REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 137 OF 2013

(An appeal against both conviction and sentence of the Chief

Magistrate's court at Kakamega in Criminal Case No. 48 of 2013 [D. OGAL, RM] dated 11th July, 2013)

WYCLIFFE ILAVONGA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to **Section 8 (1)** and **(2)** of the Sexual Offences Act No. 3 of 2006. The particulars are that on 4th January, 2013 in Kakamega East District within Western Province intentionally and wilfully caused his penis to penetrate into the vagina of P K a child aged 8 years. In the alternative he was charged with indecent act with a child contrary to **Section 11 (1)** of the same Act. The particulars of charge were that on the same day and place, he intentionally touched the vagina of P K with his penis. He denied both charges.

After a full trial, he was convicted on the main count and sentenced to serve life imprisonment. Being dissatisfied with the decision of the trial court, he has now come to this court on appeal. He filed his appeal through his counsel Phoebe Munihu Muleshe & Company, under the following grounds-

1. **The learned trial Magistrate erred in law and fact in convicting the appellant against the weight of evidence on record.**
2. **The trial Magistrate erred in law and fact in convicting the appellant when the prosecution had not proved its case beyond reasonable doubt.**
3. **The learned trial Magistrate erred in convicting the appellant without sufficient evidence to support the charges.**
4. **The honourable trial Magistrate erred in rejecting the appellants defence.**
5. **The honourable trial magistrate erred in awarding the appellant an excessive sentence.**

On the hearing date learned counsel for the appellant Mrs. Muleshe submitted in support of the appeal. Ms Opiyo the learned Prosecution Counsel opposed the appeal.

The facts of the prosecution case are that on the 4th of January, 2013 PW1 C M also called P, the complainant was sent by the appellant to buy pepper at around 1 p.m. The complainant, at that time was together with PW2 S K and PW3 C M, both children of between 11 and 12 years. The complainant

reluctantly went to buy the pepper. When she brought it back, the appellant asked her to take the same to his house which was nearby. She did so. The appellant then followed her to the house and locked it, and defiled her on a mattress on the floor. When PW2 and PW3 noted that the complainant had delayed, they went to that house, pushed the door open and found the appellant defiling the complainant.

When the mother of the complainant came back in the evening after 6 p.m., PW2 and PW3 informed her about the incident. The mother who testified as PW4 A K reported the incident to the village elder, PW5. The complainant was taken to Kambiri Health Clinic for treatment on 5th January, 2013 which was the next day. A P3 form was filled. A report was made to the police. The appellant was then arrested and charged with the offence.

When put on his defence, the appellant chose to give sworn testimony. He also called one defence witness his wife DW2 Agnes Musari. It was his defence that he was arrested for no reason. That he was implicated because he had a land boundary dispute with B the father of the complainant. His defence witness DW2 confirmed the evidence that there existed a land dispute.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was thus convicted and sentenced. Therefrom arose this appeal.

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 the case of ***Okeno -vs- Republic [1972] EA 32***.

I have evaluated the evidence on record. The conviction of the appellant is grounded on the evidence of three minors, the complainant who testified as PW1 as well as PW2 and PW3. The appellant claimed that the matter arose because of a boundary dispute with the father of the complainant. The evidence of the three eye witnesses was that the complainant was defiled by the appellant. Was their evidence believable? They were minors.

Under section 124 of the Evidence Act (Cap. 80), the evidence of children need not be corroborated, provided that it is believable and is believed by the trial court on reasons to be stated.

The evidence of the prosecution has to be weighed against the evidence of defence in order to determine credibility. The appellant gave a very long defence statement. That evidence is believable just as much the evidence of the prosecution witnesses.

The commission of offence of defilement would require certain factors to be proved. That goes to the medical evidence. The Clinical Officer, PW6 Musa Kipteru gave evidence. He stated that he examined the complainant on 5th January 2013. That was a day after the incident. He stated that the hymen was torn. The injury was one hour old. From the treatment book which was produced as exh. 1, the treatment was on 5th January 2013. Prior to that, the complainant was treated on 9th June 2012. There was no record that she was treated on 4th of January 2013, the date when the incident occurred. If the injury was found to be one hour old on 5th January 2013 at 3 p.m., in my view, it would not be said to have been caused by the appellant on the 4th January 2013.

That is not all. I have perused the P3 form produced. The top shows that the report to the police was made on 5th January 2013, but which appears to have been an overwriting on a report that was made on 5th December 2012. Further down, the date and time of the report is written as 5th January 2013 at around 16.00 hrs. The name and designation of the person who signed the P3 form on 5th January 2013 was not given.

My doubts about the authenticity or reliability of the P3 is fortified by the fact that section “c” which must be completed in all sexual offences was not competed and signed. Indeed, if the complainant was medically examined, that section would have been completed and signed. It is only noted in the same handwriting at section “b” of the P3 form, that the hymen was torn, and that there was no presence of

spermatozoa in the vagina. It was also noted in the same section “b” that there was mild bleeding from the vulva. The injury noted was also said to be one hour old, on 5th January 2013.

The effect of the above omissions and errors is that penetration was not proved. There was no tangible medical evidence to prove penetration. In addition the difference of dates means that, even if there was penetration or defilement, it cannot be connected with what the appellant is alleged to have done on 4th January 2013.

The consequence is that the prosecution did not prove that the offence of defilement was committed by the appellant. The evidence on record fell far short from proving the offence. The medical evidence failed to prove that there was penetration. The appellant has therefore to be given the benefit of doubt.

To conclude, I find merits in the appeal. 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 29th day of May 2014

George Dulu

JUDGE