REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 76 OF 2013

(An appeal against both conviction and sentence of the Principal

Magistrate's court at Vihiga in Criminal Case No. 912 of 2012

[G. A. MMASI, AG. SPM] dated 11th April, 2013)

ENOCK KAGALI .... APPELLANT

VERSUS

REPUBLIC ……………….…..………………. RESPONDENT

JUDGMENT

The appellant was charged with defilement of a girl child contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of charge were that on 11/9/12 at ***[particulars withheld]*** in Vihiga County within Western Province, intentionally and unlawfully defiled a girl child name H A by causing his genital organ namely penis to penetrate into the genital organ namely vagina of H A a girl aged 8 years.

In the alternative, he was charged with indecent act contrary to **Section 11 (1)** of the same Act. The particulars of charge were that on the same day and place intentionally and unlawfully caused his genital organ namely penis to have contact with the genital organ of a girl namely H I aged 8 years. He denied both charges. After a full trial, he was convicted on the main count of defilement. He was sentenced to serve life imprisonment.

Being dissatisfied with the decision of the trial court, he has appealed to this court against both conviction and sentence. He was represented on appeal by Mr. Elung'ata.

Counsel for the appellant submitted in support of the appeal. Counsel emphasized that most prosecution witnesses, especially PW2 and PW4 tendered contradictory evidence. PW2, who was the mother of the complainant, stated that the offence was committed on 14/9/12 while PW4, the Investigating Officer, stated that she received a report at the Police Station on 10/9/12 and she took action on 11/9/12. Counsel wondered whether if a report had already been made on 10/9/12 the said offence had been committed on 14/9/12. In Counsel's view, that was not possible. Counsel also emphasized that PW2 stated that she took the complainant to hospital on 4/10/12 after reporting to the police on 10/9/12. This was a long period. It was not clear why it took so long for PW2 to take the complainant to hospital.

In counsel's view also, no proper medical report was produced to support the charge and the magistrate should not have believed the evidence of the prosecution witnesses. The medical evidence did not link the breaking of the hymen of the complainant with the appellant. Lastly, counsel submitted that

crucial witnesses were not called to testify. These were E and D, who were said by the complainant PW1 to have been with her at the time the appellant called her. Counsel submitted that failure of the prosecution to bring these two crucial witnesses to testify in court greatly weakened the prosecution case. Mr. Oroni for the State conceded the appeal. Counsel submitted that though the charge sheet stated the date of offence as 10/9/12, hospital treatment for the complainant was sought on 4/10/12 which was long after the event. In addition, the immunization card produced at the trial to prove age was for H F and not H A the complainant. In counsel's view, the two were different persons. Counsel also stated that there were a lot of contradictions in the evidence of PW1, 2 and 4. The age of the complainant was not also established. No age assessment was done.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. See **Okeno –vs- Republic [1972] EA 32**.

I have perused the record of evidence and documents tendered as exhibits at the trial. I have also perused the original record. The charge sheet refers to 11/9/12 as the date of the offence. However, PW2 M A the mother of the complainant stated in evidence that the offence occurred on 14/9/12. She confirmed that date in cross-examination. PW1, H A, the complainant, did not give the date of the offence, though she was asked about the same. PW4 PC Rhoda Atemo, the Investigating Officer, on the other hand, stated that a report was made to the police on 10/9/12, and that she took action the next day which was 11/9/12 and arrested the appellant.

It is clear from the above evidence that there is an unexplained variance in the evidence of witnesses regarding the date of commission of the offence. The complainant herself avoided or was not able to give the date of commission of the offence. The charge stated that the offence occurred on 11/9/12. The report to the police was however on an earlier date 10.9.12. The mother of the complainant PW2 insisted that the offence occurred much later on 14/9/12. In my view, the failure to the complainant to give the date of the offence and the contradictions on the date of the commission of the offence given by key witnesses PW2 and PW4 completely destroys the prosecution case. There cannot be logic in an offence being reported on 10/9/12 and the charge sheet stating that the offence occurred on 11/9/12. There could also be no logic in the charge sheet stating that the offence occurred on 11/9/12, while the reporter maintaining that it occurred later on 14/9/12. These contradictions give credence to the allegation of the appellant that the charge was a frame-up.

The second issue relates to the proof of age of the complainant. I have seen the immunization card produced at the trial. As stated by the Prosecuting Counsel, the name of the child in that card is H F, not the complainant in this case H A. No explanation was given regarding the variance of the names. The presumption is that the two different names refer to two different persons. This is an offence where proof of age is necessary. It is possible that the child who was brought to court and testified as the complainant was not H A. The prosecution was required to bring evidence in court to prove the age of the complainant beyond reasonable doubt. They did not. On that allegation also, the appeal will succeed.

The evidence of the Clinical Officer, PW3 Dan Kavole, was that the hymen of the complainant was broken. The evidence on record does not however connect the breaking of the hymen to the appellant. The fact that the complainant was taken to hospital on 4/10/12 which was more than 10 days after the alleged occurrence of the offence, also made the medical report worthless. In addition there was nothing in the evidence to connect the appellant with the alleged offence.

The learned Prosecuting Counsel has conceded to this appeal and in my view he was correct in doing so. The case of the prosecution is not sustainable. The conviction and the sentence cannot stand.

In the result, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E