REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 161 of 2011

(From original conviction and sentence in Criminal Case No.1285 of 2010 of the Principal Magistrate's Court at Nyahururu – D. N. MUSYOKA, RM)

KELVIN MWANGI MACHARIA…….....…….…….APPELLANT
VERSUS
REPUBLIC…….....…….....RESPONDENT

JUDGMENT

Kelvin Mwangi Macharia was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. After a full trial where the prosecution called a total of 9 witnesses, and the appellant gave an unsworn statement in his defence, he was found guilty of the offence of defilement and sentenced to serve 20 years imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal based on the following supplementary grounds:-

1. **That the charge sheet was fatally defective;**

2. **That the Resident Magistrate did not have the jurisdiction to pass sentence he purported to;**

3. **The magistrate erred in relying on the evidence of a flowed identification parade;**

4. **That the trial court erred when it relied on the uncorroborated evidence of the complainant and failed to warn himself of the danger;**

5. **That no report was made to the police station in respect of the offence;**

6. **That there existed a grudge between him and the complainant's family over a motor cycle.**

He therefore prays that the appeal be allowed, conviction quashed and sentence be set aside.

Ms Idagwa, the Learned State Counsel opposed the appeal on grounds that the appellant abducted the complainant during the day time at 5.00 p.m; the complainant was able to identify the assailant; the complaint's evidence was corroborated by the medical evidence of PW6; the complainant described the culprit as having dreadlocks and motor cycle and that is how the appellant was arrested; that the allegation of the existence of a grudge came as an afterthought during the defence.

Before I consider the grounds of appeal it is important that I set out in brief, the evidence adduced in this case. The complainant MWM s a minor. She told the court that she was 12 years old and a standard 4 pupil. She recalled that on 7/5/2010 at 5.00 p.m, she left school and went to her aunt Charity Wachuka who lives at a place called Site, to get bus fare to go to her grandmother's house. She was given Kshs.10/- and when on the way amongst high rise houses, she met the appellant and another with a motor cycle and bicycle. One person suddenly held her and blocked her mouth; she was put on the motor cycle and driven to Ngomongo. They took her where people do wood carving where the appellant defiled her till morning at 5.00 a.m. when he took her to the river and washed her. She said she fell unconscious, came to and tried to walk and it is then she saw two ladies who assisted her by taking her to Nyahururu District Hospital where she was treated. One of the ladies took her to her house for the night and her grandmother was called. She identified the accused on a parade where there were 5 others with dreadlocks.

PW2, Rose Nyawira Mwai and PW3, Nancy Wambui Kabue, a resident of Nyahururu, were coming from their respective places of business on 8/5/2010, at about 6.30 p.m. when they saw PW1 at the stage. She could not walk properly and was crying. They enquired from PW1 what the problem was and she told them that on her way home two men confronted her, took her to Ngomongo where she was defiled throughout the night and she had started walking in the morning looking for the direction to go home. They hired a taxi, took her to hospital where she was treated and they reported to police. PW2 went home with PW1 for the night and next day they again reported to police. The police gave them a letter and she was taken to St. Martins.

PW1's grandmother is CC (PW4) who testified that on 6/5/2010, PW1 went to school at 7.00 a.m. She had indicated that she would not be back but could go to her aunt, CW. She was supposed to come back on Friday but failed to do so. On Saturday her aunt called enquiring about PW1 and that is when she started to look for PW1. On 9th May 2010, she went to report at Nyahururu Police Station and on 10/5/2010 went to school but when there the teacher told her to go the police station. It is then she was given a letter to go and pick the child from St. Martin and after 3 days, she learnt that the culprit had been arrested.

CWM (PW5) recalled that on 6/5/2010 at 4.00 p.m., PW1 went to her home and spent the night; she went to school next day and thereafter would go to her grandmother. The next day she called PW4 but PW1 had not arrived there. PW5 went in search of PW1 at Ngomongo, reported to police, she later found PW1 at St Martin.

The complainant was examined by Dr. Maneti Kariuki who filled a P3 form which was produced in court by Dr. Maneti Kariuki (PW6). The Doctor estimated PW1's age to be 12 years. The Doctor had found that her clothing were stained with blood, her hymen was torn with a fresh tear, the vagina had blood stained discharge but no spermatozoa and there was evidence of penetration.

The appellant was arrested by Cpl Richard Nyakora (PW7) on 14/5/2010, after he received information that he had been sported in Nyahururu Town at a petrol station.

The Investigation Officer in this case was PC Hillary Kiprono. He read from the children desk of a report of defilement on 8/5/2010. He recorded a statement of the victim, PW2 and PW3. The culprit was described as having dreadlocks and a motor cycle rider. It is PW8 who escorted PW1 to hospital.

Chief Inspector, Allan Ogolla on 15/5/2010, conducted a parade where the complainant identified the appellant.

When called upon to defend himself, he opted to make an unsworn evidence. He said that on 13/8/2010, he had gone to Nyahururu to visit his uncle who had been arrested with a motor cycle offence. When he took food to him, the Officer Commanding Station asked why he had rastas and arrested him. He was informed that there was a complaint of defilement by a person who had rastas and a parade was done but no other person had rastas on the parade. He denied having defiled the complainant but that there is a case Cr. 91/2011 in which the same family made him be charged but he had been released on bond and that they had given him one of their motor cycles to use for business and that the complainant in the case

wanted him to marry her but he refused.

As the first appellate court, I am required to analyse and evaluate the evidence afresh and arrive at my own conclusions always bearing in mind that I did not have the advantage to see and weigh the demeanor of the witnesses.

Having considered all the evidence on record, I am satisfied that there is overwhelming evidence that PW1 was defiled on the night of 6/5/2011 and 7/5/2011. There is overwhelming evidence from PW1 herself, PW2 and PW3, the good Samaritans who saw the girl crying and unable to walk and took her to hospital, reported to police and gave her accommodation. The Doctor who examined the complainant found the hymen torn, had bruises and lacerations and bloody discharge. There is a treatment chit from Nyahururu Hospital issued on 8/5/2010, where she continued for treatment for a while.

Was the charge sheet defective?

The appellant alleges that the names of the complainant in the charge sheet are different from those she gave when she testified rendering the charge sheet fatally defective. In the charge sheet, the complainant is names as **"MWW".** When she testified, PW1 identified herself as **"MW**M the treatment cards, the complainant was identified as MW. The difference between the names is in the last names. In my view, there is no evidence that the complainant is not the same as the person named in the charge sheet. There is no offence in one having more than three names. The difference in the last names was not an issue at the trial. Maybe it would have been clarified. The difference in the last names does not render the charge sheet fatally defective. Both names may be hers or her parents and that cannot be ascertained at this stage.

The appellant complains that he was not properly identified. The complainant was accosted during the day time about 5.00 p.m. The assailant was with her till the next morning. She told the court that she was able to see the person well as he defiled her. When she met PW2 and PW3, PW1 described to them the person as having dreadlocks and a motor cycle. It is the same report that she made at the police station. The trial court was satisfied that the complainant identified the appellant having met during the day, even if the act was committed in the night, the complainant had had ample time to see the person who had abducted her. The appellant was arrested on 14/5/2011 which was soon after the incident. On the parade the complainant picked him out. Though the appellant claims to have been the only one with dreadlocks, PW1 said 5 of the members of the parade had dreadlocks and PW9 did corroborate her evidence. I am satisfied that PW1 ably identified the appellant on the parade out of other members with dreadlocks because PW1 had seen him during the day and had spent the whole night together in close proximity. Contrary to what the appellant alleges that no parade form was produced, the record contains the parade form produced in evidence as PEx.3 by PW9 Chief Inspector Ogola.

The complainant told court that she is 12 years and in class 4. PW6 estimated her age at 12 years too. She is a minor. The court conducted a voire dire examination and was satisfied that she possessed the necessary intelligence and understood the meaning of the oath. She testified on oath and was subjected to cross examination by the appellant. She did not falter in her evidence at all. The appellant complains that her evidence should have been corroborated. **Section 124** of the **Evidence Act** was amended and there is no longer a requirement that such a witness's evidence be corroborated. It is enough if the trial court believes the witness and is satisfied that the child is telling the truth. **Section 124** reads as follows:-

"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

Although the trial court did not warn itself of the danger of relying on a minor's evidence, the trial court believed the testimony of PW1. That court had an opportunity to see and assess the demeanor of PW1 and this court would have no business interfering with that finding.

The appellant also complains that the Resident Magistrate did not have jurisdiction to pass the sentence he imposed on him and that the sentence offends **Section 7(2)** of the **Criminal Procedure Code**. Under **Section 7(1)(b)** of the **Criminal Procedure Code** the Resident Magistrate has jurisdiction to pass any sentence under the **Sexual Offences Act**. It reads:-

"**S.7(1)(b). A resident Magistrate may pass any sentence authroised by law for an offence under Sections 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006."**

The Resident Magistrate had the jurisdiction to hear and determine any offence under the **Sexual Offences Act, 2006** and pass sentence accordingly.

The appellant also complained that the prosecution failed to call important witnesses. Under **Section 143** of the **Evidence Act** there is no specific number of witnesses that need to be called to prove a particular fact unless a particular provision of the law requires so. **Section 143** of the **Evidence Act** provides:-

S.143. No particular number of witnesses shall, in the absence of any provision of law t the contrary, be required for the proof of any fact."

Even one witness is sufficient to prove a fact upon which the court can found a conviction. The court cannot lose sight of the fact that most sexual offences are committed in secret or seclusion so that the victim may be the only witness to the act.

Having analysed the evidence afresh and arrived at my own findings, always being in mind that I did not have the advantage of seeing the witnesses testify to determine their demeanor, I am satisfied that the appellant was properly convicted. Under **Section 8(3)** of the **Sexual Offences Act**, a person who commits an offence of defilement of a girl aged between 12 years and 15 years is liable upon conviction to a term of not less than 20 years. The trial court imposed the minimum sentence. The sentence is lawful. In the end, I find that the sentence is safe and is hereby confirmed. The court will not with interfere with both the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED this 23rd day of January, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Appellant in person

Ms Idagwa for the State

Kennedy – Court Clerk