



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.129 OF 2011

BETWEEN

JULIUS KIPSANG LANGATAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of the SRM's Court at Kilgoris

in Criminal case No.508 of 2010 dated on 24th June 2011 – Hon. B.O. Ochieng, SRM)

JUDGMENT

1. The appellant herein Julius Kipsang Langat was the accused in the SRM's court at Kilgoris Criminal Case Number 508 of 2010. In the main count, he was charged with defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charges were that on the 7th day of July 2010 in Transmara District of the Rift Valley Province, he had unlawful carnal knowledge of a girl namely JC, a child aged three and half years.
2. He also faced an alternative charge of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences act No.3 of 2006**. The particulars of the charge were that on the 7th day of July 2010 in Transmara District of the Rift Valley Province, unlawfully indecently assaulted JC, a girl of three and half years of age by touching her private parts namely vagina.
3. He pleaded not guilty to the charges and trial ensued. The prosecution called 6 witnesses.
4. PW1 was the complainant JC. The trial court noted that due to her tender age, she needed protection as she was vulnerable thus she could not give a sworn statement. She told the court that she knew the appellant. His name was Julius. She pointed to the area of her body where she said the appellant had touched her (her genitals), while they were both in the thickets and they were there alone.
5. Afterwards she went to Gladys house, she never felt pain when appellant touched her and she cried when he (appellant) touched her.
6. PW2 was S C. She recalled that on 7th July 2010 she was from the canteen when she found PW1 crying. She also saw appellant running away from the thickets. They raised alarm but appellant tried to throw rocks at them. Appellant then entered a maize plantation.

7. When she saw complainant, she (complainant) stood up, they examined her and found her clothes were wet; that is her skirt was wet, she was without her inner pants which were never found. On examining her genitalia, they found that it was wet inside, the outer parts were full of sperms and body fluid but the inner section had no injuries.
8. At this time, the complainant was on the grass in the thickets and she told her that it was Julius (appellant) who did it. Apparently appellant was a neighbour, they stayed in the same area and both complainant and PW2 knew him very well.
9. On cross examination by the appellant, PW2 maintained that she saw appellant clearly, she was in the company of Gladys and Chemotai; it was on a Thursday and she had gone to Kaptembwo. That appellant was dressed in a brown trouser.
10. PW3 was LC. After the trial court conducted a voire dire examination on her, it formed the opinion that she possessed sufficient intelligence to understand the meaning of an oath and thus she gave sworn evidence.
11. PW3 told the court that on 7th July 2010 at 10.00 a.m., she was from school and heard a small child crying in the bush beside the road. She went towards the cry and saw appellant pulling out with a small child. That appellant was in the company of two children that is C and C. She heard C crying.
12. Furthermore, PW3 said she saw C and appellant in the thicket. She saw appellant lying on top of complainant. By this time complainant did not have any pants on, though appellant had his clothes on. Appellant ran away but complainant remained on the ground crying. She took complainant to where PW2 was and she corroborated PW2's testimony that appellant was their neighbour.
13. PW4 was Johana Arap Sigei. He recalled that on 7th July 2010 at about 11.30 a.m., he was selling at his shop in Kaptembwo when a child known as C told him that appellant had done bad things to the complainant.
14. He immediately closed his shop and went to the scene. He found the complainant, took her to hospital at Angata, where the doctor confirmed that indeed complainant had been defiled and she was treated.
15. PW4 also testified that he took appellant to the police after arresting him; the appellant was later taken to Lolgorian. He produced the P3 form which he was given at Lolgorian. It was marked as **MF1-P1**. He also produced treatment notes he got from Angata which were marked as MF1-P2 and complainant's health card which indicates that she was born on 23rd December 2007.
16. Furthermore, he recalled that he spoke to the complainant at the scene; she told him that appellant had laid on her; she had no inner pants and complainant's mother confirmed that the child had had her panties on earlier in the day. He also examined the clothes the child wore and found wet stuff on her skirt. He also testified that the grass was disturbed.
17. In concluding his testimony, PW4 corroborated PW2 and PW3's testimonies that appellant is a neighbour; he used to come to his house and he used to walk with his son at times.
18. PW5 was ZS (complainant's mother). She recalled that on the material day, she was at another person's shamba harvesting for him when she was called and told that her child had been defiled. She confirmed that the complainant was 3 years old and in baby class.
19. At the scene, she found the complainant. She examined her sexual organ and found that she had been defiled. The clothes were wet, she had left the girl with another younger one at her neighbour and some sperms were inside and others outside.

20. PW6 was No.88336 PC W. Constable Wangechi attached to Lolgorian police station performing general duties.

21. She recalled that on 9th July 2011 she was instructed by her commander to investigate a case of alleged defilement. By that time, appellant was in custody already. He booked both appellant and complainant at Lolgorian sub District hospital and took them both to hospital for medical examination and check out for treatments.

22. PW6 also testified that she recorded statements from prosecution witnesses who availed themselves at the station. She visited the scene of defilement at Kaptembwa village. It was a thicket adjacent to a road leading to complainant's residence. There was grass all over. The complainant seemed disturbed even though she saw her some 2 days of the attack. She also issued the complainant with P3 form which was filled at Lolgorian sub district hospital; the appellant's mental status was also done and both reports were marked as P. Exhibit 4.

23. PW6 (though should have been PW7) was Dr. Robert Mutula, senior Medical Officer based at Lolgorian Hospital. He confirmed that he prepared the complainant's medical report on 9th July 2010 after receiving the complainant for medical examination.

24. That at the time of examination, she had changed clothing and it was alleged she had been defiled by a neighbour 7 days prior to the examination. On examining her, he found she had a swollen labia majora, her hymen was not intact though she had no bruises. There was also no vaginal discharge. He did a urine test which showed pus cells. The complainant was then started on prostexposone prophylaxis.

25. Meanwhile, appellant was also examined on 10th July 2010. His mental examination revealed he was oriented in time and place that is he was physically fit and mentally sound. Appellant was also taken for a urinalysis and STD test. Both tests were negative. He also added that between the two examination of child and appellant there was no link worthy of note. He produced appellant's lab report as P. Exhibit 2.

26. Dr. Mutula also referred to the complainant's treatment notes from Angata Health Centre where she had been examined on the material day that is 7th July 2010. These were the findings:-

- 1) *The vaginal walls were swollen;*
- 2) *Hymen was not intact;*
- 3) *No viable discharge.*

1. He stated that according to his observations there had been penetration due to the absence of hymen and presence of swollen labia. He also said there were no bruises at the time he examined the complainant and also at first examination.

2. He explained that the swelling could be due to blunt trauma but absence of hymen meant penetration. He produced the complainant's health card which established she was 3 years old as **P. Exhibit 4**.

3. At the close of the prosecution case, the trial court, after considering the evidence placed before it ruled that the prosecution had established a *prima facie* case against the appellant to warrant him being put on his defence. The appellant opted to keep silent as a defence. He however stated that he was 16 years and had understood what the court had been told.

4. In its judgment, the trial court found that the prosecution had established a strong case against the appellant beyond all reasonable doubt. Appellant was accordingly found guilty,

convicted and sentenced to life imprisonment as stipulated by **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006**.

5. The appellant being dissatisfied with both conviction and sentence preferred an appeal to this court. In his petition of appeal dated 14th February 2010 filed by Maroro & Omariba Advocates, the appellant has appealed against the entire conviction and sentence on grounds that:-

- 1) *The learned trial magistrate erred in law and in fact in convicting the*
- 2) *appellant who was not mentally sound during the entire period of the trial and therefore did not understand proceeding before him in court.*
- 3) *The learned trial magistrate erred in law and in fact by failing to appreciate that the doctor's evidence did not link his findings with the appellant.*
- 4) *The learned trial magistrate erred in law and in fact by not taking into consideration the age of the appellant who was only sixteen (16) years by then.*
- 5) The learned trial magistrate erred in law and in fact by not taking into account that the appellant was arrested on 26th June 2010 and arraigned in court on 11th July 2010 well beyond the prescribed period of 24 hours of his arrest and charged with the offence of defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences act No.3 of 2006**.
- 6) The learned trial magistrate erred in law and in fact by not finding that the unexplained delay of the appellant's detention in the police cell was contrary to **Article 49 (g)** of the **Constitution**.
- 7) The learned trial magistrate erred in law and in fact in deliberately failing to remind the appellant of his constitutional rights under **Article 50 (j)** and **(h)** as substantial justice will otherwise result in trial where the appellant did not understand the proceedings.
- 8) *The learned trial magistrate erred in law and in fact in failing to appreciate that the doctor's evidence was based on an examination which was done 7 days after the alleged defilement yet he claims to have found sperms whose owner can not be ascertained from the entire prosecution case.*
- 9) *The learned trial magistrate erred in law and in fact in failing to appreciate the fact that the child's evidence needs to be corroborated as a matter of law, which was not done.*
- 10) *The learned trial magistrate erred in law and in fact in convicting the appellant based on basically hearsay testimonies.*
- 11) *Alternatively the sentence imposed was manifestly harsh and excessive in the circumstances.*

1. The appellant prays that the appeal be allowed, the conviction quashed and the sentence set aside and the appellant be set at liberty.

2. When the appeal came before me on 4th June 2014, Mr. Maroro for the appellant submitted that the charge of defilement preferred against the appellant was not proved to the required standard as the testimony of the minor was such that it could not be solely relied upon to convict the appellant. Furthermore, that none of the prosecution witnesses was an eye witness and only observed the child after the incident. Thus the case was not adequately proved.

3. In reference to the medical evidence, counsel submitted that from the doctor's

evidence there was no link between the appellant and the alleged crime; and that the doctor simply concluded there was penetration because the hymen was not intact. Thus the latter's testimony was contradictory to his earlier evidence and there was clearly no link between appellant and alleged offence. Furthermore, Mr. Maroro submitted that the doctor's evidence that the hymen was not intact was not proved scientifically, the medical examination undertaken 7 days after the alleged offence was not helpful to the prosecution's case and that in essence therefore and taking the totality of the evidence into account, there was no direct evidence against the appellant herein.

4. On ground 2, it was submitted that the appellant was not given a fair trial in keeping with **Article 50 (2) (h) and (j)**. That throughout the trial the appellant was not represented, was aged 16 years, he was not informed of his rights and that is why the appellant remained quiet throughout the trial. That further, and quite contrary to **Article 50 (2) (j)** appellant was not provided with witness statements before commencement of trial and there was delay in arraigning appellant in court, which delay was not explained anywhere by the court. He referred to the case of **Francis Ogega Mochama -vs- AG – Criminal case No.21 of 2005 at Kisii** by Musinga J. (unreported). The Court has carefully read Mr. Justice Musinga's ruling. Counsel urged court to allow the appeal on the basis of the above submissions.

5. The appeal was opposed by the state. Mr. Shabola learned counsel for the State submitted on ground 1 of the petition that the testimony of PW6 (the doctor) indicated that after the appellant was examined it was revealed that appellant was oriented in time and place and was both physically and mentally sound.

6. In reference to Ground 6 of the petition touching on the alleged breach of the constitutional rights of appellant, he questioned instances under which state should appoint counsel to represent an accused person and answered that a case of defilement was not one of those cases where State had to appoint counsel for the appellant.

7. Regarding matters of time when appellant was presented to court, Mr. Shabola submitted that there are other remedies the court can award to the applicant should it be established that the delay was deliberate and there was no sufficient explanation for the same.

8. On the rest of the grounds of appeal, that is grounds 3, 4, 5, 7, 8 and 9, counsel submitted that these touch on the way the trial was conducted by the trial court. That PW1 (the complainant) gave unsworn testimony based on her age and she was not able to comprehend what was happening. That that fact notwithstanding, PW1 was able to identify the appellant by pointing at him during trial and also pointed at her genitalia as the area where appellant touched her.

9. On the other hand, the doctor's (PW6's) testimony was to the effect that:-

? *The victim's age was 3½ years;*

? *On examining victim, he found she had an enlarged labia minora and hymen was not intact;*

? *Absence of hymen meant penetration;*

? *The complainant had been earlier seen at Angata Health centre and he had the notes.*

1. Thus he submitted that the evidence of the prosecution witnesses shows consistency and that the same remained watertight throughout the trial.

2. On ground 6, counsel submitted that the charge of defilement against victims below 11 years has a statutory sentence of life imprisonment upon conviction and that that was the sentence imposed on the appellant. He thus urged court to find and hold that this appeal lacks

merit on both conviction and sentence and to dismiss the same altogether.

3. As a first appellate court, it is my duty to evaluate and consider afresh the evidence that was tendered before the trial court and arrive at an independent determination. I have now carefully analyzed the evidence and given due consideration to the judgment of the learned trial magistrate, the grounds of appeal and submissions made of the hearing hereof. The following are issues for determination by this court:-

- 1) *Was the appellant given a fair trial in the lower court?*
- 2) *Was the main charge against the appellant proved beyond reasonable doubt?*

1. Firstly, counsel for the appellant submitted that his client was aged 16 years old; he did not understand the nature of proceedings against him hence he chose to keep quiet throughout the trial.

2. In my humble view, contentions by counsel for the appellant cannot be correct because, as indicated in the record of proceedings, the appellant took plea in Kiswahili language that he clearly understood after which he pleaded not guilty to the charges facing him. Thereafter the appellant was able to cross examine the prosecution witnesses after they were examined in chief by the prosecutor. Further, PW6 the Medical Officer in his evidence attested to the fact that appellant was examined (mentally) and the results of the examination were that he was physically fit and mentally sound. In addition to this, the fact that appellant chose to keep quiet when called upon to defend himself simply shows that **Section 211** of the **Criminal Procedure Code** was read and explained to him and thus he chose to exercise one of the three options open to him as to how he would proceed with his defence. The mere fact that he chose to keep quiet does not necessarily mean that he did not understand the proceedings against him. It means that **Section 211** of the **Criminal Procedure Code** was complied with by the trial court.

3. In **Republic -vs- Antony Nganga Wanjiku & another [2014] e KLR** Korir J and Njagi J held:-

1. **“We are alive to the fact that an accused person need not offer any defence or at all during trial. He can choose to remain silent through and through. It is the onus and duty of prosecution to prove its case beyond reasonable doubt. However, in this case, having critically reviewed the evidence before the trial court, we are of the firm view that the prosecution did indeed prove the case.”**

2.

3. I am satisfied that in the instant case, the prosecution proved its case against the appellant.

4. Thirdly, counsel for the appellant contends that his client was 16 years old at the time of his trial. Having made the allegation, the onus of proving this allegation was upon the appellant. Since it was the appellant's contention that he was under age to stand trial, he should have presented in evidence his birth certificate or requested for an age assessment test to be done on him. The fact that he raised the issue of his age without arming himself with proper documentation did not convince the trial court that he was indeed under age. I am also not convinced that the appellant was under age.

5. Lastly, there is the appellant's contention that he was detained from 7th July 2010 to 12th July 2010 thus causing an infringement of his right under the Bill of Rights and that this infringement should earn him an acquittal. In **Republic -vs- David Geoffrey Gitonga – Criminal Case No.79 of 2006 - Meru**, (unreported) Anyara Emukule J held that a breach of **Section 72 (3) (b)** of the **repealed Constitution** does not render a trial a nullity but simply entitles

an accused to compensation as stipulated in **Section 72 (6)**. The learned judge reasoned thus: *“I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order and indeed nullity is none curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect to defined offences and by duly competent courts or tribunals.”*

6. Applying the above reasoning by Anyara Emukule J, which reasoning I wholly agree with, should the appellant feel aggrieved over his 2 day delay in remand before being arraigned in court to take plea, he should make a formal application which will obviously give the prosecution the right to be heard as to why they delayed appellant's arraignment in court. Should the prosecution not be able to give a valid reason as to why appellant's arraignment was delayed, then appellant will be entitled to compensation for such delay. Thus the appellant's appeal on all the above grounds fails.

7. I now turn to the more contentious issue in this appeal that is whether the prosecution proved its case before the trial court beyond all reasonable doubt.

8. The complainant in this case was a 3½year old child who testified as PW1. The trial court noted early enough during the trial that the child was of a tender age and before even proceeding with her testimony, she was already noted as a vulnerable witness. She however recognized the appellant in court and told the court that the appellant touched her genitalia. She said this by pointing at her genitalia.

9. PW3 who was also a child but certified by the trial court to have sufficient intelligence to understand the meaning of an oath stated the following:-

10. **“I saw C and Julius at the thickets. I saw Julius with C. Julius ran away. I saw them. I saw the other lying down Julius laying on top of C. C had no small clothe inner clothe. I never saw where it was. Julius had his clothes on. Julius ran away. C never said anything. She was crying. I took her where Sarah was..... I know Julius. He is from my area. They stay near us.”**

11.

12. PW6 the doctor had this to say during examination in chief:-

1. “The child had been seen at Angata Health Centre. I have the notes here. She had been examined on 7th July 2010. This was same day the child is alleged to have been defiled. The walls was swollen. Hymen was not intact. There was no viable discharge. According to my observation there had been penetration basing on the absence of hymen and swollen labia. There was no bruises at time I examined her and also at first examination. There was no indication whether there were bruises.”

2.

13. To my mind, the prosecution has already proved by medical evidence that indeed the complainant's genitalia was not intact. It is not normal for a girl of 3 years to have a punctured hymen. In any event, the act of defilement took place in broad day that is between the hours of 10-10.30 a.m. in the morning. The appellant was seen by PW3 who was not a stranger to him since they were neighbours; lying on top of the complainant and then moments later after she heard PW1 crying while the accused was seen running away from the scene of defilement. Why did the appellant run away unless he wanted to cover his tracks?

14. This piece of evidence to my mind proves not only the fact that the appellant was seen in the vicinity of the defilement but that he was infact caught red handed defiling the minor after which he took to his heels. PW3's evidence stood unshaken as the appellant chose not to cross examine her.

15. Further, and from the record, the trial court which saw the child victim testify in court was satisfied that the child victim was telling the truth. He observed her and noted that he had seen no signs of being tortured and that she clearly identified the appellant as her attacker. In the circumstances therefore, the proviso to **Section 124 of the Evidence Act, Cap 80 Laws of Kenya** is applicable and I so find.

16. Lastly on the issue that the sentence of appellant was harsh there is no other sentence for a person found guilty of defiling a child of tender years other than life imprisonment.

17. In conclusion, I find the appeal to be unwarranted and lacking in merit. I uphold the conviction and sentence of the trial court and dismiss the appeal. The appellant shall continue serving his life sentence. R/A to the Court of Appeal within 14 days from today.

18. **Delivered, dated and signed at Kisii this 29th day of October, 2014**

R.N. SITATI

JUDGE

In the presence of:-

Mr. Nyagwencha for Maroro Omariba for Appellant

Mr. Otieno for Respondent

Mr. Bibu - Court Assistant