believed and that the clinical officer confirmed the evidence of the complainant; that the clinical officer is a professional and is officially recognized to act and perform the duties of a medical practitioner in accordance with Section 11 of the Medical Practitioners and Dentists Act; that the trial magistrate evaluated the evidence and delivered a judgement which emphasized the weight of the evidence. The respondent urged this court to dismiss the appeal.

Determination

The prosecution called evidence from eight witnesses. From the evidence of M.S, PW1, the appellant who is related to her as her father had been sexually molesting her from December 2010 to February 2011. She told the court that the appellant used to go to the room she used to sleep in at 6.00am and have sex with her. He would tell her not to scream. He warned her against informing her mother.

It seems that PW1 did not report the alleged defilement to her mother or anyone else. However, her observant class teacher G M M, PW4, had noticed that PW1 kept on crying. She asked the child the reason but the child denied anything was the matter. PW4 summoned PW1's mother A.S, PW2, on 28th February 2011 and confronted her. PW2 was told to investigate the matter. PW2 confronted her daughter who informed her that the appellant had been molesting her sexually over time.

The matter was reported to Kitheka Kituku, PW3, who was the village elder. He summoned both PW2 and the appellant and sought to discuss the matter. However, the issue became complicated after the two disagreed. PW3 referred the matter to Mary Mwende Muli, PW5, chief of the area. The appellant was arrested and charged with this offence.

In his defence, the appellant dwelt on issues touching on his relationship with his wife, PW2. His defence was on the disagreements he and PW2 had before. He said that PW2 reported to the village elder that he

had intended to defile the child. On cross examination he talked about his wife having chased the child away after having found her with a boy and of PW2 not taking care of the child. He stated that the child conspired with her mother.

I have analyzed and evaluated the evidence afresh. I find no inconsistencies in the prosecution evidence. PW1 did not report defilement to anyone. It was her class teacher, PW4, who noticed her crying and decided to find out. This was on 28th February 2011 almost three months from the time the alleged defilement started in December 2010. When PW1 failed to disclose the reason for her crying, PW4 summoned her mother PW2. This started a chain of events that led to the arrest of the appellant. PW1 told PW5 the Chief that the appellant had been defiling her since December 2010.

The appellant has not pointed out any inconsistencies in the prosecution evidence and on my own evaluation of the evidence, I have found none.

The appellant did not submit on the issue of defective charge. The charge was drawn under section 8 (1) read with 8 (3) of the Sexual Offences Act. This givens the definition of defilement, Section 8(1), and specifies the age of the victim and the penalty, Section 8(3). There is absolutely nothing wrong with the charge as drawn and this ground has no merit.

The medical report, P3 Form, was completed by a clinical officer, Kennedy Kioko, PW8. He is the one who had examined the complainant. It was submitted by the appellant that this report has no merit because it was not made by a doctor. The respondent has submitted that a clinical officer is a medical practitioner by virtue of section 11 of the Medical Practitioners and Dentists Act. I have no reason to doubt that PW8 is a medical practitioner and therefore find this ground without merit.

I have considered the submission that the report was made two months after the alleged defilement. That is true but this does not make it worthless. PW1 did not report the alleged defilement to her mother or any other person. It took her class teacher to notice her crying and try to find out what the problem was. PW4 did not tell the trial court the date when she noticed PW2 crying for the first time. She only told the court that on 28th February 2011 she confronted PW2 about the matter and told her to investigate. By the time the matter was reported to the authorities, it was in March 2011.

PW8 noted in the P3 Form that **"No injuries seen as the girl has a history of having been abused sexually for some months"**. He made additional remarks on paragraph 6 of the Form where he stated that: **"The hymen appears to have been broken before, there is history of having been molested for several months…"**

The behaviour of PW1 crying in school leading to the discovery that she had been sexually molested by her father, the appellant, viewed with the medical evidence that she did not have injuries because the sexual assault had occurred over time, leads me to conclude that whatever physical injuries this girl suffered over time must have had healed by the time she was examined. Her emotional injuries had not healed, however, and this made her cry all the time leading to her class teacher noting her behaviour.

I take the view that the medical report has merit and indeed corroborates the evidence of PW1 that she had been defiled over time. I see no reason why PW1 would identify the appellant as the person who had defiled her over time if this was not the truth. The trauma of having been defiled by her father was telling in the manner she behaved over time before PW4 found out what the problem was.

I find the evidence of PW1 on defilement well corroborated by that of the medical report. Even if such corroboration was lacking, the proviso to section 124 of the Evidence Act comes to the aid. Section 124 provides that:

> ***Notwithstanding the provisions of Section 19 the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material***

evidence in support thereof implicating him:

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.

It was submitted by the appellant that the trial magistrate did not give his opinion if he believed the testimony of the minor. I have noted that the trial magistrate conducted a *voire dire* examination on the child before she testified and noted: "**I am satisfied that the witness understands the meaning of oath and importance of telling the truth**". This court is therefore satisfied that the trial magistrate was alive to the fact that PW1 was a minor and that she understood the meaning of oath and telling the truth. Having so noted, the trial magistrate believed the testimony of PW1. This ground therefore has no merit.

The appellant did not point out the extraneous matters he claims the trial court relied on. I have not found any. I have confirmed that the trial court considered the appellant's defence. On page 17 of the record of appeal, the trial magistrate notes in his judgement:

> **"I have considered all the material placed before me and beginning with the accused's defence, I find that the accused only alleged a set up by the victim's mother but could not challenge the allegations by the victim especially the medical evidence……".**

The ground that the trial magistrate did not consider the appellant's defence has no merit. This court has considered the defence of the appellant afresh and I find that it does not relate to the charges before the court safe for stating that the case is a conspiracy. It does not in any way raise doubts in my mind.

On sentencing, the trial court found the case proved and sentenced the appellant to 21 years imprisonment. It is submitted that the trial magistrate did not give reasons for sentencing. I must admit that I do not understand what this means but I take the view that the trial court evaluated the evidence and was convinced that the case had been proved to the standard required. He convicted the appellant and sentenced him. Section 8(3) of the Sexual Offences Act provides for a sentence of not less than 20 years imprisonment. The appellant was sentenced to 21 years imprisonment. The sentence is perfectly legal. Once a court gives its judgement upon conviction, the judgement itself, which includes the charge and the section of the law the charge is based on, is the reason for such sentence as may be imposed.

I have read the authority relied on by the appellant, that is, **David Turupon Kiprono v Republic [2007] eKLR.** This case does not help the appellant. It is different in that the trial court did not conduct a *voire dire* examination on the minor.

In conclusion, this court finds that the appeal has no merit. Consequently, it must fail. It is hereby dismissed. I make orders accordingly.

Dated and delivered this 14th day of January 2014.

S.N.MUTUKU

JUDGE