IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 225 OF 2013

PETER GITHINJI CHEGE……...…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant, Peter Githinji Chege was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, the appellant faced a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The appellant was found guilty and convicted on the main charge and sentenced to life imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal which is based on the following grounds:-

1. **That the appellant's fundamental rights were violated;**
2. **That he was convicted based on a defective charge sheet contrary to Section 214 of the Criminal Procedure Code;**
3. **That there were many contradictions in the prosecution evidence;**
4. **That the medical evidence was inconclusive and exhibits were irregularly produced;**
5. **That the appellant's defence was not considered.**

The appellant therefore prays that the conviction be quashed, sentence be set aside and the appellant be set at liberty.

The appeal was opposed and the Learned Counsel for the State, Mr. Chirchir submitted that the appellant was well known to the complainant, he defiled her twice and she was examined by a doctor who found that she was infected with a venereal deceased and so was the appellant; that the complainant was confirmed to be 11 years old; that the defence was considered by the court which found it to be an afterthought because though he alleged to have a grudge with PW3, his wife, he never cross examined her on that defence.

The brief facts of the case before the trial court were that PW1, SM, who was then aged 11 years old had gone to live with his grandparents, PM (PW3) and the appellant. On the fateful day, which was a Saturday, her grandmother went to Nakuru and she had remained at home with her cousins/sisters N (PW2), AW (PW4) and the appellant. After supper, PW1 was going to sleep with her cousins in bed but the appellant told her to sleep on the seat. During the night, the appellant took her to his bed, removed her underpants, put his thing for urinating into hers and defiled her. In the morning, the appellant told PW1 to go back to the seat and PW4 later informed her that they knew she did not sleep on the seat. The next day, the appellant came back home in the evening asked PW1 to accompany him to the shamba to get sugar cane. When in the shamba, the appellant pulled PW1 in the bushes and defiled her again. They went back to the house and she informed her grandmother. She was later taken to Karengero Police

Station and then to hospital.

PW2, MN, a younger sister of PW1, did not give evidence on oath because she did not understand the meaning of the oath. She told the court that on 3/10/2010, the appellant who is her grandfather came back home when drunk. He asked PW1 if she had eaten sugar cane and PW1 accompanied him to the shamba where they stayed for long. When her grandmother came home and asked for PW1, she informed her that they went to the shamba. Later, she saw both the appellant and PW1 emerge from the shamba and it is then PW1 informed their grandmother what had happened to her.

PW3, PM, recalled that on 3/10/2010, she arrived home at about 4.00 p.m. from church when she found PW2 who informed her that SM (PW1) was in the farm with the appellant. PW3 went to look for them on the farm but did not find them. Later on PW1 and the appellant returned and she asked PW1 where the had been and it is then PW1 informed her that the appellant had defiled her.

PW4, LWG, is the daughter of the appellant. She recalled that in October 2010, she was at home with PW1 and PW2. After supper the appellant told the complainant to sleep on the chair while they, PW2 and PW4 went to sleep on the bed. Later on in the night, PW2 and PW4 decided to go and get PW1 from the seat but did not find her. The next morning PW4 asked PW1 where she slept and PW1 said the appellant took her to his bed.

The complainant was examined by Isaac Gitonga (PW5), a Clinical Officer at Kabazi Health Centre. On examination of PW1 he found that she had a smelly discharge from her vagina, the hymen was broken, bruises around her vulva and vaginal swab revealed pus cells, evidence of an infection. He filed P3 on14/10/2010 (PEx.1(a). He also produced the complainant's treatment card (PEx.1(b). He also said that the appellant was examined and found to be infected with a venereal diocese.

The Investigation Officer in this case was PW6, PC Stanley Mwenda of Kerengero Police Station. After receiving the report of defilement from the complainant at the police station, they took the complainant to Kabazi Health Centre for treatment and then went to the appellant's home where he was arrested. He obtained the complainant's clinic card from the mother and birth certificate (PEx.2 a & b) which confirm that she was born on 22/3/1999. The mother of the complainant, SN (PW7) only learnt of what had happened to the complainant from PW3 because she lives away in Nakuru. She escorted PW1 to Police Station and hospital.

PW8, Cpl Prisca Onchonga, was the in-charge Kerengero Police Station when the report was made on 14/10/2010. She interviewed the complainant and escorted the complainant to the hospital.

Upon being called upon to defend himself, the appellant made an unsworn statement. He told the court that he had a quarrel with his wife which used to arise whenever he asked for proceeds from the farm produce; that the wife wanted to circumcise the girls and he refused and they had a big fight and in the cause of the fight, she went to see a witch doctor. The accused reported the issue to her church from where she was deregistered. He was then arrested a week later. He denied the charges.

Having considered all the evidence on record it is clear that the appellant is not a stranger to the complainant. The appellant is PW1's grandfather. PW3, PW4 and PW7 explained that PW1 is a daughter to PW7 and JM though PW7 got married to JM when she already had PW1. There is therefore no blood relation between the accused and the complainant.

The clinic card from Langalanga Health Centre and the birth certificate of the complainant were produced in evidence by PW6. she was born on 22/3/1999 and was therefore 11 years when the offence was committed.

Upon examination by the Clinical Officer, PW5, he found that PW1 had injuries to her private parts, pains to the lower abdomen, pain when passing urine, healing bruises to the vulva, broken hymen, smelly vaginal discharge which revealed an infection. He formed the opinion that the complainant was defiled. No doubt the complainant was defiled and the only question is who committed the offence?

PW1 was very explicit when explaining what happened to her, first on a Saturday and the next Sunday. PW4 was present when the appellant asked PW1 to sleep on the seat instead of the bed with PW2 and PW4. PW1 said that it is on that night that the appellant first had a sexual act with her. PW4 corroborated PW1's testimony that she checked on PW1 on that night and found that PW1 was not asleep on the seat. The 2nd incident was on the next day when PW1 was taken to the shamba by the appellant, purportedly to give her sugar cane. PW2 was present at home and corroborated PW1's evidence on what happened. PW2 said that when the two went to the shamba, they took a long time to return home. The trial court believed the witnesses and I have no reason to fault them. I find that the appellant had the opportunity and did take advantage of that opportunity on the night PW1 slept on the seat and when the appellant took PW1 to the shamba.

It was the appellant's contention that the prosecution case was full of contradictions, for example when PW1 said that their grandmother had gone to church and yet later, she said that she explained to the grandmother what had happened to her on the same day. PW1 was clear in her evidence which was corroborated by PW4 that their grandmother, PW3 had gone to Nakuru on the first night she was defiled. According to PW1 she informed PW3 about her first ordeal upon her return and also on the next day when the appellant took advantage of her in the shamba. Both PW1 and PW3 talked of PW3 going to church when the 2nd incident occurred. I do not find there to be any serious contradiction in PW1 and PW3's evidence because PW3 was not present when both incidents occurred. She was only informed of the incidents.

Whether the charge sheet was defective:

It is the appellant's contention that the particulars of the charge sheet did not accord with the evidence because the charge sheet indicated that the offence was committed on 3/10/2010 yet PW1 denied knowing the exact date. He also raised issue with the fact that PW2, a younger child than PW1 was able to recall the date. PW1 was categorical that she could not recall the date when the incident occurred but PW3 who learnt of the incident on the same date said it was on 3rd October 2010. It is not abnormal for a person to forget the exact date of the incident especially considering that the complainant was a child. The evidence of PW3 does support the charge as respects the date and I find no defect disclosed that would go to vitiate or weaken the prosecution case.

The appellant complained that the court violated his Constitutional rights by the magistrate who was only a Resident Magistrate passing sentence contrary to **Section 7(a) & (b)** of the **Criminal Procedure Code.** The appellant's submission is without basis because **Section 7(1)(b)** of the **Criminal Procedure Code** clearly gives jurisdiction to Resident Magistrates to hear cases under the **Sexual Offences Act 2006** and sentence the accused persons accordingly. The section reads:-

> "**7(1) A subordinate court of the first class by –**
>
> a. **…**
> b. **A resident magistrate may pass any sentence authorized by law for an offence under Sections 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act 2006."**

The Resident Magistrate, Ms Tanui had jurisdiction to hear and determine this case.

The appellant also alleged that he was not informed of his rights under **Article 50(2)(h)** of the **Constitution. Article 50(2)(h)** provides that an accused person has a right to have an advocate assigned to the accused by the State at the State expense, if substantial injustice would otherwise result and he should be informed of this right promptly. This provision rests the discretion on the court, to decide whether or not an injustice is likely to result if the accused is not accorded representation and ask the State to assign an advocate to an accused. If the court does not see the necessity to do so, it will not do so. In any event, so far there are no counsel availed by the State to take up proborno matters save in murder cases where counsel take up cases on proborno basis and are paid by the State. Maybe it is high time this gesture was extended to all the serious offences now that there is provision in the Constitution. I find no miscarriage of justice on the part of the trial court.

Whether the Clinical Officer was qualified to adduce medical evidence:

It is this court's view that in our hospitals today, it is the Clinical Officers who do the bulk of the work due to shortage of Doctors. In criminal cases, medical evidence is produced pursuant to **Section 77** of the **Evidence Act**. That section reads as follows:-

"S.77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

Section 77(1) does not specify who a medical practitioner is and for purposes of examining patients in such cases, a clinical officer is a medical practitioner. Clinical officers have even been known to attend to post mortem which is a more complex exercise, than just an examination of a person who has been defiled. In CRA 360/2012, **Daniel Lucas Kivuva v R,** the Court of Appeal upheld the decision of the High Court where post mortem was conducted by the Clinical Officer. In **Lochuch Nchacha & Loroto Elolo v Rep** CRA 229/2011, Wendoh & Emukule J held that the fact that a Clinical Officer conducted a post mortem did not offend **Section 77** of the **Evidence Act. Sections 35** and **48** of the **Evidence Act** which the appellant relied upon are not applicable in criminal cases but relate to admissibility of evidence in civil cases. PW5 testified that the appellant was examined too and found to have an infection. However, his treatment records were not produced in evidence. The police were negligent in omitting to produce the medical records. But despite the said omission, I find that there was overwhelming evidence as to the appellant having defiled the complainant because the complainant knew him well they lived in same house and the 2nd incident took place in broad daylight.

In his defence, the appellant alleged that there had been a quarrel with his wife prior to his arrest and hence the wife had a grudge against him. I do note that the trial court did consider the said defence and found that it did not raise any doubt in the prosecution case. I do agree with the Learned State Counsel's submissions that it was a mere afterthought. The appellant had the opportunity to cross examine PW1, PW2, PW4 and PW7 but he made no mention of the existence of a quarrel or grudge between him and PW3. He also had an opportunity to cross examine his own wife PW3 but he never raised such an issue. In evidence it emerged that the complainant is not even biologically related to PW3 or the appellant and there was no good reason for PW3 or PW1, PW2, PW4 and PW7 to frame the appellant for an offence committed by somebody else on PW1.

Having evaluated and analysed the evidence for the prosecution and defence as required of the first appellate court, I am satisfied beyond any doubt that the trial court did arrive at the correct finding that it is the appellant who defiled the complainant, a child aged 11 years. The complainant knew him as a grandfather. I hereby dismiss the appeal, confirm the conviction and sentence. It is so ordered.

DATED and DELIVERED this 20th day of May, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

In person for the appellant

Mr. Chirchir for the State

Kennedy – Court Assistant