REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPLICATION 220 OF 2011

LAMECK MOMANYI NYAKUNDI…….....……..APPELLANT

VERSUS

REPUBLIC……...…..RESPONDENT

JUDGMENT

Lameck Momanyi Nyakundi was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. In the alternative, he was charged with the offence of indecent act contrary to **Section 11** of the **Sexual Offences.** After a full trial, Ms B. Kituyi, Resident Magistrate, convicted the appellant on the main charge and sentenced him to life imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal citing the following grounds:-

1. That the trial court relied on the hearsay and uncorroborated evidence of the complainant;

2. That there were glaring contradictions in the P3 form and the evidence of the prosecution witnesses;

3. That that trial court failed to consider the appellant's defence;

4. That the prosecution failed to prove its case beyond any doubt;

5. That the sentence is harsh and excessive.

The appellant prays that the conviction be quashed and sentence set aside. The appellant was represented by Mr. Muiru who made substantive submissions

Mr. Marete, the Learned State Counsel, opposed the appeal for reasons that the Doctor (PW1) who examined the complainant found her to have been defiled; the complainant knew the appellant before and that the court admitted the complainant's evidence under **Section 124** of the **Evidence Act**.

I have considered both the submissions of the appellant's counsel, the State Counsel and the evidence on record. The complainant, S.K (initials used to protect privacy) (PW2), a child of tender age, did not know her age at the time she testified. Her father, PW3, S.N(name withheld) testified that she was born on 9/5/2005 and was therefore about 4 years old at the time the incident occurred. The P3 form that was filled by PW1 and PRC forms from the Ministry of Health all show that the complainant was 4 years old. Upon examination by PW1 and the examiantion done at the hospital, it was found that PW2's hymen was broken with a fresh injury and the vulva was swollen. A vaginal swab taken showed that there were

pus cells and spermatozoa. PW1 was of the opinion that the child was defiled. The tear to the hymen and injury to the vulva was evidence of penetration and I am in agreement with the finding of the trial magistrate that the child was defiled. The only question is then, who committed this heinous act?

After the voire dire examination, the court found that the complainant did not understand the meaning of the oath and correctly directed that she give unsworn evidence and she was subjected to cross examination although she was not supposed to be cross examined. It is only evidence given on oath that would be subject to cross examination. Subjecting the complainant to cross examination did not, however, prejudice the appellant's case in any way.

Ordinarily, the evidence of a minor will require corroboration if the court were to found a conviction based on it. **Section 124** of the **Evidence Act**, however, provides that the court can rely on the uncorroborated evidence of a minor in sex related offences if the court believes the child to have been truthful. The Section states as follows:-

"S.124. Notwithstanding the provisions 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.

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."

PW2 is the only witness to this incident. She told the court thus:-

"On 16/10/09, my mother had sent me to buy chapattis then I found uncle Lameck at his house and he told me to come and drink 'uji'. But I did not drink it. He did to me bad manners from where I use to urinate. I did not remove blood but I was feeling pain. My mother examined me and found I was wet. I told the Doctor that Lameck had done to me bad manners."

Although the trial court did not go further to find out what PW2 meant by bad manners, from the above account, PW2 clearly stated that the bad manners was done where she urinates and she felt pain. As a result of the bad manners she was also wet. PW4, D.S, a neighbour and grandmother to PW2 was called by PW2's mother and together they examined PW2 on 16/10/2009 about 7.30 a.m. and saw semen in PW2's private parts. PW2 was taken to hospital on the same day and was found to have been defiled. I take into account the fact that PW2 was a child of tender years and she may not even have had the proper words to use to define what happened to her. The words 'bad manners' are commonly used by children to describe sexual acts. The finding of PW1 and what the hospital found do corroborate PW2's evidence that indeed bad manners were done to her which means defilement.

There is no dispute that the appellant was known to PW2. Infact PW2 believed that the appellant is her father's brother because she called him uncle. PW2's father, PW3, S.N(name withheld) denied that he is related to the appellant but they lived in the same plot – the applicant lived 2 houses from where PW2 lived.

The appellant complains that there were contradictions in the prosecution case. Counsel submitted that there were no blood stains on the complaint's dress. PW1 said that when he examined the complainant, he saw a dry yellowish stain on her dress. The Medical Officer who filled the P3 form (PW1) on 19/10/2009 also noted that there was a dry stain on the complaint's dress but upon examination, saw no discharge or blood. I find no contradiction in the prosecution case as regards what was found on the dress. It is true that the police did not take the vaginal swab and dress for further investigations but that is not contradictory.

The appellant's counsel also submitted that the medical evidence is falsified because whereas PW1 told the court that PW2 was injured, when she appeared before him for examination, she was stable and playful. PW1 was examining PW2 on 19/10/2009, 3 days after the incident. PW2 is a child aged about 4 years. It would not be put beyond her to be playful even when sick. The fact that she was playful 3 days after the incident does not make the evidence false.

The appellant's defence was two pronged; first, that there was bad blood between him and the complaint's mother and secondly, that he was not at home when the incident allegedly occurred. Unfortunately, the complaint's mother was not called as a witness. The Investigating Officer (PW5) told the court that she was unwell and that is why she was not in called. She did not witness the incident and so her evidence would have been more or less like that of PW3 and PW4's. The appellant told the court that the complaint's mother had wanted to befriend him but he refused. However, at no stage during the prosecution evidence did the appellant make such an allegation either to PW3 (complainant's father) and PW4 or even the police officer. He claimed to have told PW3 about his relationship with his wife before but it is surprising that counsel did not put any such question to PW3 during cross examinaiton. Then came DW1, A.B(name withheld) who the allegation that the complaint's mother had also wanted him. DW3 also alleged that the lady had loose morals and also wanted to sleep with him. Having had the opportunity to raise this allegation during the prosecution case and the appellant did not, I do not believe the appellant's evidence and his witnesses. The story is an afterthought and a lie. If there was a dispute between the complaint's mother and the appellant, then how did the complaint get to be involved? The appellant wants the court to believe that somebody else defiled the complainant and then it was framed on him. The child was very clear, it was Lameck whom she even thought was an uncle who did bad manners to her.

The defence raises an alibi that the appellant was at work on 16/10/2009 in the morning, having left the house at 5.00 a.m. and returned home at 2.00 p.m. The complainant did not state the time of the incident but PW4 said she was called at 7.30 a.m. after the incident had occurred. Having been in agreement with the prosecution evidence that it is the appellant who defiled the complainant, I find the alibi to be an afterthought. It does not displace the prosecution evidence. The prosecution should have been notified of the alibi so that it could respond. In any event, the court doubts that a child of 4 years would have orchestrated such a serious allegation against the appellant. The conduct of the complainant, going into the appellant's house persuades this court to doubt that likelihood of there having been a grudge between the appellant and PW2's mother. The appellant got his friends to come to lie to court. The defence is rejected and dismissed.

The appellant was charged and convicted under **Section 8(1)** of the **Sexual Offences Act.** The complainant was only 4 years old and the sentence prescribed under **Section 8(2)** of the **Sexual Offences Act**, is life imprisonment. I find no reason to interfere with either the conviction or sentence. The appeal is hereby dismissed. It is so ordered

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE
PRESENT:
Ms Kahunga for the appellant
Mr. Chirchir for the State
Kennedy – Court Clerk