REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 201 OF 2011

ELIAS NYONGESA MAKENZIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Hon. D. Alego (Senior Resident Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 610 of 2011 delivered on 12th October, 2011)

JUDGMENT

The Appellant herein Elias Nyongesa Makenzi was charged with defilement contrary to section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 14th day of February, 2011 in Uasin Gishu District within Rift Valley province, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of FC a child aged 7 years.

In the alternative, he was charged with indecent act with a child contrary to Section 1(1) of the Sexual Offences Act No. 3 of 2006 in that he allegedly touched the private parts (vagina) of F C.

He was found guilty, convicted and sentenced to life imprisonment.

He was dissatisfied with the judgment and appealed against both the conviction and sentence. He raised eleven Grounds of appeal dated and filed in court on 13th October, 2011.

During the hearing of the appeal, learned counsel for the Appellant submitted that he only wished to argue on three issues namely;

First, that the trial court made an error in sentencing the Appellant to life imprisonment when in fact the prosecution had not proved penetration, which is a key ingredient of the offence of defilement. He pointed out that the medical report indicated that the hymen was intact and no vaginal discharge had been detected. He also pointed out that the date the offence was allegedly committed was not clear. It was indicated as 4.2.2011 in the charge sheet and 14.2.2011 in the P3 Form.

Two, that the trial court failed to take into account that the evidence was not corroborative. Mr. Omboto submitted that it is only the complainant's mother who testified whereas she was away when the offence was allegedly committed. The father who was with the child did not testify.

Third, Mr. Omboto pointed out that the judgment had an error by the fact of the trial magistrate making the remark "the 2nd charge fails."

Learned state counsel Mr. Omwenga opposed the appeal. He submitted that the offence of defilement

was proved beyond reasonable doubts. He submitted that the complainant who was well known to the Appellant gave a detailed account of what transpired between her and the Appellant. There was also the medical evidence which proved that her private parts had injuries which was an indication of penetration. He also submitted that the age of the complainant was proved by a clinical card. He submitted that the evidence of the complainant was sufficient to found a conviction if the court believed what she told the court.

As regards the error on judgment, Mr. Omwenga submitted that once an accused is convicted in the main charge, the alternative count automatically fails.

In rejoinder, Mr. Omboto submitted that the fact that the complainant was seven years old, it was important that her father corroborated her evidence.

This is the first appellate court whose duty is to re-evaluate the evidence on record and draw its conclusion but bear in mind that it has neither heard nor seen the witnesses -see **OKENO -VS- REPUBLIC (1972) E.A 32, KARIUKI KARANJA -VS- REPUBLIC (1986) KLR, 190 AND PANDYA -VS- REPUBLIC (1957) E.A 336**

I will consider the first and the second issues together because they relate to weight of evidence and whether the same, crystalised together proved a case beyond all reasonable doubts. This calls for evaluation of the entire evidence.

The prosecution called a total of four (4) witnesses. PW1 was the complainant who, after the voire dire examination gave a sworn statement of evidence. She testified that she knew the Appellant whom she called by name. She stated that the Appellant called her, then pulled her into the house. He removed her pant and defiled her. He told her not tell her father or any other person. As warned by the Appellant, **PW1** did not tell anybody although she felt pain and bled.

In cross examination, she stated that the Appellant was her father's tenant. She also indicated that she later told her mother what had happened.

PW2, J T and the mother to the complainant testified that on the 6th February, 2011,she had left home to go and visit her mother. She left PW1 with her father. She returned on 6th February, 2011. On 7th February, 2011 she noted that PW1 (F) looked unwell. She examined her private parts and they looked sored. On inquiring what had happened, PW1 told her that the Appellant had pulled her to the house and defiled her. She immediately took her to hospital in Turbo from where she was referred to Moi Teaching and Referral Hospital. A medical examination report (P3 Form) was filled. The Appellant was her farm hand (shamba boy).

In cross examination, PW2 stated that the Appellant had worked for her for only one month.

PW3, Doctor Cynthia Chemutai Chebet of Moi Teaching and Referral Hospital examined PW1 and filled her P3 Form. PW1 gave her story on how, when her mother was away the Appellant called her into her parent's bedroom and defiled her. She observed injuries in her private parts which were red. Her hymen was intact but the hymen orifice was widened. There was no discharge but pulses were found when urinalysis was done.

In cross examination PW3 stated that somebody had tried to penetrate the hymen of PW1 but it did not break.

PW4, police Corporal Adan Hussein of Turbo Police Post testified that on 10th February, 2011, the complainant and PW2 (her mother) reported a case of defilement . He recorded their statements and issued them with a P3 Form. PW2 also brought to him PW1's child immunization card (Pexhibit) which showed the age of PW1.

The Appellant gave a sworn statement of defence. He stated that he was a victim of circumstances. He

said he worked for the complainant's brother. He stated that PW2 refused to pay him for three months and that is why she claimed that he had defiled her daughter. He denied committing the offence.

In cross examination, he confirmed that he worked for the complainant's mother who did not pay her for three months to the tune of Kshs 9,000/=.

The complainant, PW1, was the only eye witness in her case. Despite her tender age, she was able to recall the events leading to the offence. That the Appellant lured her into the house and defiled her. He also warned her not to tell anybody. And because PW1 feared for any repercussion should she breech the warning, she did not disclose what had happened to her. The offence was discovered by her mother who noted that she was not looking well. On probing her, she disclosed what had transpired.

PW1's evidence was corroborative by PW2 and 3. PW2 narrated word for word what PW1 said had happened between her and the Appellant. PW3 on the other hand stated that PW1 narrated to her how on 4th February, 2011 when her mother was away the Appellant took her to her parent's bedroom, removed her pant and defiled her.

PW1's story was thus consistent and did not change no matter who she was narrating to. There is no reason why the trial court should have doubted her. I also do not have any reason to doubt that she gave a true account of what transpired between herself and the Appellant who she knew very well and was thus her acquaintance.

This court appreciates the fact that Sexual Offences will more often than not be committed to the exclusion of third parties. That is why Section 124 of the Evidence Act clearly stipulates that, in defilement, where the court believes in the evidence of the complainant, corroboration of the complainant's evidence is not mandatory. For avoidance of doubts, I duplicate the said section 124. It reads thus;

"124. Notwithstanding the provisons of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him".

More importantly, PW1's testimony was corroborated by that of PW3, the doctor who examined her and filled her P3 Form. Under Section C of the said P 3 Form the doctor noted that the offence for which examination was done was defilement. She noted that although the hymen itself was not torn, it had been widened. In her own evidence, in cross examination, she indicated that somebody had tried to penetrate the hymen but it did not break. Her testimony was as follows:

"Someone tried to penetrate her hymen but it did not break..."

This statement is indicative that there already was an object inside the vagina of PW1 save that that object did not break the hymen.

To deduce whether or not there was penetration as defined in the Sexual Offences Act, it is first and foremost important to understand that the operative word in the offence of defilement is **"penetration".**

Defilement is defined under Section 8(1) of the Sexual Offences Act as follows;

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement." (emphasis mine)

Penetration on the other hand is defined under Section 2 as;

"Means the partial or complete insertion of the genital organs of a person into the genital organs

of another person."

From the latter definition, even a slight penetration into the victims genital organ would amount to a penetration. Therefore, in penetration, a hymen need not be broken. Besides as PW3 testified it was factual that the Appellant had penetrated PW1's genital organ which was red.

I therefore conclude that the trial court did not misdirect itself when it arrived at the finding at that PW1 had been defiled. And PW1 having positively identified the Appellant as the culprit,then the finding of the magistrate was proper.

I therefore discount the Appellant's submissions that there was need for further corroboration especially by the evidence of PW1's father as a seal for concrete evidence against he Appellant.

Let me also point out that the age of the complainant was proved by way of immunization card that was produced as an exhibit by PW4. The same showed that she was born on 4.2.2004. Going by the charge sheet, at the time she was defiled, she was 7 years old.

The Appellant's counsel submitted that there was a discrepancy on the date the offence was committed that in the charge sheet it is shown as 4.2.2011 whereas in the P3 Form it is indicated as 14.2.2011.

I have looked at the P3 Form. Under part 1 which is filled by the issuing officer, the date is recorded as 4.2.2011. Under part B which is filled by the doctor, in paragraph 1, the doctor wrote;

"findings- 14.02.2011"

At the bottom of the page is the hospital stamp bearing the same date (14.2.2011) which is the date the P 3 Form was filled. It is clear that the doctor's writing at the top is against details of the injuries sustained AND NOT the date the offence as committed. As such, I find that there was no discrepancy at all on those dates.

With regard to t he issue of a defective judgment, it is important that I duplicate the part of the judgment referred to by the Appellant's counsel.

In pronouncing the conviction, the learned trial magistrate wrote as follows;

"This court finds accused person guilty of the principal charge and convicts him accordingly. However the alternative charge thus fails."

It is trite that where an accused is charged with a main charge alongside an alternative count, if he is convicted in the main charge, no pronouncement is made with respect to the alternative count. Whereas it did not serve any purpose for the trial court to state that the alternative charge failed, no prejudice was occasioned by that pronouncement as the trial court rightly did not make a finding in the alternative charge. I hence overrule the Appellant's Counsel in that regard.

Finally, as regards the sentence, under Section 8 (2) of the Sexual Offences Act, a person who defiles a child aged eleven years or less upon conviction shall be sentenced to imprisonment for life. That is the penalty the learned trial magistrate imposed. The same was lawful and this court has no reason to vary it.

In the upshot, I find that the appeal has no merit and I dismiss it in its entirety.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 30th day of October 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Omboto Advocate for the Appellant/Accused

Miss Oduor for the Respondent/State