

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 282 OF 2011

J O APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the original Criminal Case NO.808 of 2010 in the Senior Resident Magistrate's Court at Butali [S. N. ABUYA, SRM])

J U D G M E N T

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant *on the 4.7.2010 in the Kakamega North District within the Western Province unlawfully inserted his genital organ namely penis into the genital organ namely vagina of E K a child aged 12 years.*

The appellant was convicted and sentenced to serve 30 years imprisonment. His grounds of appeal are that he pleaded not guilty to the charge, he was not given witness statements, no scientific evidence such as DNA was produced and that his alibi defence was not considered. The appellant submitted that he was acquitted by the court at the first instance due to lack of evidence and he was arrested later after 7 months and he was charged afresh. The complainant said she was 10 years old while the mother said she was 12 years. No baptismal card or birth certificate was produced. No exhibits like clothes or blood were produced. Mr. Oroni, State Counsel, opposed the appeal and relied on the record of the trial magistrate.

Before the trial court the complainant **E K** gave unsworn evidence after the magistrate concluded that she could not testify under oath. She testified that she was a student in Nairobi and on the 4.7.2010 at about midday she was at their rural home in Kabras. She went to the appellant's house and they entered into a blanket. She was defiled and given KShs.40/=. The appellant told her to go back to the shop. On the way her sister M came with a panga and went to the appellant's farm. The appellant gave her KShs.20/=. She was later taken to hospital. **PW2 R N** is the mother of PW1. On the 4.7.2010 at about 1.00 p.m. she was informed by the complainant that the appellant had defiled her and given her 40/=. The appellant is her relative and when she enquired from him he only told her that the kids had borrowed money from him. She reported the matter to the village elder who is the appellant's brother and they were referred to the area assistant chief. The child was later examined by a doctor and it was found that she had been defiled several times.

PW3 FM testified that she is a teacher and on 4.7.2010 she was looking for firewood when she saw PW1 having money. PW1 told her that she had been given the money by the appellant. She went to the appellant's house and found the appellant in his farm with his wife. She enquired from the appellant what had happened and the appellant was rude to her and tried to seduce her. She reported the matter to the village elder and later to the assistant chief. The doctor examined the child and found that she had been defiled several times. **PW4 DR. DAVID OLUCHINA** examined PW1 and found that her hymen was torn and her vagina was swollen and painful. According to him the child had been defiled several times.

The appellant was put on his defence and he gave unsworn evidence. He stated that he was at his home with his wife weeding napier grass when M and R went to his shamba with a 12 year old girl. M had a stick and a panga and R had sugarcane. They asked him why their child was always late when she goes to the river. The river is in his farm and M and R are his neighbours. They told him also that they found the child with 40/= in the pocket and it was him who had given her the money. M started beating

the child and the child started screaming. He has a shop at his house and there were customers. He told M to leave the child. The child told M that she had taken her money and asked for forgiveness. M told him that she could turn the issue and claim that he had raped the child. He was later charged with the offence. **DW2 P M S** testified that on the material day at about 10.00 a.m. he was at the appellant's home having gone there to buy sugar. He found the appellant at his farm with his wife and three kids. He saw M and R and one child. M had a panga and a stick while R had a sugarcane that had been partly eaten. M enquired why the child normally delays when she goes to fetch water. She said that the appellant ought to be beating the child so that she could go home very fast. The appellant told M that he could not do that. M started beating the child and the child fled to the appellant's home and found some blankets that were hanging and covered herself so that she could not be beaten. The appellant told M to take her child and beat her at her own place. M said the child had stolen her money. He bought his sugar and left.

DW3 P M K testified that on the material day he went to the appellant's kiosk to buy sugar. He found the appellant weeding napier grass with his wife and three children. While at the kiosk he saw M carrying a panga and R eating sugarcane. M complained that she had sent the child to fetch water at the river and she had stayed for long. She asked the appellant to be disciplining the child but the appellant declined. M started beating the child in front of people and claimed that she had found the child with 20/=. M told J she would take action against him as he is the one who makes the child delay going home. DW3 is a cook at a nearby school and is a neighbor to the parties herein.

The main issue for determination is whether the appellant defiled the complainant. According to the complainant she went to the appellant's house and they entered into a blanket. The appellant defiled her and she went out having been given 40/=. She was later taken to hospital. She also told the trial magistrate that she was 10 years old and leaving in Nairobi. PW2 did not witness the incident but was told by PW1 what had happened. PW3 saw the complainant with some money and went with her to the appellant's shop. PW4 the doctor examined PW1 and found that she had been defiled several times. The defence evidence is to the effect that the complainant's relatives by the name R and M who I presume to be PW2 and PW3 went to the appellant's shop and enquired as to why PW1 was usually late whenever she goes to fetch water from the river. M started beating the child and claimed that she had found the child with some money. It is the defence case that M promised to take action against the appellant.

PW4 produced the P3 form that shows that indeed PW1 was defiled. It is indicated on the P3 form that the child reported to the doctor that the appellant used to give her money and defile her several times. The investigating did not testify to enable the court know when the matter was reported. The charge sheet shows that the incident occurred on the 4.7.2010 and the P3 form indicate that the child was sent to the hospital on 7.7.2010. The physical appearance of the child was that she had no injuries on her body other than the tearing of the hymen. The complainant testified that she was 10 years while the P3 indicate that she was 12 years. There was no baptismal card or birth certificate that was produced before the court. The trial magistrate interrogated the child before she testified and concluded that she was not fit to give sworn evidence.

I have gone through the record of the trial magistrate. The proceedings were poorly recorded and it is a bit difficult to come up with a proper analysis of the case. The proceedings give long narratives without comas or full stops. The English used is not up to the standard. Although the court tried to capture the evidence verbatim but that is not the proper way to do it. A presiding judicial officer should be able to understand what the witness is telling the court and the officer should capture that evidence in a better manner his or her own words if need be. This is so because whenever the matter goes on appeal the second court will rely on that record. If the record is not clear and the second court is not in a position to determine the demeanor of the witnesses then it becomes difficult to deal with such matters. It is common for witnesses to use their surnames or alias names but the court had to make a proper record that it would be able by the end of the hearing understand the case. The record shows that PW1 testified that M is a sister to PW1 and she had gone to cut some trees. It is also indicated in the evidence of PW1 she was given KShs.20/= by the appellant and PW1 gave it to M. I am satisfied that a 10 year or 12 year old can be properly guided and give a narrative of what transpired. The record here is recorded poorly and the evidence of PW1 appears to have been cut short without any proper details coming out. Whereas PW1 referred to M the trial magistrate gave the name as F M. The evidence of F M PW3 is also not

properly captured to make me conclude that she had gone to the appellant to complain about the defilement of her sister. There is also no evidence that PW3 examined the private parts of PW1 for her to conclude that she had been defiled. There is no evidence as to what happened between 4th of July and 7th of July when it seems the matter was reported to the police. The record shows that PW3 found the child with the money on the same date of the incident. The area assistant chief was not called to testify and also the investigating officer. Indeed when PW4 testified the prosecution simply closed its case. The case was not closed because of several adjournments given to the prosecution.

The defence evidence refers to M and R. PW2 was R N whom I believe is the person referred to in the defence case. The defence also refers to a dispute on money found with the complainant. Although the appellant gave unsworn evidence, his testimony is corroborated by that of DW2 and DW3. The fact that a period of about 3 days elapsed before the matter was reported to the police creates doubt as to whether it is the appellant who defiled the child. I cannot simply take what is recorded on the P3 that the child was defiled several times by the appellant to be the truth. I do find that the defence evidence raises doubt on the prosecution case. The case was not proved beyond reasonable doubt. The trial court did not conduct the proceedings properly so as to bring out the relevant issues. It is now over four years from the time the incident occurred and I do not wish to bring back the child from Nairobi only for her to be reminded of what happened four years back. There is no order to order a retrial. I do find that both the prosecution and the trial court did a shoddy job and made the matter not to be proved as required by the law. I find the appeal to be merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

DATED AT KAKAMEGA THIS 24TH DAY OF SEPTEMBER 2014.

SSAID J. CHITEMBWE

J U D G E