REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRA NO. 13 OF 2013

M W .... APPELLANT

- VS -

REPUBLIC.. RESPONDENT

(Apeal arising from Senior Resident Magistrate Hon. J. O. Magori

in

Sirisia Cr. Case No.138 of 2011)

J U D G M E N T

1. M W, the Appellant, was on 4th March, 2011 charged with two (2) Counts of the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006. In the two (2) counts, it was alleged that on 23rd day of February, 2011 in Bungoma County, he did an act of causing penetration of his male genital organ namely the penis into the female organs, namely Vaginas, of J N and M N, girls aged 10 and 12 years, respectively.

2. The Appellant was also charged with two (2) alternative charges of indecent act to a girl contrary to Section 11 (1) of the Sexual Offences Act. It was therein alleged that on 23rd February, 2011 and 1st March, 2011, in Bungoma County, the Appellant did an act of indecent by touching the genital organs, namely Vaginas, of J N and M N, girls aged 10 years and 12 years, respectively.

3. After trial, the Appellant was convicted by the Senior Resident Magistrate's Court, Sirisia (Hon. J. O. Magori) for Count 1 and for attempted defilement for Count 2 and sentenced to 20 and 14 years, respectively. He has now appealed to this court against both the conviction and sentence. The grounds of appeal are:-

a) that the trial court erred in convicting the Appellant on testimony of witnesses whose evidence was not credible;

b) that the trial Court erred in failing to consider that the prosecution evidence was speculative, fabricated and of no probative value; and

c) that the trial Court erred in convicting the Appellant whilst the prosecution had not proved its case to the required standard.

4. This being a first appellate Court, it is incumbent that I do review, examine and re-evaluate the

entire evidence to be able to come up with my ownindependent findings and conclusions. However, in so doing, I have at all times to consider that I did not have the advantage of seeing the witnesses testify. See the Case of **Ekeno -vs- Republic [1972] EA.**

5. The prosecution case was that; J N (PW1) and M N (PW2) were sisters aged 11 years and 13 years at the time they testified. That sometimes in February, 2011, their parents travelled to Uganda and left them in the custody or company of the Appellant who is their uncle. That on the night of 23rd February, 2011, while the two sisters were sleeping, the Appellant who was sleeping in an adjacent room came to their room and defiled them. The two sisters told a neighbour who reported the incident to the area Assistant Chief.

6. The Assistant Chief (PW3) took the children to Malakisi Police Station where they recorded their statements. The two were taken to Malakisi Health Centre where they were examined and P3 forms filled. Upon examination, the two girls were found to have injuries on their private parts. PW1 was found to have a bruise on the labia minora with a torn hymen and with signs of vaginal penetration. As regards PW2, she had a bruise on right labia minora but with an intact hymen. PW5, Philisters Khamala, a Clinical officer at Sirisia sub-district hospital told the court that the Doctor who examined the two girls concluded that they had been defiled. The treatment books and P3 forms for the two girls were produced as Pexh. 1, 2, 3 and 4, respectively.

7. When called upon to offer his defence, the Appellant exercised his Constitutional right to and remained silent.

8. At the hearing of the Appeal, the Appellant filed written submissions filed on 12/02/14 which he entirely relied on. On the first ground, the Appellant submitted that the evidence of PW1 and PW2 was contradictory as to the date of defilement. That whilst PW1 told the court that both were defiled on the same date and time, PW1 stated that the defilement was on 23/2/2011 at 10.00 a.m whilst PW2 testified that the defilement was on a Tuesday in the month of May, 2011 at 5.00 a.m. The medical records produced showed that PW2 was allegedly defiled on 2nd March, 2011. The Appellant contended that the report was made to the Assistant Chief, PW3 on 2nd March, 2011 nine days after the incident for PW1 and before the alleged defilement of PW2. According to the Appellant, this was contradictory evidence that was not sufficient to convict him.

9. As regards the 2nd and 3rd ground, the Appellant submitted that the prosecution evidence was fabricated, that the ages of PW1 and PW2 were never established at the trial. He complained that the age assessment forms dated 3rd March, 2011 appearing at pages 23 and 33 of the record were never produced at the trial and should therefore not be relied on. Finally, he complained that crucial witnesses were never called. According to the Appellant, these were; the brother to the girls by the name of X J, W the neighbour, the Administration Police Officers who were with PW3 when the incident was reported and the girls' mother. These, according to the Appellant, were crucial witnesses who were not called by the prosecution to testify.

10. On his part, Mr. Kibellion, Learned Counsel for the State opposed the appeal. He submitted that PW1 and PW2 knew the Appellant as their uncle; that they made a report to PW3 who alerted the police leading to the arrest of the Appellant; that on examination, it was discovered that the two girls had been defiled. That the evidence of the two minors was never challenged both in cross-examination and defence. Counsel urged the Court to dismiss the Appeal.

11. On my part, I have carefully examined the evidence on record. I will deal first with the issue of the ages of the minors. The Appellant's complaint was that the age of a victim in a sexual offence case is crucial. That the age assessment forms appearing at pages 23 and 33 of the record were never produced at the trial and should not be relied on. According to him, the ages of the minors was never established as there were no birth certificates that were produced. The state did not seriously dispute the Appellants contention that the subject age assessment forms were never produced at the trial and should not be relied on here.

12. I am in agreement with the Appellant that age is a crucial aspect in a case of sexual offence, because of the sentencing aspect of it. In this case, PW1 and PW2 are alleged to have been 10 years and 12 years, respectively at the time of the alleged defilement. My view is that, the age of a minor or any person for that matter, can be proved by any means other than a birth certificate. A proper examination and assessment of age by a medical officer, in my view, will suffice. In other cases, oral testimony of witnesses will suffice. In the case of **Fappyton Mutuku Ngui vs. Republic Machakos HC. CR. App. No. 296 of 2010**, the court held that:-

"…. That conclusive proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

13. From the record, it is not clear whether the Age Assessment forms complained of were tendered at the trial. What seem to have been produced as Pexh.1, 2, 3 and 4 are the treatment books and P3 Forms for PW1 and PW2, respectively. Those Assessment Forms cannot therefore be relied on at this stage.

14. Having excluded the Age Assessment Forms at pages 23 and 33 of the record, was there any evidence before the trial Court as to the age of the minors? Both PW1 and 2 testified on 8th August, 2011, which was about six months after the alleged incident. They told the Court that they were 11 and 13 years, respectively. Pexh.2 and Pexh.4 were P3 Forms which were filled by Dr. Omeri on 03rd March, 2011, respectively. In Section C of the P3 Forms, Dr. Omeri estimated the ages of PW1 and PW2 as being 10 and 12 years respectively. He properly signed the said documents. None of these werechallenged in cross-examination. In my view, the ages of the minors was proved at the trial by their undisputed evidence and these P3 Forms to have been 10 and 12 years at the time of the alleged incident. I reject that ground.

15. The other ground is that the prosecution failed to call crucial witnesses. These witnesses were identified by the Appellant as X J, Mr. W, Administration Police Officers and the minors' mother. The general rule is that the prosecution is enjoined to call and present all evidence that is both in support of its case as well as evidence that may be against it. It would therefore, in my view, be fatal if the prosecution, either by design or oversight,fails to adduce relevant evidence by failing to call crucial witnesses. It is only by calling and placing before Court all the relevant evidence both in its favour and against it, that it can be said that one has been afforded a fair hearing.

16. In this case, the prosecution called five (5) witnesses in support of its case.The Appellant complains that the four named witnesses were crucial but were never called to testify. Were they crucial as contended by the Appellant?

17. X J is said to be a brother to PW1 and PW2. He is said to have been present when the alleged incident of defilement took place. He is also said to have accompanied PW1 and PW2 to the Assistant Chief PW3 when the incident was reported. From the record, it is not clear how old the said XJ was. It was not established at the trial whether he was an elder or younger brother to the two girls. Of course if he was younger, it is unlikely that he could have been a competent witness having in mind that PW1 was only 10 years old when the alleged incident took place. I think that since the Appellant wished to use this fact, he should have been the one to solicit for this information during cross-examination. To my mind, the court cannot speculate. Since it is not clear whether X was or was not a competent witness, I will not hold him to have been crucial.

18. As regards W, the neighbour who accompanied PW1 and PW2 to the Assistant Chief PW3, I do not see any important piece of evidence that he would have offered. This also applies to the Administration Police Officers who accompanied the Assistant Chief with PW1 and PW2 to the police. Their evidence would have been to repeat what PW3 told the Court. The mother of the complainant was in Uganda at the time. I do not think that there is any useful evidence she would have offered.

19. To my mind, whilst it is the duty of the prosecution to present all the available evidence, I do not think that means that the prosecution must present witnesses who would give same repetitive evidence. It

is not the quantity or plurality of evidence that matters but rather the quality. See the case of **Bukenya & Others Vs. Uganda (1972) EA 549**. I reject that ground.

20. The last ground was that the prosecution witnesses lacked credibility as they gave conflicting evidence. It was submitted that there was a conflict as to the date when the incident allegedly occurred. That according to PW1, both her and PW2 were defiled on the same day and time being 23rd February, 2011 at 10.00 a.m. That, on her part, PW2 stated that she was defiled in May, 2011 but later changed to 2nd March, 2011.

21. I have perused the original handwritten record of the trial Court. PW1's evidence was that on 23rd February, 2011 at 10.00 p.m (night), the Appellant came to the room where they were sleeping. The Appellant lifted up PW1's dress and removed her underwear. He also removed his clothes and did bad things to her. She wanted to scream but the Appellant held her throat and told her that he would slaughter her if she screamed. That he then proceeded to PW2 and slept on her. That PW1 in the company of her sister Pw2 went to the neighbor who took them to the Assistant Chief. She was later taken to Malakisi Health Centre for treatment. She identified the treatment book and her P3 Form, PExh1 and 2, respectively. This evidence was never challenged either on cross-examination or defence.

22. PW3 and PW4 told the court how the matter was reported to PW3, the Area Assistant Chief who took PW1 and PW2 to the police. PW4 testified how she took the children to hospital for examination. The medical documents produced by PW5, that is Pexh.1 and 2, showed that on examination, PW1 was found to have had injuries on her vagina. She had a bruise on her labia minora and a torn hymen. The doctor estimated the injuries to have been about 7 days old. The examination was done on 3rd March, 2011.

23. In my view, that evidence was consistent. PW1 knew the Appellant as her uncle. Her evidence placed him at the scene of the incident. There was no contradiction as to what happened to her and as to who did it to her. In my view, the evidence of PW3, PW4 and PW5 fully and effectively corroborated the evidence of PW1. Accordingly, my view is, the Appellant's conviction on Count 1 was safe.

24. As regards PW2, she told the court that on a date she cannot recall in May, 2011, she was with PW1 and her brother X J. She was sleeping in her room with her sister PW1. The Appellant came to the room, removed her underwear and put his thing in her. She asked him why he was doing so but he started assaulting her. He and her sister ran and informed their neighbor one W who took them to PW3 and then to the police. She was examined at Malakisi Health Centre. She identified her medical book (Pexh.3) and P3 form (Pexh.4), respectively. According to PW5, when PW2 was examined, she was found to have a bruise on labia minora. The hymen was intact. The Doctor estimated the injuries to have been under 24 hours. Although this evidence was also not shaken on cross-examination or defence, it contradicted the particulars in the charge sheet. I think the contradiction cannot be cured under Section 382 of the Criminal Procedure Code. The charge sheet was never amended. Her evidence was therefore unsafe to hold a conviction. In the circumstances, I find that the conviction on Count II was unsafe. I will allow the appeal on the 2nd count and set aside the conviction in respect thereof.

26. However, I find that the appeal to be without merit on count I and I dismiss the same. The conviction and sentence are safe.

DATED and DELIVERED this 26th day of May, 2014.

A. MABEYA

JUDGE