REPUBLIC OF KENYA

INT HE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO 78 OF 2008

F M N.....APPLICANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

The Charge

[1]. The Appellant was charged with Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. He defiled A F, a child of the age of 8 years. He was also charged with an alternative charge of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act. He was convicted to imprisonment for life. Aggrieved by that judgment, he filed this appeal.

The Appeal

[2] The appeal proposed 5 grounds namely; contravention of rights under Section 77 (1) of the constitution; failure to call vital prosecution witnesses; conviction and sentence not backed by evidence; trial suffered procedural irregularities; and the grounds of appeal were done without the advantage of proceedings.

The Magic Words: ‘’Intentionally and Unlawful’’

[3] These words “unlawfully” and “intentionally” requires an instant settlement by the court of the submission by the counsel for the Appellant that the charge herein is defective for it does not use those words as required by the law. Counsel seems to be quite fetish about, and holds unusual fervour for the decision in the case of **NKR HCCRA NO. 11 OF 2008 ERRO OBA V REPUBLIC**.

[4] The point raised by Mr Riungu is one of jurisprudential importance especially now that we have the Constitution, of Kenya 2010 and existing laws which must conform to it. But a more fundamental task is to appreciate the provisions in Sexual Offences Act by giving them an interpretation that accords appropriate proportion of significance to the objects of that Act to wit:

An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.

[5] Doubtless, the provisions in the Sexual Offences Act are the linchpin law that governs sexual offences in Kenya. The Act superseded all the earlier law on sexual offences unless it is otherwise provided in law. It is that framework which underpins my explication of the position of the law on the issue herein, the way I know it. Offenses are established by law and cannot be presumed or implied. The offence of defilement is established under Section 8 (1) of the Sexual Offences Act and is found in the act of causing penetration with a child. Penetration is defined in Section to mean;

''.....the partial or complete insertion of the genital organs of a person into the genital organs of another.....''

[6] The act of penetration with a child is what constitutes the offence in question. Prior to the Sexual Offences Act, the provisions in the Penal Code on sexual offences adopted the words ''intentionally and unlawfully'' as part of the offence, and those words needed to be included in a charge sheet drawn upon those provisions. But, the Sexual Offences Act establishes sexual offences against a child on a totally different awareness on the rights of a child; the status of a child victim in criminal justice on sexual offences; the protection of a child from sexual harm; and the prevention from occurring and punishment of harm by sexual acts on a child through penal sanction. Therefore, it contains a regime of law on protection of child rights and also one that defines the status of a child victim in criminal justice. The offences against a child under the Sexual Offences Act, and especially defilement, does not use the words ''intentionally and unlawfully'' in the substantive section establishing the offence. That position of law is undergirded by plausible legal and constitutional considerations based on the legal presumption that the act of sexual assault on or sexual intercourse with a child is intentional and unlawful in law. And, indisputably, that intention is expressed in the presumptions in Section 43 of the Sexual Offences Act as to what and in which circumstances an act is deemed to be *intentional* and *unlawful*, and of particular significance is Section 43 (4) (f) that a child is presumed to be incapable in law of appreciating the nature of the act of penetration or sexual intercourse or any form of sexual act. In other words, a child is incapable of consenting to any sexual intercourse or activity. These are peremptory commands in international as well as domestic constitutional and statutory laws.

[7] One more thing; Section 3 of the Sexual Offences Act from which Mr Riungu's argument seems to draw legitimacy, relates to rape and does not extend to other offences especially those committed on a child. Where the law intends to use the words ''intentionally and unlawfully'', they have been so used in the text of the substantive provision. It will not, therefore, be defensible to read-in those words in a provision that is so clear and which is free from ambiguity. In sum, as a charge sheet should always be drafted keeping very much to the elements of the offence as established in the relevant law, the charge sheet in question adhered to the law. For those reasons, I find that the charge sheet herein is not defective. The argument by Mr Riungu represents the law before the entry of the Sexual Offences Act.

Failure to call crucial prosecution witnesses

[8] Mr Riungu urged that the prosecution did not call crucial witnesses. To him, the failure entitles the court to draw an adverse inference that the witnesses would have given adverse evidence to the prosecution case. There are legion judicial decisions on this issue and I do not wish to multiply them. Although he did not quote any judicial authority, from his submission he must have had in mind the decision of **BUKENYA AND OTHERS V UGANDA [1972] EA 549** which set the rule that has been applied with approval by our own Court of Appeal that:

i)....the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. ii).....the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case

iii)....where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

[9] But, in the same vein, the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be so inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence in this case, will discern whether it is appropriate to make an adverse inference on the uncalled witnesses.

Medical notes not produced; P3 Form is hearsay

[10] Mr Riungu urged another ground; that, other than the P3 Form, treatment notes that were not produced. He lamented that this is a serious charge where the Appellant suffered a sentence of life imprisonment and should have been conducted in a more serious manner by the prosecution According to Mr. Riungu, failure to produce the treatment notes, denied the Appellant an opportunity to interrogate those medical notes. Further, the doctor relied on the medical notes to fill in the P3 Form which then made it important that the notes ought to have been produced in court.

[11] M/S Mureithi argued that the P3 Form was sufficient medical evidence on which a safe conviction can be grounded.

[12] The subject of non-production of medical notes has been raised before in a great many cases. The general consensus amongst the judicial authorities on the subject is that, although it is desirable that medical notes are produced in the trial, failure to produce them is not fatal as long as sufficient medical evidence is produced. A P3 Form duly filled in by a medical doctor using the medical treatment notes is in itself sufficient medical evidence for purposes of a criminal trial. The sufficiency of the P3 Form is completed when it is supported by the evidence of the doctor at the trial.

[13] Therefore, it is not necessary that the medical notes be produced as long as it is shown by the doctor that the findings in the P3 Form were based on the initial treatment notes. Important also to note is that a P3 Form is informed by further examination that the doctor carried on the victim at the time of its preparation. It is sufficient for purposes of a trial and that cannot be under played. This thinking discounts the school of thought which posits that the evidence in the P3 Form is hearsay. It is not hearsay evidence in the sense of the four corners of the rule.

THE CONSTITUENTS ELEMENTS

[14] In defilement cases, there are three inextricable elements that the prosecution must proof namely;

(a) ***Was the victim a child?***

(b) Was there penetration; and

(c) Was the penetration by the Appellant*?*

Was the Victim a Child?

[15] The offence under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act relate to a child aged eleven years or less. It is the age of the child that determines the penalty applicable to the offence charged under the Act. That is why assessment of age should be properly done before the court. The Appellant submitted that no proper age assessment was done on the victim, PW2. He submitted that her age was just mentioned in the P3 Form in a casual manner and that was not sufficient proof of age.

[16] The court conducted a *Voire Dire Examination* on PW1 and found she possessed sufficient intelligence to testify- she was competent. She told the trial court that she was 8 years old and was in Standard 3 at [Particulars Withheld] School. She even remembered and gave the age of her sister K whom she said was 10 years old. She gave a clear account of events and dates. In addition, PW6, the doctor testified that the victim (PW1) was aged 8 years at the time. There was no formal certificate that was produced. But let me state that age assessment does not necessary mean certificate of birth. The court could still come to a conclusion of the age of the victim from other evidence. In this case the evidence of PW1 and that of the doctor showed she was 8 years old and, therefore, below the age of eleven years. Thus, Section 8 (2) of the Sexual Offences Act would apply. I find that PW1 was 8 years old.

Was there Penetration?

[17] No doubt PW6 confirmed that there penetration of the genital organs of PW1. He described it in medical term

…....“***findings consistent with vaginal penetration and ejaculation therein”.*** He recorded that information in the P3 Form.

Was the Penetration by the Appellant?

[18] This is the thrust of the matter. Was there evidence which identified the Appellant as the person who caused the penetration with PW1? The evidence of PW1 was clear that the Appellant lured her by promising to purchase her mandazi. He told her that they were going to his hotel across the river where she would be given mandazi. But near the “big river” he wrestled PW1 to the ground and squeezed her throat with threats that he would throw her into the river if she screamed. He also threatened to stab her with a knife he was holding. The squeezing of the throat made her bleed from the mouth and nose. The Appellant then removed ‘’his trouser and removed his “thing” which he put into mine’’. As a result she bled. I believe “his thing” refers to the Appellants genital organ while ‘’which he put into mine” refers to the genital organ of PW1.

[19] The Appellant was known to PW1 as her father for he had lived with her mother. She even recalled that her mother used to take alcohol and so also the Appellant. And when he came home drank, he used to beat her mother. Her mother also used to beat the Appellant. She remembered little but important details such as the Appellant had at one time attempted to commit suicide by taking medicine. She knew and recognized the Appellant by name and physical appearance. The trial magistrate believed her evidence and he was the best placed officer to make that kind of observation. There is nothing on record which materially negates that finding. Accordingly, that evidence would have entitled the trial court to convict on the evidence of a single victim witness as long as he records the reasons that he was satisfied that the victim was telling the truth. That authority is granted by the proviso to Section 124 of the Evidence Act. But the evidence by PW2 rendered further credence to the evidence of PW1. PW2 was with PW1 when the Appellant promised them mandazi. The Appellant used the promise of mandazi to lured PW1 into accepting to go with him to get mandazi for her friends. PW2 confirmed that it

was the Appellant who took PW1 to get mandazi for them. The trial court heard these witnesses and believed PW1 was telling the truth. All the other witnesses rendered credence to the evidence of PW1. I do not think therefore, that the identification of the Appellant by recognition was attended by any possibility of a mistake on the part of PW1. PW1 gave a clear account and she was positive the person who penetrated her genital organs was the Appellant.

[20] With all the foregoing analysis, the evidence adduced supported the charge and the prosecution proved its case beyond any reasonable doubt.

[21] The Appellant did not argue some grounds especially the one on alleged violation of his rights. The ground fails.

[22] The upshot is that I dismiss the appeal, uphold the conviction and sentence imposed by the trial court. Orders accordingly

Dated, signed and delivered in open court at Meru this 22nd day of October, 2013

F. GIKONYO

JUDGE