REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 139 OF 2012

(Being an appeal from original conviction and sentence in criminal case No.209 of 2009 by Hon. S.M Soita PM, Molo Law Courts dated 8th June, 2012)

DAVID KIPKOECH YEGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged and convicted of the offence of defilement of a child under the age of eleven years contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, 2006** and was sentenced to life imprisonment. In the alternative he faced a charge of indecent act contrary to **Section 11(1) of the Sexual Offences Act.**

Aggrieved by both the conviction and sentence, the appellant has appealed on five (5) grounds that can be reduced into one namely, that the conviction was against the weight of the evidence.

Through his written submissions, the appellant amended the said grounds and sought to argue the appeal based on the grounds; that his constitutional rights were violated; that his demeanor was incompatible with a guilty conscience; that the medical report was incomplete and produced in contravention of the law; that the prosecution case was full of contradictions and inconsistencies; that the trial magistrate refused to recuse himself even after he informed him that he had no faith in him; and that the trial magistrate failed to appreciate that the alleged defilement of a child aged 2 years is an utter impossibility. He has also complained that he was not provided with all trial proceedings for the purpose of preparing his appeal.

The evidence adduced in the lower court and which led to the conviction of the appellant was that on 21st April, 2010 at about 8 pm E C M (the complainant's mother) was at her house preparing supper when the appellant came to her house. After they had supper together, she asked him to leave but the appellant refused prompting her to go to her brother-in law's house (P.W.3) to seek help. Accompanied by her daughter, then aged five, she walked out of the house leaving the appellant in the house. She also left the complainant (then aged two years) sleeping in the house.

When she returned in the company of P.W.3, they discovered that the appellant had gone and the child was missing. After she (P.W.2) raised alarm, villagers came to her house and a search for the complainant was mounted. Later on, the complainant was found in a bush having been defiled. At the scene of the crime a pack of unused condoms and a pair of trousers which P.W'2 claimed was different from the one

the minor was wearing, earlier on, were recovered.

Upon examining the complainant, P.W.2 noticed that she was bleeding and had sperms (could be semen) on her genitalia. A report was made to the area chief and on the following day, the appellant was found in a bush at Lemotit.

On cross-examination, P.W.2 denied either having framed up the appellant or having had an affair with him.

P.W.3, E Y, testified that on the material day, 23rd January, 2009, at about 9.00pm, he was at his home having supper when P.W.2 came and told him that her daughter had been taken. Together they went to the appellant's house but failed to find him. The appellant's brother informed them that as he was coming home from preps, he heard a child crying in the bush. In the company of the appellant's father, they went to the place where the appellant's brother had heard the sound of a child crying where they found the complainant naked. A pair of trousers lay beside her. The complainant was assisted by Jackson to wear the trouser. At the scene of crime they recovered condoms.

The following day, they learnt that the appellant had been found at Lemotit and arrested.

Upon cross-examination by the appellant he stated that his house and that of the P.W.2 are 50 metres apart. He also stated that he found many people after an alarm was raised.

P.W.4, James Omolo, received a report of the crime herein while at Londiani Police Station. He issued a P3 form to the complainant which P.W.1 filled confirming that the minor had been defiled. On the basis of the report made at the police station and the medical report herein he charged the appellant with the offences hereto.

On 25th January, 2009, P.W.1, a clinical officer at Londiani Hospital, examined the complainant after she was taken to the hospital by P.W.2. She had bruises on the labia and her hymen had been broken. There was also a discharge which he took for examination. He concluded that the complainant had been defiled.

As the complainant could not comprehend what had happened to her, due to her tender age, her evidence was dispensed with.

Put on his defence, the appellant gave an unsworn statement and stated that on that day, he went to P.W.2's house because they were lovers. As they were planning to go to bed, P.W.2's in-law came. P.W.2 said they could not sleep in the house and asked him to arrange to take her to a lodging where they could finish their business. She also asked him to hold the complainant, he declined. After he declined P.W.2's request to hold the complainant, P.W.2 held her and they went to the bush where they had sex. While in the act, P.W.2's in-law came and they both ran away leaving the child behind. He went to his house and slept. On the following day, he went to Lemotit (his mother's place).

Upon considering the foregoing evidence, the trial magistrate believed the prosecution case and disbelieved the explanation offered by the appellant.

As the first appellate court, it is the duty of this court to consider and re-evaluate the evidence presented in the lower court in order to arrive at its own independent conclusion, bearing in mind it neither heard nor saw the witnesses. See **Okeno v.Republic** (1972) E.A 32.

Upon considering the prosecution evidence, I find as a fact, that there was no eyewitness to the offence herein. The victim is a child of 2 years who did not understand what happened to her. This being the case, the prosecution case was entirely premised on the circumstantial evidence presented by the prosecution witnesses.

For the said prosecution evidence to form the basis for conviction of the appellant, it must irresistibly point to the appellant to the exclusion of all others. See **James Githinji Ndungu** v. **Republic** (2012)

eKLR where the Court of Appeal observed:-

> **"It is trite law that in a case depending exclusively upon circumstantial evidence the court had to, before deciding upon a conviction, find the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused person's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

In this regard counsel for the respondent, while opposing the appeal, submitted that there was strong circumstantial evidence which pointed to the appellant.

The appellant, on his part, has submitted that the evidence of P.W.2 and that of P.W.3 is contradictory in that the allegation that P.W.2 raised alarm after they found the minor missing is unsupported by the testimony of P.W.3. Further that whereas P.W.2 stated that the minor was bleeding, the trouser had no blood stains. He has submitted that the allegation that the minor was bleeding and that of sperms seen on the minor's genitalia were also not borne out (corroborated) by P.W.1's evidence.

Regarding the pack of condoms that was allegedly discovered at the scene of the crime, he has submitted that such evidence is hearsay as P.W.2 was not there when the minor was discovered.

He has also taken issue with the prosecution's failure to call Jackson, appellant's brother, who allegedly heard the child crying that night and dressed up the child.

Regarding the medical evidence led by P.W.1, the appellant has submitted that a clinical officer is not a qualified witness under **Section 35** and **48** of the **Evidence Act, Cap 80 Laws of Kenya**.

The issues arising from the foregoing submissions and the law are:-

1. **Was the complainant (the minor herein) defiled?**
2. **If the answer to (1) above is in the affirmative, did the prosecution evidence irresistibly point to the appellant to the exclusion of all other persons?**
3. **Did the prosecutor fail to call important witnesses?**
4. **If the answer to (3) above is in the affirmative, can any adverse inference be drawn from such failure?**

Whether the complainant was defiled:

The complainant's mother, PW2, stated in her evidence that she observed the child upon being brought to her and noticed that she was bleeding and there were sperms in her private parts. The child was examined by PW1 the clinical officer, on 25/1/09, 2 days after the alleged incident. He found that the complainant's hymen was broken, labia was bruised and had a discharge. He formed the opinion that the child was defiled. **Section 2** of the **Sexual Offences Act** defines penetration. It reads **"'penetration' means partial or complete insertion of the genital organs of a person into the genital organs of another person"**. There is no doubt that the complainant was defiled.

The appellant complained that the complainant was examined by unqualified person, PW1, a Clinical Officer in contravention of **Section 35** and **38** of the **Evidence Act**. **Sections 35** and **38** of the **Evidence Act** are not applicable to criminal proceedings but relate to civil proceedings. **Sections 35** and **38** fall under part v which is titled **'statements - documents produced in civil proceedings'**. In this case, a medical report is produced pursuant to **Section 77** of the **Evidence Act**. It reads as follows:-

> **"In Criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or genolgist upon any person, matter or thing submitted to him for examination for analysis may be used in evidence.**

(2) ...

(3) ..."

Section 77 does not specify who a medical practitioner is, but this court takes judicial notice of the fact that in such cases, clinical officers who form the backbone of Kenyan hospitals do carry out such examinations in absence of a doctor. Failure to use clinical officers may result in a lot of injustices as most of the dispensaries and small hospitals do not have doctor. Further people in remote areas of Kenya may never be able to reach doctors in the bigger hospitals and the evidence in Sexual Offences would disappear before they reached the hospitals. In CRA 360/2012, **Daniel Lucas Kimaru** (Embu) the Court of Appeal upheld the decision of the High Court where post mortem on the deceased was conducted by a Clinical Officer. In **Lochuch Nchacha and Loroto Eloto v Rep** CRA 229/2011, Wendoh and Emukule JJ held that the fact that a Clinical Officer conducted a post mortem did not offend **Section 77** of the **Evidence Act**.

Clinical Officers in our hospitals perform the bulk of the work due to shortage of doctors and have even been used to perform post mortems and the court has found the post mortems to have been done by a qualified person. In this instance the clinical officer was qualified to examine the complainant and form an opinion on his findings.

Whether the prosecution evidence irresistibly points to the appellant as the perpetrator of the offence to the exclusion of others:

According to the appellant; the evidence of PW2 and PW3 was contradictory in that the allegation that PW2 raised an alarm after they found the minor missing is unsupported by PW3's testimony. First of all, the testimony of the appellant itself does put the appellant at the scene of crime. He admitted to have gone to PW2's house on that evening. What is material is what happened when he was there.

According to PW2, she went to call her brother in law, PW3, when appellant refused to leave her house only to find both the appellant and the child missing. However, from PW3's testimony it seems he was called because the child was already missing and that is when they went in search of the appellant. The appellant having admitted the fact that he was at PW2's house, and PW2, the only eye witness told the court that the appellant was left with the child but the child was nowhere to be found on her return, the presumption raised is that the appellant must have known where the child was and should give an explanation. **Section 111** of the **Evidence Act** places the burden on such person to give a plausible explanation as to where the person he was last seen with is. The **Section** reads:-

> **"111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**
>
> **(2) Nothing in this section shall -**
>
> **(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist."

In this instance, having been left with the child in the house, it is only the appellant who could explain where the child was and what subsequently happened to the child. Failure to given this explanation, it is presumed he is the culprit. The fact is that PW2 raised alarm after finding the child missing and the stage at which the alarm was raised was not very material as to be a ground of quashing a conviction.

The appellant in his defence alleged that they were friends with PW2 and that she had gone with him to the bush on that night to engage in sexual activity when PW2's in-law found them and they both ran away leaving the child. During cross examination of PW2, the appellant alleged that PW2 knew him because he had jilted her and that she had wanted him to father for her a son which he had not done. After asking these questions, the appellant then totally contradicts himself in his defence when he alleged that infact they had gone out in the bush with PW2 and to have sex. PW3 denied knowing about a love affair between PW2 and the appellant. From the contradictory statement in his defence and the questions put to PW2 by the appellant, I find his defence to be untrue and an afterthought because the issue of him going to the bush with PW2 never arose as he cross examined PW2. Even when PW2 went to PW3's house, it is the appellant whom PW3 said they went in search of but the appellant was not in his house that night. The appellant totally failed to explain what happened when he was left with the child in PW2's house. It does not mean the court is shifting the burden of proof on him but he had a duty to explain by dint of Section 111 of the Evidence Act. The appellant was at the scene on the material night the child disappeared and the child was found in a bush about 1-1½ kms away, having been defiled. The appellant could not be traced in his house that night. He was arrested in Lemotit, a fact which he accepted. I am satisfied that the chain of events is so linked that it only leads to him as the culprit.

The appellant contends that essential witnesses were not called, for example one Jackson, who allegedly heard the child crying in the bush and in company of PW3, also dressed the child. The said Jackson is a brother of the appellant. The record shows that the said Jackson Bor came to court on 15/7/2010 but when called out later, he had disappeared. On 13/5/2011, Jackson Bor was in court again but disappeared before testifying. It is obvious that the said witness, a brother to the accused did not want to testify. Despite several adjournments, the witness did not attend court and when he attended he disappeared; before testifying. May be the court should have had him arrested. But what evidence was he supposed to give? He was with PW3 when the child was found in the bush. He did not witness the incident or see the appellant at the scene. Having heard PW3's evidence, I find that failure to call the said Jackson Bor does not prejudice the defence case. Besides the prosecution did its best to get the said witness to testify but failed. In **Bukenya & Others v Uganda (1972) EA 326**, the East Africa Court of Appeal held:-

> **"Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

The evidence of PW3 sufficed as to where the child was found and was not inadequate.

The appellant's arrest is not in doubt. PW4 rearrested him from members of the public. Upon his arrest, he admitted to having been arrested away from home in Lemotit. PW4 is the one who produced the child's trouser and condom found at the scene. There is no doubt as to how the appellant was arrested.

On 30/5/2013, when the appellant appeared before this court, he confirmed that he had received the record of appeal but was not ready to proceed. The court ordered the matter to be adjourned so that the record could be completed and enable the appellant prepare. The appeal came up several times before it was heard on 24/2/2014. The appellant had the record of appeal which includes the proceedings of the lower court. His allegation that he was denied the record of appeal is unfounded.

After PW1 and PW2 testified, the appellant applied to recall them. On 6/1/2011, PW1 attended court and the appellant said he was ready to proceed but the prosecution asked for adjournment because one Chief Inspector Muteti was not present. On 21/3/2011, PW1 was present in court but the appellant said he was not ready to proceed because he had not perused the P3 filled by the Doctor. The court then discharged

PW1 and directed that he should not be summoned again. As regards PW2, she was present in court on the same date, 21/3/2011 and the appellant claimed to be unwell and hence not ready to proceed. The case was adjourned to 6/4/2011. The appellant changed his mind and did not wish to proceed because he claimed to have instructed Mr. Tengekyon to represent him. However, Mr. Tengekyon, who was in court denied having any instructions but asked for adjournment. The court noted that PW2 had come to court twice after being re-summoned and the court directed that the appellant proceeds to cross examine her. The appellant did not ask her any questions. She was then discharged. The record clearly shows that the prosecution did make effort to produce PW1 and PW2 but the appellant seemed to be playing games. If the appellant had been ready to cross examine PW1 on 6/1/2011, why would he change his mind on 21/3/2011 and claim that he had not perused the P3 form? On the same day, when asked to cross examine PW2, he claimed to be sick. He was not serious and the court clearly gave him two opportunities to cross examine PW1 and PW2 again but he failed to make use of it.

The appellant complains that his right to fair hearing under **Article 50(2)((i)** was breached when the court denied to give him copies of the witnesses statements. On 9/3/09, the court ordered that copies of statements be supplied to the appellant at his own cost. On 6/2/09, the appellant sought an adjournment because the copies of witnesses statements had not been given to him and the prosecutor replied that the defence had not make any effort to procure them. Again on 20/11/09, the appellant repeated the same request and asked for adjournment. The case finally commenced and it is not clear whether the appellant managed to get copies of the statements. He also complained that he severally asked for time to engage an advocate but he was denied that right **(Article 50(2)(g).** The record indicates that the appellant only made one application to engage Mr. Tengekyon and this was towards the end of the case on 6/4/2011. Mr. Tengekyon was present but he never attended court again till after appellant was put on his defence, then the counsel reappeared again to seek recalling of PW1, PW2 and PW3. As regards to the statements, I do note that even without the witnesses statements the appellant did cross examine the witnesses. But most important the appellant should bear in mind that in 2009, when this case was heard the provisions by the **Constitution** that he seeks to rely upon were not yet in force. The **Constitution 2010** came into force on 27/8/2010. The provisions he relies upon were not explicitly set out in the old constitution. There was no specific provision for provision of witness statements and the court did grant him several opportunities to get them only that it was to be at his own cost. The court did its best to ensure the appellant got witnesses statements and allowed the appellant so many adjournments that it cannot be faulted for breaching the appellant's right to a fair hearing.

The appellant cannot rely on the provisions of the provision of the **2010 Constitution** because the law does not have a retroactive effect.

On 29/4/2011, the appellant asked the magistrate to disqualify himself from the case because he had no faith in the court. The court declined to disqualify itself because no good reason had been given by the appellant. Indeed there is no reason given by the appellant as to why he sought the court's disqualification. It was the duty of the appellant to give reasons and support that application with reasons. It could not just be given as a matter of course. I find no miscarriage of justice by the court's refusal to recuse itself from the case.

After close of the prosecution case, Mr. Tengekyon appeared again and sought to recall PW1, PW2 and PW3 under Section 150 of the Criminal Procedure Code. The court declined to grant the application giving reasons that the appellant had been allowed the opportunity to cross examine the witnesses but had not done so and besides the prosecution had closed its case. Under Section 150 of the Criminal Procedure Code the court is given a discretion to summon or call any person as a witness or examine anyone in attendance even if not summoned as a witness and the prosecutor or advocate for accused would have an opportunity to cross examine the witness. Under this Section it is the court to initiate the summoning of witnesses but not on an application by the appellant and his advocate. In this case the court could have recalled the witnesses if it felt the need to do so.

Upon perusal of the court file, it is apparent that the appellant did whatever possible to ensure that the hearing of this case was delayed by asking for so many adjournments. In respect of Chief Inspector Muteti (PW4) whenever the witnesses attended court, the appellant would not be willing to proceed. On

2/6/2011, when Chief Inspector Muteti came to testify, the appellant said he was not ready to proceed because the officer had taken his Kshs.10,500/- which he wanted before he could take part in the proceedings. This is something that the appellant had not alleged since the trial began. After PW4 finished his testimony, the appellant refused to ask him any questions till he got his money. By the time PW4 testified, he had attended court 4 times and appellant would ask for adjournment for same reason. It is obvious that the appellant was bent on derailing and delaying the conclusion of this case. It is the appellant who abused court process.

After carefully considering all the evidence adduced before the trial court, I am satisfied like the trial court, that none but the appellant who had been left with the child, who carried her out of the house and defiled her. The medical evidence supported the evidence of PW1 and PW2. I have no reason why I should fault it. I hereby confirm the conviction and sentence. Appeal is hereby dismissed. It is so ordered.

DATED and DELIVERED this 18th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present in person

Mr. Chirchir for the State

Kennedy – Court Assistant