



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.183 OF 2012

BETWEEN

SAMSON MURIMI KIBWABWA APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence of the SRM's court at Keroka in criminal case No.3570 of 2012 – Hon. N. Wairimu, SRM, dated 20th July 2012.)

JUDGMENT

1. The appellant herein Samson Murimi Kibwabwa was the accused in Criminal case No.357 of 2011 at the SRM's Court, Keroka. He was charged with defilement of a child with mental disability contrary to **Section 7 of the Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on diverse dates between 28th February 2012 and 1st March 2012 at [Particulars Withheld] in Borabu District, the appellant intentionally caused his penis to penetrate the vagina of D N a mentally disabled child aged 12 years.
2. In the alternative charge, the appellant was charged with 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 alternative charge were that he indecently and unlawfully assaulted a minor D N by touching her vagina and suckling her breasts.
3. He pleaded not guilty to the above charges and trial ensued.
4. PW1 was Nancy Kemunto Dan, aged 19 years and appellant's neighbour. She told the court that she knew appellant as a traditional healer who lived next door to her. That the appellant lived with his wife Rose and was also living with the complainant who (complainant) was one of his patients.
5. That the complainant and herself were friends and sometime in February while appellant's wife was away, the complainant told her that in the course of the night, appellant suckles her breasts and puts his penis in her vagina. That the complainant raised this complaint on several occasions.
6. IPW1 also recalled one time when she was washing clothes with appellant's wife at the river when appellant called the complainant. When she got home after washing clothes, appellant's wife questioned appellant why he was having sex with complainant yet she was there as his wife. Appellant in turn hit his

wife with a rungu on the head and as a result appellant's wife ran away leaving him with their one year old child and the complainant.

7. Furthermore, on another occasion, complainant's mother came to take complainant home but she was not able to do so as appellant asked her for Kshs.50,000/=. PW1 also testified that she used to hear complainant crying in the middle of the night as their houses were in one line and the walls were made of bricks. When she heard complainant crying, she thought she was being given medicine by appellant as she had already seen appellant giving complainant medicine from boiled roots though she never used to cry when taking the medicine.

8. She also confirmed that complainant was about 11 years old. She did not depend on herself, she had to be assisted as she did not know how to cook, the appellant's wife used to give her bath and she had never seen complainant take a bath since the appellant's wife left. Further, she recalled that when complainant told her what happened, she examined her vagina and found a watery discharge and dirt mixed with urine.

9. She then helped complainant with soap and asked her to go and take a bath. That the complainant told her that if she bathed without appellant's permission, appellant would beat her up.

10. PW1 also recalled on one occasion when she saw appellant beating complainant apparently because complainant had spoken to people on her way to the river. PW1 also stated that appellant used to lock complainant in the house whenever he went away as she was only allowed to go to the river when appellant was at home.

11. On cross-examination by appellant, PW1 stated that she reported the fact that appellant was defiling complainant to a female community policing in charge but she was asked to wait while she (community police) carried out investigations. PW1 also stated during her testimony that she was usually in the company of her friend Mercylene whenever complainant talked with her.

12. PW2 was Mercy Kwamboka Atandi also appellant's and PW1's neighbour. She corroborated PW1's testimony to the extent that they were neighbours with appellant, appellant was a traditional healer, he was treating the complainant, complainant used to cry at night and on asking her why she was crying, she told her that the appellant was putting his penis into her vagina.

13. Furthermore, she confirmed that she had been to appellant's house which comprised two rooms that is one for his patients and another as his house. That when appellant's wife was living with appellant, she used to visit her at appellant's house and when complainant told her that appellant used to put her on the bed, indeed she confirmed that there was a bed in appellant's bedroom.

14. She also revealed that once she saw complainant having a seizure and other than that she also corroborated PW1's testimony that complainant had a discharge coming from her vagina and upon examination of the complainant's vagina, she found it was damaged. PW2 also confirmed that she had told a lady by the name of Agnes that complainant was being defiled in the guise that she was undergoing treatment. On telling that to Agnes (a member of community policing), the appellant was arrested. PW2 testified that appellant accused her of influencing his wife to run away.

15. PW3 was the complainant D. After the court conducted a voire dire examination on her, it formed the opinion that she did not possess sufficient intelligence to understand the meaning of an oath. Therefore she gave unsworn testimony.

16. In her testimony, complainant told the court that she had never been to school, the appellant is a doctor who was treating her by administering medicine through her nose as she was suffering from epilepsy. That apart from putting medicine into her nose, appellant also used to put his penis into her vagina while she had her clothes on. When appellant put his penis, she cried and in turn appellant beat her on her shoulders with blows. On asking the appellant why he was putting his penis inside her, he told her it was because she was his wife.

17. PW3 also confirmed that appellant had a wife whom he beat with a piece of metal and she ran away. She also confirmed that when appellant was treating her, he used to live alone. That she only went to his bed when he took her there and she told him to leave her alone as she lay on her back.
18. On cross examination, the complainant confirmed that she told her mother that appellant was defiling her
19. PW4 was No.35763 Sgt. Herbert Mudibo stationed at Manga police station, the investigating officer in this matter. He recalled that on 11th March 2012 he was at Manga police station when he was told to go to Kijauri DC's office to collect a suspect. Before getting there, he was informed that Administration police officers were at the stage. On reaching the stage, he found Samson Murimi and a suspect by the name Juma Hassan who was said to have stolen from appellant and appellant was said to have defiled the complainant who was mentally disabled. He also confirmed that he had been given this information by Aps who had been alerted by members of the public. He immediately took appellant and Juma Hassan to Manga police station and booked them in OB.
20. The next day, he went to where appellant used to live and questioned PW2 and PW1. He was then led to where PW3 (the complainant) was. He then took her to the hospital where the doctor assessed her age as being between 11-12 years old. He established that the complainant used to initially live at Chepilat with her mother. He also confirmed that he never found the complainant's mother although he had gone to look for her at Chepilat. He produced the P3 form which was marked as **MF1-1 (b)** and treatment notes OPP 1639 as **MF11 (a)**.
21. PW4 also stated that when the appellant was questioned, he said that he had been treating the complainant but denied that he had defiled her. He also confirmed that he recorded the appellant's wife's statement and he also established that the appellant was a herbal doctor.
22. On cross-examination, PW4 confirmed that appellant's wife did not record any statement to say that he (appellant) had assaulted her rather when she recorded her statement she said appellant was defiling complainant.
23. PW5 was Joel Ongaro, a clinical officer at Kijauri Level 4 Hospital. He confirmed that on 12th March 2012 he examined the complainant who was in good general condition though she was mentally challenged. Upon examination, she had tenderness on the forelegs bilaterally, weapon used was blunt and the injuries were 3 months old. Complainant was then given analgesics and antibiotics. He assessed the degree of injury as harm.
24. In reference to section C of the P3 form, PW5 assessed the complainant's age to be 13 years. He found that her hymen was broken, there were bruises to the labia cervix and she also had a whitish foul smelling vaginal discharge. On conducting lab tests non reactive HIVs indicated there was spermatozoa, yeast cells were present and so were pus cells. Her urinalysis also showed yeast and pus cells.
25. PW5 concluded that the complainant had been defiled and that there had been ejaculation. He filled the P3 form on 12th March 2013 and produced the same as **Exhibit 1 (a)**. He also produced treatment notes for the complainant OPP – 1639/12 and confirmed he was the one who treated the complainant on 12th March 2012. The treatment notes were marked as **Exhibit I (b)** and lab request and report as **Exhibit II (c)**.
26. PW5 also examined the appellant and confirmed that he had no bruises on his penis, lab test was HIV non reactive and VDRL for syphilis non reactive, urine test did not reveal anything. He signed the P3 form on 12th March 2012, his treatment notes and lab request form as **Exhibit 2 (a)** , P3 form as **Exhibit 2(b)** and treatment notes as **Exhibit 2 (c)**.
27. PW5 explained that the offensive smell from the complainant was the result of her hygiene due to her mental condition and the cells which were not normal were likely to be a contamination from faeces. In

addition to this, he confirmed that any stress in a female results in a whitish discharge as seen on the complainant, the bruising on the labia was the result of defilement and there was penetration and ejaculation since there was spermatozoa seen when tests were carried out.

28. On cross examination, PW5 stated that there was no bruising on appellant's penis as he had been circumcised, and that the presence of spermatozoa indicated that the act had taken place less than 72 hours before.

29. At the close of the prosecution's case, the trial court after considering the above evidence by the prosecution ruled that the prosecution had established a prima facie case against the appellant and thus put the appellant on his defence. The appellant gave unsworn statement with no witnesses.

30. In his defence, appellant admitted the fact that he was a herbalist and that on 9th March 2012 he went to his home in Isebania and returned on 1st at 7.45 p.m. On getting back to his house in Kijauri he found his place where he houses his patients had been broken into. He was then informed that his worker one Juma Ibrahim was responsible for the said theft since his worker had been locked in by his neighbours. When he opened the house, the suspect was removed from therein and beaten by neighbours.

31. They then took him to the stage where police officers from Manga came for him. He was then asked to go and record a statement of how the man had stolen from him. He was then charged with an offence he knew nothing about. He alleged that if indeed he committed the offence, they ought to have taken him for DNA testing on the complainant.

32. The appellant blamed his arrest on the complainant's parents whom he had asked to pay Kshs.35,000/= for the treatment, but which amount they had not paid. He alleged that the complainant's parents were trying to take her away before paying for the services he had rendered in treating the appellant.

33. After carefully considering the evidence on record, the learned trial magistrate found that the appellant was guilty of the offence of defilement of a child with mental disability contrary to **Section 7** of the **Sexual Offences Act** as charged and sentenced him to 10 years imprisonment.

34. The appellant being aggrieved by both conviction and sentence, preferred the instant appeal to this court. In his homemade petition of appeal received in court on 26th July 2012 the appellant contends:-

1. *That the learned trial magistrate erred in both points of law and facts by failing to notice that PW1 was not truly in her sense, example she was taking tradition herbal medicine.*
2. *That the trial court erred in both points of law and facts by believing the evidence of PW1 and PW4 which was insufficient to prove the charge.*
3. *That the learned trial magistrate erred in both points of law and facts by failing to notice that PW1 and appellant were examined together by the doctor whereby PW1 was found with disease while the appellant was negative.(sic)*
4. *That the trial learned magistrate misdirected herself to uphold the evidence of speculation tendered by PW1 and PW3 whose evidence truly of identification degree and not guarantee on accuracy.*
5. *That the trial learned magistrate erred in both points of law and facts by failing to notice that the prosecution case was not only insufficient, but affricative speculative discredited and lack of proper probative value.(sic)*
6. *That the learned trial magistrate erred in both points of law and facts in not accepting the appellant's strong defence that would have attracted a non custodian sentence.*

35. When the appeal came up before me, on 4th June 2014, the appellant relied on his written submissions tendered in court on 7th May 2014 and also submitted that the evidence adduced by all the prosecution witnesses was a frame-up. He pointed out that though PW1 and PW2 alleged that the complainant always told them what he was doing to her in the night, the complainant in her testimony denied telling them

anything like that. Furthermore, that the clinician who examined him told the court that he did not find anything amiss with his genital organ. At this point, I must hasten to add that he did not observe any bruises on the appellant's penis because the appellant was circumcised.

36. The appellant also submitted that whereas the trial court had relied on evidence of one Rose Moraa as given to both PW1 and PW2, the said Rose Moraa was not called as a witness. From the record, PW4 told the court that his efforts to get Rose Moraa (who was appellant's wife) to come and testify had proved futile.

37. The appeal was opposed by the State. Mr. Shabola learned counsel for the State in opposing the appeal submitted that the prosecution proved its case beyond reasonable doubt that despite the absence of DNA test linking the appellant to the alleged offence. Counsel submitted that the testimony of the victim being a person of mental disability, ought to be believed as she had no reason to blame the appellant for acts that he did not commit.

38. Further, counsel submitted that the prosecution's evidence was sufficient to warrant a finding of guilt and the subsequent conviction and sentence. He therefore urged the court to uphold the same, and to dismiss the appellant's appeal in its entirety.

39. The appellant in reply reiterated that the absence of DNA meant that he could not be linked to the said offence. He also submitted that there was a reason for the complainant to frame him, as she had been brought for treatment at a fee but when her parents failed to pay up, they found a way through PW1 and PW2 to frame him.

40. Lastly, appellant submitted that if it is true that he repeatedly committed the offence as alleged, why a report was not made earlier? He thus submitted that all that the prosecution witnesses told the court was a pack of lies.

41. As a first appellate court, it is my duty to evaluate afresh the evidence that was tendered before the trial court and arrive at an independent determination, always remembering that I neither saw nor heard the witnesses. I have carefully analyzed the evidence on record and given due consideration to the grounds of appeal and the contending submissions. I have also carefully weighed and considered the judgment of the learned trial magistrate.

42. From the evidence especially from the complainant who testified as PW3, the appellant was a herbalist who was treating her for epilepsy. According to PW3's evidence she stated:-

“He only used to put the medicine in my nose. He also did something else to me other than putting medicine in my nose. He put his penis into my vagina when I was young the way I am.

..... When he put his penis he sent me to the river. When he put his penis I cried and he started beating me on my shoulders with blows. I started crying nobody helped me..... Every time he put his thing he beat me. I asked him why he was putting his penis in me he told me I am his wife.”

43. The complainant's testimony was corroborated by PW2's evidence in chief when she stated in part:-

“We examined the complainant's vagina and found it was damaged. Her vagina was protruding out. When we examined her, Damaris had a whitish discharge.”

44. The above testimonies were corroborated by the evidence of the clinical officer PW5 who stated:-

“She had tenderness to the forelegs bilaterally weapon used was blunt the injuries were 3 months old.”

I assessed her as 13 years. Hymen was broken, there were bruises to the labia cervix was closed. She had a whitish foul smelling per vaginal discharge. Lab tests, HIV test non reactive

UDRL non reactive HIVs indicated there was spermatozoa yeast cells were present and as were pus cells.

Conclusion was that the complainant had been defiled and there was ejaculation.”

45. PW5 also testified that the offensive smell from the complainant was the result of her poor hygiene due to her mental condition and the pus cells which were not normal were likely result of contamination from faeces. He also stated that any stress in a female results in a whitish discharge as seen on the complainant. The bruising on the labia was the result of defilement. He confirmed there was penetration and ejaculation since there was spermatozoa seen when tests were carried out.

46. On cross examination by appellant, PW5 revealed:-

“She had spermatozoa and pus cells which could have resulted from contamination due to poor hygiene.

You had no bruising which was normal as you are circumcised. We did not carry out DNA to establish whether you are the one who defiled the complainant but she said that the person was known to her.”

47. From the above evidence, it is clearly established that the appellant was not a stranger to the complainant as the appellant was treating her as she (complainant) was suffering from epilepsy and had treated her for a long time. Though the complainant is said to suffer from a mental ailment, her testimony was consistent and unshaken on the fact that the appellant not only treated her of her ailment but took advantage of her and defiled her both when appellant's wife was around and more after appellant's wife left him. This evidence was corroborated by PW5, the clinical officer who upon observing the complainant's genitalia was convinced beyond doubt that indeed the complainant had been defiled and there was penetration.

48. The appellant's contention that he was not found with any sexually transmitted infection while the complainant was found with an infection does not stand for the following two reasons:-

- a. *The said infection found in complainant's genitalia was not a sexually transmitted disease but simply a hygiene issue and from the evidence of PW1 and PW2 it was clearly established that the complainant rarely took a bath after the appellant's wife left her matrimonial home.*
- b. *There was no proof that indeed there was a grudge between complainant's parents and the appellant. Even though the appellant claimed that the complainant's parents owed him money for the complainant's treatment, there was no evidence to the effect that the complainant's parents tried to frame the appellant.*

49. In the circumstances therefore, I uphold the conviction and sentence of the trial court meted against the appellant. The appeal is therefore unmerited and is accordingly dismissed in its entirety. R/A within 14 days.

Delivered, dated and signed and delivered at Kisii this 24th day of September, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Present in person for Appellant

Mr. Otieno for Respondent

Mr. Bibu - Court Assistant