



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 62 OF 2013

**Appeal from original conviction and sentence in Principal Magistrate's Court at Kyuso Criminal
Case No 244 of 2012 (E.M Mutunga, RM)**

JAMES MWANGANGI SYENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

James Mwangangi Syengo, referred to as the Appellant in this judgement, is serving life sentence for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act. It was alleged in the charge that the appellant had defiled A M M a child aged 6 years on 14th December 2012 at (particulars withheld) within Kitui County.

After taking evidence from six prosecution witnesses and two defence witnesses, the trial magistrate analysed the same and found the main charge of defilement proved beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment.

The appellant is aggrieved by the conviction and sentence and has moved this court on appeal challenging the same.

Petition of Appeal

The appellant filed his petition and grounds of appeal on 17th June 2013. After receiving proceedings of the lower court and with leave of this court he amended his petition and grounds of appeal. The amended petition was filed on 15th October 2013. He has listed seven grounds of appeal which I have summarized as follows:

- i. The trial magistrate was in error on convicting the appellant without considering that the evidence of PW1 was not tested through cross examination.
- ii. The appellant was not identified as the offender since there was no eye witness.
- iii. Investigations were not conducted and that the appellant was arrested before the report was made to the police station.
- iv. The prosecution evidence is contradictory, inconsistent and uncorroborated.
- v. The P3 form had alterations and was not genuine.
- vi. The medical evidence does not support penetration took place.

vii. The trial magistrate failed to consider that there existed a grudge between the appellant and the father of the complainant over a salary debt.

Submissions by Appellant

In support of the grounds of appeal, the Appellant has submitted that the onus is on the prosecution to prove this case beyond reasonable doubt; that without cross examination of PW1, his evidence was not tested as to its accuracy; that PW1 was coached on what to state in evidence and therefore it was wrong to admit his evidence without cross examination; that to admit evidence given using signs was prejudicial to the appellant since there was no sign language interpreter; that the offence is alleged to have been committed on 14th December 2012 and reported on 16th December 2012 while the appellant is alleged to have been arrested on 15th December 2012 before the matter was reported.

The Appellant further submitted that the medical evidence contained in the P3 form does not support defilement and that the said P3 form was altered making its contents questionable; that he was arrested when he went to ask for his salary from the complainant's father.

The Appellant is asking this court to allow this appeal, quash the conviction, set aside the sentence and set the appellant free.

Submissions by the Respondent

Through the learned state counsel Mr. Collins Orwa Okaka, the Respondent has opposed this appeal and submitted that PW1 gave unsworn evidence after the trial court conducted a *voire dire* examination and found that he could not testify under oath due to lack of understanding and therefore he could not be cross examined; that there was no need of a sign language interpreter since PW1 was only using gestures which were understood; that there was nothing to show that PW1's evidence was coached; that the prosecution evidence was overwhelming and was not controverted by that of the defence; that the paramount consideration in defilement cases is penetration and the medical evidence shows that there was penetration of the complainant; that the proviso to section 124 of the Evidence Act does not require corroboration of the evidence of the victim of a sexual offence; that in this case there was corroboration of the evidence of PW1 and that the prosecution has proved the case beyond reasonable doubt.

The learned state counsel asked the court to dismiss the appeal for lack of merit and confirm the conviction and uphold the sentence.

Determination

The victim of the defilement the subject of this case is a boy who was aged six years at the time of offence. His age was assessed by Kennedy Kioki, PW5, Clinical Officer who also examined him and filled the P3 form. I note that the father of the boy, D M, PW2, had with him during the time of testifying the Child's Health Card showing his date of birth as 19th January 2006. However, the record does not show that the card was produced in evidence. Despite this anomaly, this court does not doubt that PW1 was six years at the time of defilement.

The trial court conducted *voire dire* examination and found that the child did not comprehend many things and therefore could not testify under oath. This is the reason why he was not cross examined. A M M testified as PW1 and this is what he told the court:

“Am A M (full name withheld). I go to [particulars withheld]. Am in nursery. I remember on 14.12.12 when I was with Mwangangi he did “*tabia mbovu*” to me. Mwangangi called me and removed my trousers (touches the trouser and demonstrates). It was near granary. It was in my anus (He touches his anus to demonstrate). I was in pain. I told my dad of the incident. I was taken to hospital.”

On 14th December 2012, PW1 was at their home with Purity Nzangi, PW3, a domestic worker. PW3 testified that it was around 9.00am. She was making tea and had sent P M, PW4 aged 7 years and sister to PW1 to go to buy *maandazi*. She told the court that it was raining that morning and the Appellant who used to work for PW1's father arrived and went to the granary. PW1 followed him there. After making tea, PW3 went outside and found PW1 who told her that the Appellant has done "*tabia mbaya*" to him and he demonstrated that the Appellant had used his penis to insert into the boy's anus.

P.M, who testified as PW4 confirmed she had been sent by PW3 to go to buy *maandazi* and that when she returned at 10.30am she was informed by PW3 what had happened. PW4 told the trial court that before the Appellant left to go home that evening, PW1 kept on reminding him (Appellant) that they had done "*tabia Mbovu*". According to PW4, PW1 was touching his penis and anus to demonstrate what the Appellant had done to him. This made PW4 make a decision to tell their father PW2.

PW5 examined PW1 on 17th December 2012. This was three days after the alleged defilement. He found multiple abrasions in the anal region and the anus was tender on touch and was painful on examination using a finger.

I have examined and analysed this evidence afresh. While I note that PW1's evidence was not subjected to cross examination as the record shows and as stated by the Appellant, it is my considered view that the Appellant was someone known to PW1, PW3 and PW4. PW3 was at home with PW1 before the Appellant joined them. She saw PW1 going to the granary to join the Appellant and although she did not witness firsthand the defilement, she met PW1 soon after the alleged defilement and PW1 told her what had happened. PW1 kept on repeating what had happened to PW3 and PW4 in the presence of the Appellant. When PW2 went home, he checked his son's anus and saw it had tears according to his evidence.

The medical report and the evidence of PW5 who examined the boy confirmed that the boy had been defiled. Section 8(1) of the Sexual Offences Act states as follows:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Defilement is an act that causes penetration. Penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person. For the purposes of the Sexual Offences Act, "**genital organs**" include anus.

It is now settled that the evidence of a child victim of a sexual offence does not require corroboration so long as the trial court records the reasons for believing such evidence (see proviso to Section 124 Evidence Act). The trial court in this case had this to say in its judgement on this issue:

“This court has looked at the evidence of the minor, (PW1), PW2, PW3 and PW4 and found it to be consistent and corroborated. I have also looked at the demeanour of the said witnesses and especially of PW1 and I find no reason that the accused person was framed. It is my considered view that they were truthful.”

This court did not have the benefit of observing the witnesses as they testified and therefore I have no reason to doubt the trial magistrate who observed them give evidence and make a finding on their demeanour. This court has examined and evaluated the evidence of PW1, PW2 and PW3 and finds it consistent. I also find the evidence of the clinical officer consistent with that of PW1. The evidence is therefore well corroborated.

In **Mohamed v Republic Criminal Appeal No 210 of 2003** the Court of Appeal had this to say:

“The Court of Appeal has reiterated that an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has

been committed but also that the accused committed it. There was strong circumstantial corroborative evidence to form a basis for the appellant's conviction in this case."

In addition to PW1 stating what happened to him, he was quick to point at his penis and anus to demonstrate what the Appellant had done to him.

I have examined the P3 form. The Appellant claims the dates on the first page of the form have been altered. There is no doubt that the P3 form was completed on 17th December 2012. This is the date PW5 said he examined PW1. There is no controversy over this date. What seems to be the problem is 15th and 16th December 2012. PW6 told the court that he received the Appellant at Kyuso Police Station on 15th December 2012. At the time the Appellant was brought from Katse Administration Police Camp. PW6 did not say much about the dates when PW1 was taken to hospital or when he issued the P3 form. The P3 form indicates the date and time the matter was reported to the police as 16th December 2012 at 0200hrs. This cannot be true since PW6 testified that he received the Appellant on 15th December 2012. The date seems to have been altered and this court not being an expert in handwriting is not able to tell what the original date was entered.

I have considered this issue and I find that the alteration of the date when the matter was reported to the police does not prejudice the Appellant in any manner. There is evidence from PW1, PW2, PW3 and PW4 that the offence was committed on 14th December 2012 and PW2 was informed of the matter on 15th December 2012. There is evidence that the Appellant had been held at Katse AP Camp before being handed over to Kyuso Police Station on 15th December 2012. On the issue as to whether the matter was investigated on 26th February 2013, the Appellant seems to have misunderstood the evidence. PW6 told the court on cross examination that he investigated the matter. He went on to state on a different sentence that he did not threaten the Appellant on 26th February 2013.

I have considered the allegation that there existed a grudge between the Appellant and PW2 and I find no basis of such a claim. I have noted that the Appellant cross examined PW2 on salary payment and PW2 told the court that at the time PW2 had not paid the Appellant salary for December 2012. The alleged grudge and fabrication of the evidence due to that grudge in my view have no basis. The trial court found no reason for the claim that the Appellant was framed.

After my careful examination and evaluation of all the evidence of the prosecution and the defence, it is my considered view that the appeal has no merit. The evidence by the prosecution proves beyond reasonable doubt that the Appellant defiled PW1. I find medical evidence on the injuries sustained by PW1 consistent with the evidence of PW1 and that of PW2 after he examined PW1 on his anus. The defence that there was a grudge leading to the fabrication of this case is not true. PW2 admitted to owing the Appellant salary for December 2012 and not any other month. The trial magistrate was correct in finding the case proved and in convicting the Appellant.

The Appellant is also contesting the sentence although he did not submit on this issue. Section 8(2) of the Sexual Offences Act provides thus:

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

Sentencing is left to the discretion of the court. Court sitting on appeal will not interfere with that discretion unless in cases where the sentence imposed is illegal in some factor or it is manifestly excessive (see Wanjema v. Republic (1971) E.A 493).

The penalty for defiling a child aged 11 years and below is spelt out under section 8 (2) of the Sexual Offences Act. This is the sentence imposed by the trial court. I find nothing illegal in it and therefore I have no reason to interfere with the discretion of the trial court.

In conclusion, this court finds the appeal without merit and it is hereby dismissed. I make orders accordingly.

Dated, signed and delivered on 25th March 2014.

S.N.MUTUKU

JUDGE