IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 168 OF 2013

KENNETH KIMNGETICH SOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by Hon. H.M Nyaga SPM Molo Law courts 31st July, 2013)

JUDGMENT

The appellant, Kennedy Kipnengetich Soi, was charged with the offence of defilement of a girl, aged 11 years contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No.3 of 2006. In the alternative he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No.3 of 2006.

The particulars of the main charge were that on the 27th day of August, 2012, at [Particulars withheld] within the Rift valley province, he caused his penis to penetrate the vagina of MC, a child of 11 years.

Upon trial the appellant was found guilty of the main charge, convicted and sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant brought this appeal on ten (10) grounds.

1. **That his constitutional rights were violated;**
2. **That the charge was not proved;**
3. **That the learned trial magistrate erred in law by shifting the burden of proof to him;**
4. **That the trial magistrate failed to consider his defence;**
5. **That essential prosecution witnesses did not testify; and**
6. **That section 36(1) of the sexual offences Act was not complied with.**

Through his written submissions the appellant amended the foregoing grounds and sought to argue the appeal on the grounds that the charge was defective; that the provisions of Section 43 of the Sexual Offences Act were not complied with; that the person who produced medical evidence (P3) was not qualified to do so. Further that the charge was not proved and that the trial magistrate failed to consider his defence.

Through his written submissions, the appellant contends that the charge herein is defective because, contrary to the provisions of Section 137(a) of the Criminal Procedure Code and Section 43 of the Sexual Offences Act, it does not allege that the act complained about was unlawful and intentional. The appellant argues that as the alleged act was not described as unlawful and intentional, it did not disclose any crime or offence known in law. That being the case, the conviction and sentence had no basis in law.

The evidence adduced in court is also said to be at variance with the particulars of the charge. This is particularly so, in the case of the complainant's age which was described as 11 years. The appellant contends that the evidence led in court established that the complainant was 12 years old and not 11. In this regard the appellant has submitted that he ought to have been charged under Section 8(1) as read with 8(3) and not Section 8(1) as read with Section 8(2).

The appellant has also challenged the prosecution testimony to the effect that he was also called "Booster" yet the said name did not feature in the charge.

Further, that the case for the prosecution lacked crucial evidence because essential witnesses did not testify. In this regard, the appellant pointed out that neither the arresting officer nor the investigating officer were called to testify. The appellant argues that without the testimony of those witnesses, his contention that he took himself to the police station remains uncontroverted. Besides, without the testimony of any police officer it is not possible to know who charged him and in respect of what offence.

Reiterating that he was arrested when he went to report that the complainant's mother had threatened him, he submitted that the complainant's mother decided to fix him because she believed he had a hand in her arrest. He also claimed that the complainant's mother decided to fix him because he had declined to accede to her sexual advances.

Likening his situation to that of biblical Joseph who suffered at the hands of Pharaoh's wife, Portipher, the appellant urges the court to analyse and re-evaluate the evidence in order to reach a fair decision.

Before me, the appellant reiterated the contention that he was framed up by the complainant's mother for having played a role in her arrest and that crucial witnesses were not availed to testify. Further that he was not given an opportunity to submit or to mitigate.

Opposing the appeal, counsel for state, Mr. Chirchir, submitted that P.W.1 examined the complainant and confirmed that she had been defiled. Terming the appellant's contention that he was framed up by P.W.2 an afterthought, Mr. Chirchir submitted that the appellant took advantage of the complainant after her mother was arrested.

Concerning the sentence imposed by the trial magistrate Mr. Chirchir submitted that it was unlawful and urged the court to uphold it.

The evidence adduced before the trial magistrate and which led to the conviction of the appellant was that the complainant's mother, NB (P.W.2) had been arrested over a cow she had bought. Because of the arrest, she left her children on their own. After the police released her on the following day (28th August, 2012) she went home and found the complainant (P.W.3) who upon seeing her began crying.

When she sought to know what had happened, P.W.3 informed her that Booster (nickname for the appellant) had taken her to his house and raped her. Upon examining the complainant she saw tears on her vagina. Since the health centre is far away from her home she did not take the complainant to hospital that day. However, she did so on the following day and later reported the incidence to the police. At the police station she was given a P3 form which she took to hospital along with the child.

Later on the appellant was arrested and taken to the police station.

On cross examination, it emerged that the appellant was well known to the complainant as the complainant's mother had hired him to be riding her motor cycle. P.W.2 denied having any grudge against the appellant and/or having framed up the appellant.

P.W.3 (MC) informed the court that on the material day, 27th August, 2012, the appellant, whom she knew, came to their home and asked her to accompany him to his house to take some sour milk. She obliged. The appellant then took her to a house (different from his parent's house) and upon entering the house, the appellant held her mouth and locked the door. He then pulled her to a bed inside the house,

removed her panty and did “Tabia Mbaya” to her.

The complainant informed the court that she felt pain when the appellant's thing entered her private parts and that she bled from her private parts. When the appellant finished, he released her. She went home but did not tell anybody because her mother was in custody.

On the following day, when her mother returned, she informed her about the incident. Her mother took her to hospital and later made a report to the police.

Later on, the appellant was arrested by members of the public and taken to the police station.

P.W.1, Margaret Gathungu, a nursing officer at Kuresoi Health Centre examined the complainant after she was taken to the Health Centre by P.W.2. She informed the court that the complainant who was at the material time 11 years old, had a history of defilement. On examining the complainant, she noted lacerations on her labia minora. Her hymen was also broken. There was no discharge. She formed the opinion that the complainant had been penetrated. She produced the P3 and the Post Rape care form which she filled for the complainant as PEX 1 and PEX 2 respectively.

On the basis of the foregoing evidence, the trial magistrate found the main charge to have been proved beyond reasonable doubt and accordingly convicted the appellant.

This being a first appeal it is the duty of this court to reconsider the foregoing evidence, evaluate it itself and draw its own conclusions, of course bearing in mind that it never saw or heard the witnesses testify. See **Okeno** v. **Republic** (1972) E.A 32.

From the foregoing evidence and the submissions by the respective parties, the issues for determination are:-

1. **Was the charge herein defective, if so, is the defective curable?**
2. **Was the medical evidence herein produced by a person who was not legally competent to do so?**
3. **Did the prosecutor fail to call important witnesses?**
4. **If the answer to (3) above is in the affirmative, can any adverse inference be drawn from such failure?**
5. **Did the trial magistrate fail to consider the appellant's defence?**
6. **Was the charge herein proved beyond reasonable doubt?**

Whether the charge herein is defective: Having seen the charge, I agree with the appellant's observation that the charge does not state that the act complained of was ‘unlawful and intentional’. However, upon analysis of the charge and the particulars therein, I find as a fact that the respondent was duly notified of the charge he was facing and the consequences thereof. That being the case, no prejudice whatsoever was occasioned on him by the omission of the phrase “intentional and unlawful” as used in Section 43 of the Sexual Offences Act. After all, Section 43(1)(c) of the Sexual Offences Act supplies the details that are allegedly missing in the charge as it makes the acts the appellant was alleged to have done to the complainant unlawful and intentional the same having been done in respect of a person who was incapable of appreciating the nature of the act in question.

By operation of law, and in particular, Section 7 of the Penal Code the appellant is presumed to have known that Section 43(1)(c) of the Sexual Offences as read with the Section of law he was charged with made the act he was alleged to have committed unlawful.

For the foregoing reason, I find and hold that the charge herein is not fatally defective.

Was the medical evidence herein produced by an unqualified person? In answering this question, I adopt this court's holding in **Nakuru Criminal Appeal No.139 OF 2012; David Kipkoech Yegon v. Republic** where it held:-

"... a medical report is produced pursuant to Section 77 of the Evidence Act.....Section 77 does not specify who a medical practitioner is, but this court takes judicial notice of the fact that in such cases, clinical officers who form the backbone of Kenyan hospitals do carry out such examinations in absence of a doctor. Failure to use clinical officers may result in a lot of injustices as most of the dispensaries and small hospitals do not have doctor. Further people in remote areas of Kenya may never be able to reach doctors in the bigger hospitals and the evidence in Sexual Offences would disappear before they reached the hospitals. In CRA 360/2012, Daniel Lucas Kimaru (Embu) the Court of Appeal upheld the decision of the High Court where post mortem on the deceased was conducted by a Clinical Officer. In Lochuch Nchacha and Loroto Eloto v Rep CRA 229/2011, Wendoh and Emukule JJ held that the fact that a Clinical Officer conducted a post mortem did not offend Section 77 of the Evidence Act."

Clinical Officers in our hospitals perform the bulk of the work due to shortage of doctors and have even been used to perform post mortems and the court has found the post mortems to have been done by a qualified person. In this instance the nursing officer was qualified to examine the complainant and form an opinion on his findings.

Although the P3 form herein was filled and produced by a nursing officer, I have no reason to deviate from the aforementioned findings on production of medical reports by persons who are not medical doctors.

Section 77 aforementioned reads as follows:-

"In Criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or genolgist upon any person, matter or thing submitted to him for examination for analysis may be used in evidence.

(2) ...

(3) ..."

Did the prosecutor fail to call important witnesses: The appellant contends that neither the arresting officer nor the investigating officer were called to testify. In this regard, the appellant argues that without the testimony of those witnesses, his allegation that he took himself to the police station remains uncontroverted and that without the testimony of any police officer it is not possible to know who charged him and in respect of what offence. The issue is whether the failure to call the two witnesses is fatal to the prosecution case. The courts have over the years held that whereas it is important to call the Investigation Officer or Arresting Officers, failure to call them is not fatal to the proseuciton case but it depends on the cirucmstnaces of each case. In **Kiriungi v Rep** (2009) KLR 638, the court said:-

"...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the proseuciton unless the circumstances of each particualr case so demonstrte. We have examined the cirucmstnaces of this case and we are satisfied that he evidence of the investigating oficer and the arresting officer would not have been prejudicial to the proseuciot case as it was established heyond doubt that the appellant was involved in the crim with which he was charged."

See also **Haward Shikanga alisa Kadogo & Another v Rep** CRA 102/2007 and **Reuben Gitonga Nderitu v Rep** CRA 349/2007.

Although the arresting officer and the investigating officer were not called to testify, upon considering the totality of the evidence adduced in this case, I find the testimonies of the prosecution witnesses, in particular, P.W.2 and P.W.3 to be more believable that the appellant committed the offence. In my view, no adverse inference can be drawn from the prosecution's failure to call the arresting officer and/or the investigating officer. In fact, there is nothing helpful they would have informed the court that it was not informed by the few prosecution witnesses.

On whether the trial magistrate failed to consider the appellant's defence: I find as a fact that the trial magistrate did in fact consider the appellant's defence. That fact is borne out by the following observation in the lower court's judgment:-

"The accused person fails to prove his allegations that it is indeed the mother to the complainant who had made sexual advances towards him and the other allegation that she had called him traitor when being arrested of the suspicion that she had bought a stolen cow. The allegations fail to show any motive as to why the complainant's mother would stage-manage such an offence against the accused person. It is therefore the view of the court that there exists no grudge as to facilitate such a charge and the allegations are therefore dismissed as unreliable"

Was the charge proved beyond reasonable doubt? Concerning this issue, the appellant contends that there was variance between the particulars of the charge and the evidence adduced in court. That was so regarding the complainant's age which was described as 11 years. The appellant contends that the evidence led in court established that the complainant was 12 years old yet the charge alleged that she was 11. In view of the foregoing, the appellant contends that he ought to have been charged under Section 8(1) as read with Section 8(3) and not Section 8(1) as read with Section 8(2).

With regard to this question, it is noteworthy that no documentary evidence was produced to prove the complainant's age. P.W.1's testimony was to the effect that the complainant was eleven years old. P.W.2 informed the court that the complainant was born in 2001 (putting her age at approximately 11 years as at the time of the offence. The complainant, on her part informed the court that she was 12 years old (as at 2/5/13). The proseuciton did not produce the birth certificate, or clinic card of the complainant nor did they have the complainant's age assessed by a doctor. The entry in the P3 form of the complainant's age does not amount to an age assessment.

It is the duty of the prosecution to prove all the particulars of the charge against accused beyond any reasonable doubt. Proof of the age of the complainant is crucial in that it determines the sentence to be meted if the accused is found guilty. In this case, the prosecution failed to prove the age of the complainant, and the trial court erred in finding the appellant guilty on the main charge of defilement and the appellant is hereby acquitted on the charge of defilement.

However, there is overwhelming evidence on record that the complainant was defiled. Her evidence was corroborated by the medical evidence. The complainant identified the appellant as the person who defiled her. The appellant was not a stranger to her and the trial court found that no grudge existed as appellant alleged. No doubt the complainant is a child. The appellant must have touched the complainant's genitalia. An indecent act is committed if the accused intentionally or unlawfully causes any part of his body to come into contact with the genital organs, buttocks or breasts of another or exposure of display of ponographic material against his will. The court finds that since age was not proved and there being no finding made on the alterantive charge, the appellant will be found guilty of the alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act and is convicted accordingly. I sentence the appellant to 30 years imprisonment. Right of appeal 14 days.

DATED and DELIVERED this 18th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Omari for the respondent