IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal No. 327 Of 2013

D.M.N Alias W..Appellant

Versus

Republic...Respondent

(Being an appeal against conviction and sentence imposed

by Hon. H.M Nyaga SPM Molo Law courts on 4th December, 2013)

JUDGMENT

The appellant, was charged with the offence of defilement of a girl aged 5 years contrary to section 8(1)(2) of the Sexual Offences Act, No.3 of 2006. In alternative the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No.3 of 2006.

Upon trial the appellant was convicted of the main charge and sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant brought this appeal on seven (7) grounds which can be summarized as follows:-

1. **That the offence was not proved;**
2. **That there was inordinate delay in reporting of the offence;**
3. **That the evidence of the prosecution witnesses was contradictory;**
4. **That the trial magistrate shifted the burden of proof to him;**
5. **That the trial magistrate erred by dismissing his defence without any cogent reasons.**

Later on the appellant appointed an advocate who filed supplementary grounds of appeal in which he contends that the trial magistrate failed to take note of the fact that no initial (first) report was made when the crime herein occurred; that the arrest of the appellant was not prompted by commission of any offence; that the trial magistrate failed to note and consider the fact that essential witnesses were not called to testify and tie the loose ends in the prosecution’s case; that medical evidence was produced by an unqualified person (a clinical officer). Further that the appellant's defence was not considered; that the prosecution's case was marred with contradictions and inconsistencies and that the trial magistrate failed to properly analyze the evidence and as a result drew wrong conclusions.

In the submissions filed in support of the foregoing grounds of appeal, the appellant has argued that there

is doubt as to whether the offence actually took place. In this regard, the appellant argues that there is no direct date and day concerning when the offence was reported. Contending that the evidence of the main prosecution witnesses, P.W.1 (the complainant), suggests that the date the complainant was taken to hospital was the day she was defiled, the appellant argues that the evidence of the other prosecution witnesses, particularly, P.W.2 and P.W.3, does not bear out that fact.

The appellant contends that P.W.2 denied having been told by P.W.1 about the alleged defilement, that P.W.1 told her aunt about the incident after the doctor had disclosed to P.W.2 that the complainant had been defiled; that neither P.W.2 nor P.W.3 confirmed having been told by the complainant about the alleged defilement; and that according to the testimony of P.W.4, the complainant was taken to Molo District Hospital way after the alleged incident of defilement.

The prosecution witnesses mentioned herein above are said to have been addressing events that occurred on different dates: P.W.2, events of September; P.W.3, events of 2nd October, 2012 and P.W.4, events of 5th October, 2012.

Medical evidence adduced by P.W.5, is said to have failed to establish the alleged defilement. Even though, the complainant's hymen was found to have been broken, it is submitted that medical evidence did not establish the cause of breakage of the hymen.

The testimony of P.W.6 is said to be incapable of holding any water the same having been obtained from the other prosecution witnesses who are said to have been contradictory in their testimony.

The prosecution side is faulted for failing to call Mama Winzy and Mama Brian to confirm and/or iron out the creases in the other prosecution witnesses' testimony. The testimony of Dr. Njoroge who allegedly treated the complainant is also said to be important for purposes of confirming the question: Who informed the prosecution witnesses that the complainant had been defiled?

Concerning the medical report (P3) that was produced in evidence, it is submitted that it lacks essential information to wit, It does not indicate the degree of injury. Further that the information contained in it does not support the prosecution evidence in that the complainant was taken to hospital on 5th September, 2012 yet the P3 was filled in October.

Concerning proof of the complainant's age, it is submitted that no age assessment report or birth certificate was produced to prove the complainant's age. In absence of any documentary proof of age, it is submitted that its risky to rely on the oral evidence of P.W.2.

The trial court is also faulted for rejecting the appellants defence without giving any proper explanation.

The testimony of the complainant is also said to have been procured illegally, through inducement and as such inadmissible.

Counsel for the State, Mr. Chirchir, conceded the appeal. According to him, there was inordinate delay in obtaining medical evidence. Although medical evidence showed that the complainant's hymen had been broken, in view of the complainant's testimony to the effect that she did not bleed, counsel submitted that there was doubt whether the minor was defiled.

Counsel also submitted that the prosecution evidence regarding the date and circumstances regarding the reporting of the offence is contradictory. He agreed with the submission by counsel for the appellant that the complainant was induced to implicate the appellant.

As the first appellate court, it is my duty to reconsider and evaluate the evidence adduced before the trial court and draw my own conclusions, bearing in mind that I did not see or hear the witnesses testify. See **Okeno** v. **Republic** (1972) E.A 32.

The evidence adduced at the lower court was to the effect that the complainant, MN, was playing with the

appellant's son (Moses) when the appellant called them and took them to a place where they ate meat. After they finished eating, the appellant's son left, leaving the complainant and the appellant together. It was then the appellant held the complainant's hand and took her to his house, made her lie down, removed her panties and then did ‘tabia Mbaya’ to her. After he finished, he told her to go home.

When the complainant got home, her mother, MWM (P.W.2), noticed that she was walking with an awkard gait. She asked the complainant to explain what was wrong but got no response. She then decided to inspect her. She saw injuries that looked like rashes on the complainant's vagina and a yellowish discharge. She took the complainant to a nearby clinic for medication.

On the following day, she took the complainant to another clinic where at she was informed that the complainant appeared to have been defiled.

Later on, she invited her aunt to talk to the complainant. It was then that the complainant disclosed that it was the appellant who had done ‘tabia mbaya’ to her.

After receiving that information, P.W.2 reported the incident to the police. The police gave her a P3 form which alongside the complainant, she took to Molo District Hospital for filling.

P.W.3, Susan Wairimu, went to P.W.2's home on 2nd October, 2012. While there, P.W.2 informed her that the complainant was sick in her private parts. When she asked the complainant what had happened, the complainant refused to talk to her. However, she later later on told some women, mama Winzy, mama Brian and Elizabeth, that it was the appellant who had done tabia mbaya to her.

On her part, P.W.4, Elizabeth Njeri of Muchore, informed the court that on 5th October, 2012 they called the complainant to mama Winzy Salon and sought to know what had happened to her; that the complainant refused to talk to them saying that the appellant had told her not to tell anybody about the incidence. They, however, managed to convince her to tell them what the appellant had done to her. This was after she gave her Kshs.50/= to buy a dough nut. According to PW4 the complainant informed them that it was the appellant who had done ‘tabia mbaya’ to her.

P.W.5, Dr. Akute, examined the complainant after she was taken to Molo District Hospital by PW2 and PW6. On examination, he noted that the complainant had normal external genetalia. However, her vagina was hyperemic (red) and the hymen was torn. She had a foul smelling discharge on her vulva. Labaratory tests were done but nothing unusual was detected.

P.W.6, PC Godfrey David Otieno, received the report of the crime herein on 5th October, 2012 at about 1 p.m after P.W.2 and other women came to report the incident at Muchorwe Police Post. He carried out investigations into the alleged crime and arrested the accused and charged him with the offence herein.

When put on his defence, the appellant stated that he was arrested on 6th October, 2012 for a reason he did not know. At the police station, he was informed of the complaint against him which he denied. He explained that the place where the offence was allegedly committed is busy. As such, if he had truely committed the offence, the workers on duty and/or his customers would have seen him. Further that it took inordinately long for the alleged defilement to be noticed. However, he admitted that he's baba Moses and that the complainant used to play with his son.

D.W.2, Lucy Njeri Kinyanjui, who was an employee of the appellant at the material time, informed the court that the complainant frequented the appellant's premises but denied having seen her on the day in question. Like the appellant, she stated that the complainant used to come to the appellant's premises to play with the appellant's son, Moses. She also informed the court that the complainant, in the company of the investigating officer, P.W.6, came to the scene of the crime and identified the room in which the alleged offence was committed (room No. 18).

From the grounds of appeal herein and the submissions made in support thereof the issues for court's determination are:-

1. Whether the delay in reporting the offence herein vitiated the prosecution's case?

2. Whether there are any inconcistencies or contradictions in the prosecution case, and if so, did they vitiate the prosecution case?

3. Whether the testimony of the complainant was illegally procured (or obtained by undue influence)?

4. Whether the medical evidence herein was given by an unqualified person?

5. Whether the prosecution failed to call essential witnesses?

6. Whether the case against the appellant was proved?

Whether the delay in reporting the offence herein vitiated the prosecution's case;

It is not in dispute that the offence herein was reported to the police nearly one month after it was committed. The reason as to why it took so long to report the offence to the authorities, as can be deciphered from the evidence on record, is that the complainant was not willing to inform the prosecution witnesses what had happened to her. The evidence on record reveals that the offence was immediately reported to the authorities, for further investigations, immediately the complainant named the appellant as the person responsible for the offence.

In my view, without any evidence that the delay in reporting the offence was deliberate or was calculated at fixing the appellant, my answer to the first question is negative. In this regard, see

the decision of the Court of Appeal in *Julius Kamau Mbugua v Republic*, **Criminal Appeal 50 of 2008 [2010]** ***e*****KLR where the court** summarized the principles on the right to a trial within a reasonable time as follows:-

> ***"... trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.***
>
> ***1. The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.***
>
> ***2. The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.***
>
> ***3. There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.***
>
> ***4. The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.***
>
> ***5. The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits."***

In this case the complainant was a child aged about 5 years and she informed the witnesses that she had been threatened by the appellant not to reveal what had happened. Different people react differently to threats and the complainant's reaction (silence) is not abnormal. The appellant had relied on the decision of **Reuben Kiplagat Kiru v Rep CRA** 139/06, where there was a delay of 8 months before the accused

was charged. The court found the delay to be inordinate and unexplained. In this case the delay is only one month and has been explained.

Whether the inconcistencies or contradictions in the prosecution case, if any, vitiated the prosecution case: In answering this question, it is important to find out whether the prosecution witnesses indeed contradicted themselves and if so in what respect. In so doing, I take note of the testimony of the complainant which suggests that she informed her mother of the offence after she got home.

That testimony is not in tandem with the evidence of the other prosecution witnesses, particularly, that of P.W.2, P.W.3 and P.W.4 who maintained that they had to persuade the complainant before she named the appellant as the person who had defiled her.

There also appears to be a missing link in the prosecution evidence concerning where, to whom and when the complainant broke the news of her defilement. Whereas the complainant talks of having told P.W.2 after she got home, P.W.2 informed the court that the complainant declined to talk to her about what had happened to her. Similarly, the complainant declined to talk to P.W.3 and only did so before a group of women at mama Winzy Salon. P.W.4 being one of the women at the salon, confirmed that the complainant only talked about the incident after she gave her Kshs.50/= to buy a dough-nut. However, there is no suggestion from the evidence adduced before the lower court that the complainant was coached to implicate the appellant.

In my view, the complainant was steadfast in her evidence that the appellant, whom she new very well, took her to a room in one of his business premises and defiled her. She even took the investigating officer (P.W.6) to the scene of crime and identified the room in which the offence was committed. Curiously, her description of the room, turned out to be correct, according to the testimony of the appellant's own witness (D.W.2).

In view of the foregoing, I find the few inconsistencies or contradictions in the prosecution case to be incapable of vitiating the case.

Whether the testimony of the complainant was illegally procured (or obtained by undue influence): As pointed out above, there is no suggestion from the evidence on record that the complainant was coached to implicate the appellant. That being the case, nothing adverse to the prosecution case can be imputed in the fact that the complainant only implicated the appellant after she was persuaded to give information about what had happened to her. The evidence of the complainant would only have been vitiated if the women had put suggestions to the child as to the people they suspected to have been responsible for the offence. There being no evidence to that effect, I am not persuaded that the testimony of the complainant was procured through undue influence. It must be borne in mind that the complainant was a child of tender age and she cannot be treated as a grown up.

Whether the medical evidence herein was produced by an unqualified person: The medical evidence herein (P3 and treatment notes) was produced by a medical Doctor, Dr. Alma Akute. The witness was in accordance with the provisions of Section 77 of the Evidence Act, Cap 80 Laws of Kenya, qualified to give the impugned evidence.

As concerns the submission that the medical report (P3) does not indicate the degree of injury and that it was filled long after the crime herein occurred. While it is true the doctor did not indicate the degree of injury sustained by the complainant, I take note of the fact that the doctor found the complainant's hymen to have been missing. The delay in obtaining medical evidence, was in my view, adequately accounted for by P.W.2, P.W.3 and P.W.4 all of whom were categorical that it took along time before the complainant explained what had happened to her.

Whether the prosecution failed to call essential witnesses: Counsel for the appellant submitted that the prosecution should have called Mama Winzy and Mama Brian to confirm and/or iron out the creases in the testimony of other prosecution witnesses. The testimony of Dr. Njoroge who allegedly treated the

complainant is also said to have been important for purposes of confirming the question who informed P.W.2 that the complainant had been defiled?

In answering this question, I adopt my finding in question 2, which is to the effect that the gaps in the prosecution witnesses are not serious enough to be able to vitiate the prosecution case. I also note that one of the witnesses at Mama Winzy Salon testified as PW4, Elizabeth Njeri. It was not necessary to call all the women who were at the Salon to testify. Unless it can be demonstrated that the prosecution had something to hide by not calling them. There being no evidence to that effect I find and hold that nothing adverse to the prosecution case can be attributed to that failure. In **Bukenya v Rep (1972)EA 326** whereas the duty lies on the prosecution to call all witnesses relevant to their case, even if their evidence may tend to be adverse to the prosecution, yet it is unnecessary to call a superfluity of witnesses.

I also find nothing adverse to the prosecution case that can be attributed to the prosecution's failure to call Dr. Njoroge as what he allegedly told P.W.2 was subsequently confirmed through the testimony of P.W.5. In Bukenya’s case, the court said:-

> **“(i)…**
>
> **(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;**
>
> **(iii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;**
>
> **(iv) 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.**
>
> **….**
>
> **While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”**

Whether the case against the appellant was proved: In this appeal, both counsel for the prosecution and that of the State were unanimous that the case for the prosecution was not proved beyond reasonable doubt. In this regard, counsel for the State submitted that there was doubt as to whether the complainant lost her hymen through penetration. That argument was premised on the complainant's testimony to the effect that the complainant, a child of 5 years, did not bleed when the appellant penetrated her, an occurrence he submitted to have been impossible in the circumstances of the case.

The answer to counsels' submission is found in section 2 of the Sexual Offences Act, No.3 of 2006 which defines penetration as follows:-

> **“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

In my view, since complete insertion is not a prerequisite for proof of defilement, I am unable to agree with the counsel for the State that bleeding was a necessary ingredient to prove the alleged defilement. In the circumstances of this case the injuries observed by the complainant's mother and confirmed by the doctor sufficed to prove an offence of defilement.

Was the appellant identified as the person who committed the offence? Having found that the complainant was not coached to implicate the appellant, I agree with the trial court's finding to the effect that the appellant was positively identified by the complainant as the person who defiled her. There was

no grudge between the complainant and/or the other prosecution witnesses that would have warranted his being framed up.

The complainant frequented the appellant’s house to visit his son. The complainant did not waiver but only pointed the appellant as the culprit. She even led police to the scene of the act. I have no doubt in my mind that the prosecution proved beyond any doubt that it is the appellant who defiled the complainant.

Whether the appellant's defence was considered: Although brief in his analysis of the appellant's defence and the submissions in support thereof, I find that contrary to the appellant's contention, the trial magistrate did, in fact, consider the appellant's defence. That fact is borne out by his observation that:-

> **“Mr. Simiyu argues that there are anomalies in the case. He states that the mother of the complainant stated that she learnt of the incident from her sister and the later denies this. What I understood is that the girl was reluctant to tell her mother about the incident. It took the intervention of her aunt and villagers to convince the complainant to speak....”**

Proof of the complainant's age: The onus is on the prosecution to prove all the particulars of the charge. PW1 testified that she was 5 years old and the mother told the court that she was born on 25/5/2006. However, no attempt was made by the prosecution to produce evidence to confirm what her age was. Neither a birth certificate nor clinic card was produced or an age assessment was done on the complainant to ascertain her age. It was not enough to allege. Under Section 8(2) of the Sexual Offences Act, proof of age of a complainant is mandatory because it determines what sentence will be imposed in the event of a conviction. Having failed to prove the age of the complainant, I find that the charge of defilement was not proved to the required standard and the appeal succeeds to that extent and appellant is acquitted of that charge. However,, there is overwhelming evidence that the appellant was involved in a sexual act with the complainant. During that act, his body intentionally and unlawfully came into contact with the complainant’s genitalia. The trial court had not made any finding on the alternative charge. I find the appellant guilty of the offence of indecent act contrary to Section 11(1) of the Sexual Offences Act and convict him accordingly. I hereby sentence the appellant to 30 years imprisonment. Right of appeal 14 days.

DATED and DELIVERED this 25th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Maragia for the Appellant

Appellant present

Mr. Chirchir for the State

Kennedy – Court Assistant