REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 188 OF 2013

STEPHEN MUGO GITHAKA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO (J.N. MWANIKI – S.R.M) IN CRIMINAL CASE NO. 17 OF 2011 DELIVERED ON 5TH APRIL 2011)

JUDGMENT

This appeal was placed before me for hearing on 15th October 2013 during the Judicial Service Week pursuant to the directions of the Chief Justice under Gazette Notice No. 13601 of 4th October 2013.

The appellant herein was charged before the Senior Resident Magistrate at Baricho Court Mr. J.N. Mwaniki with the charge of defilement of a girl contrary to ***Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act*** No. 3 of 2006. The particulars were that on the 7th day of January 2011 in Kirinyaga South District within Central Province he penetrated with his penis into the vagina of one AWN a girl aged 6 years.

The appellant also faced an alternative charge of indecent assault with a child contrary to ***Section 11 (1) of the Sexual Offences Act No. 3 of 2006*** the particulars being that on the same day and place, he did commit an indecent act with AWN a child aged 6 years by rubbing his pennies against her buttocks.

After hearing the eight prosecution witnesses and the appellant, the trial magistrate delivered a judgment on 5th April 2011 in which he convicted the appellant on the main count and imposed the mandatory life sentence.

It is against that conviction and sentence that the appellant has now moved this Court to quash that conviction and set aside the sentence. He filed eight grounds of appeal and also addressed me during the hearing of the appeal. The grounds of appeal may be summarized as follows:-

1. ***That he pleaded not guilty***
2. ***That the trial magistrate erred in law and fact by not considering that the appellant was not taken for medical examination.***

3. ***That the trial magistrate erred in law and infact by not considering the inconsistencies in the evidence of PW2.***
4. ***That the trial magistrate failed to consider that the appellant was not provided with witness statement during the proceeding***
5. ***That appellant was arrested on the third day yet he was at home all the time.***
6. ***That there was a grudge between appellant and complainant's family***
7. ***That the complainant was coached and did not testify on the first day***
8. ***That the magistrate erred in law and infact by failing to consider his defence.***

Ms Kambanga State Counsel supported both the conviction and sentence. This is a first appellate Court. The duty of such a Court, as was held in ***OKENO VS REPUBLIC 1972 E.A 31*** is

"..... to reconsider the evidence, evaluate it itself and draw it's own conclusions in deciding whether the judgment of the trial Court should be upheld"

In performing that duty, I must be cognizant of the fact that I neither saw nor heard the witnesses who testified before the trial Court and must therefore give due regard to that situation. I have considered this appeal in light of the above principles.

The complainant was aged 6 years at the time of the incident subject matter of this appeal. This was confirmed by Mr. Hezron Macharia (PW6) a Clinical officer at Kerugoya District Hospital who examined her some two (2) hours after the incident and confirmed that complainant's vagina was bruised and swollen and her hymen was torn. She was also bleeding with a discharge around her genitalia. Laboratory results showed pus and numerous red blood cells and he concluded that she had been involved in penetrative sexual intercourse. He produced the P3 form, treatment chit and lab results – Exhibits 3, 4 and 5 respectively.

On her part, the complainant who gave un-sworn evidence following a voire dire examination testified that, she was going to school on the material day, the appellant whom she knew called her and told her that she was being called by her father inside the sorghum plantation in which he led her, removed her biker and proceeded to defile her. Doris (PW2) found her crying and took her to her grandparent who took her to hospital.

DWK is a cousin to the complainant and on the material day at about 1 p.m., she was at home cooking when she heard screams coming from the shamba of appellant's family. She went to find out what was going on and found the appellant who is a neighbour trying to wipe the complainant's soiled dress.Complainant was hysterical, could not walk and was vomiting. She also had no pants. D took her to MERCY WANJA NKONGE (PW3) who together with ZIPPORAH MUTHONI (PW7) examined the complainant and found she had no pants and had a discharge in her private parts. She was handed over to her father ELIUD MUNYI MURIUKI (PW5) who took her to hospital and later the matter was reported to P.C. ANNA ACHIENG (PW8) at Sagana Hospital and a P3 was issued and she took possession of complainant's torn biker.

The appellant's answer to that testimony was to confirm that indeed the complainant was her neighbour but he added that all the witnesses had a grudge against him following a land dispute. He said he was not at the scene and had travelled to Ngariama for business and was arrested on 9th January 2011 while asleep in his house.

In supporting the conviction and sentence, Ms Kambanga stated that the appellant was known to complainant and her evidence had been corroborated and further the appellant's defence was considered.

The above was the evidence before the trial magistrate.I have re-considered and re-evaluated it as required of me.The complainant was aged 6 years at the time of the incident as was confirmed by the Clinical officer Mr. Hezron Macharia (PW6). The magistrate did carry out a voire dire examination of the complainant as required by law before allowing her to give un-sworn testimony

in which she gave a vivid account of how the appellant whom she knew as a neighbour lured her into the shamba, removed her biker and defiled her. DK (PW2) who was alerted by complainant's screams says she went to the shamba where she found the appellant trying to wipe the complainant's clothes. The complainant was hysterical, could not walk and her biker was torn. She told PW2 that the appellant had laid on her and when she was examined by Mr. Hezron Macharia later the same day, he confirmed that she had been defiled. Prior to that confirmation, other witnesses including MERCY NKONGE (PW3) and ZIPPORAH MUTHONI (PW7) had examined the complainant and detected a discharge in her genitalia. The appellant's defence was to raise an alibi adding that the witnesses had a grudge against him.

In the face of the above evidence, the trial magistrate could only arrive at the decision that he did. Appellant himself confirmed in his defence that the complainant was his neighbour. His recognition at the scene of the evidence could not therefore be an issue.He was seen by DK (PW2) soon after the incident trying to wipe complainant's dress and in the circumstances, his alibi could not be supported by the evidence on record. He says he was not taken for medical examination and that neither was his defence considered. At no time did the prosecution allege that he infected the complainant with a venereal disease as he alleges in his grounds of appeal.The evidence of Mr. Hezron Macharia on that issue was clear. He said:-

"On the genitalia, she had bruised inner and outer vagina which was swollen. She had a torn hymen. She was bleeding from the genitalia injured. She had a crowdy (sic) discharge around the entire genitalia. Lab results showed pus cells, numerous red blood cells. No spermatozoa were noted. She had no sexually transmitted disease. H.I.V examination was negative. I completed the P3 Form on 8th January 2011"

Therefore, not only did this witness confirm that complainant was defiled but he ruled out any possibility that she was infected with any disease. There was no need therefore to examine the appellant. His defence was considered by the magistrate who dismissed it as " ***a web of lies"*** and from the evidence of DK (PW2) who found the appellant with the complainant moments after the incident, the magistrate was plainly right in rejecting that line of defence. The complainant's evidence that she was defiled by the appellant was ably corroborated by that of DK (PW2) who found the appellant trying to clean complainant's dress.The evidence of DK (PW2) that the complainant ***"could not walk properly and was vomiting"*** , that she was "***hysterical***" and that the appellant was attempting to "***block her mouth***" sufficiently corroborated the complainant's evidence that the appellant was the person who defiled her on that day.

The appellant alleges that he was not given witness statements and that the witnesses have a grudge against him. Those issues were not raised at the trial and at no time did he put to the witnesses questions regarding grudges over land disputes. Indeed the trial magistrate also considered this line of defence and said in his judgment as follows:-

" Though the accused said he was only implicated following grudges with the complainant's family, there was no evidence of existence of such grudges which washed off good relationship between the two families as would make the witness herein act in concert to make up a case against the accused person"

The appellant also took issue with the fact that the complainant did not testify on the first day and was coached by her parents during her second appearance. It is true that the complainant was due to testify on 14th February 2011 but was stepped down and ended up testifying as the last prosecution witness on 15th March 2011.That was perfectly procedural.The prosecution can step down a witness and recall him later if they so wish. Further, it is not the law that the complainant must testify first. The prosecution are at liberty to start with any witness in support of their case. And on the allegation that the complainant was coached, the appellant did infact put this question to the complainant who replied him as follows:-

"I came to Court today in company of my mother. She told me I would come to talk in

Court. She never told me what to say. Only say what happened (sic) you told me my father was calling"

It is therefore clear that the complainant denied having been coached and indeed none of the witnesses were even asked if they coached the complainant.

As indicated earlier in this judgment, the complainant was the only eye witness. She was aged 6 years at the time of the offence.The trial magistrate was alive to the provisions of ***Section 124 of the Evidence Act*** particularly that he could convict on the evidence of the complainant's sole evidence ***" .....if satisfied that the alleged victim is telling the truth"*** - see the provisal to ***Section 124 Evidence Act***. The magistrate stated as follows with regard to complainant's evidence:-

" Complainant was aged only six (6) years when she testified. However this Court being alive to the provisions of Section 19 of the Oaths and Statutory Declaration Act (Cap 15) relating to taking of evidences of children of tender years did conduct a voire dire by putting several probing questions to her and the Court did form an opinion that although she did not understand the nature of an oath was possessed of sufficient intelligence and understood the duty of speaking the truth"!

The magistrate was no doubt referring to the provisions of ***Section 19 of the Oaths and Statutory Declaration Act***. I am satisfied that there was substantial compliance with the said Act before the complainant testified. In any case, the evidence of DORIS (PW2) was ample corroborative evidence.She saw the appellant wiping the complainant's dress moments after the incident. Corroborative evidence is evidence that:-

" ------ strengthens or confirms what other evidence shows (especially that which needs support ....."

In ***MUTONYI VS REPUBLIC 1982 K.L.R 203*** the Court of Appeal said the following above corroboration:-

"... an important element in the definition of corroboration ..... is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particulars not only the evidence that the crime has been committed but also that the accused committed it -----"

The appellant was the only person with the complainant when D saw them. He was wiping complainant's dress and trying to block her mouth.Complainant was hysterical, could not walk properly and was vomiting. That evidence sufficiently connected the appellant to the offence facing him.

From the totality of the above evidence, the conviction of the appellant was inevitable and I have no reason to fault the magistrate's finding. I dismiss the appeal on conviction.

With regard to sentence, the complainant was aged six (6) years at the time of the offence and ***Section 8 (2) of the Sexual Offences Act*** imposes a mandatory life sentence.The trial magistrate had no option but to impose that sentence.

The result is that this appeal is dismissed.

B.N. OLAO

JUDGE

22ND OCTOBER. 2013

22/10/2013

Coram

B.N. Olao – Judge

CC - Muriithi

Appellant – present

Mr. Sitati State Counsel present

Language – Kiswahili/English

COURT: Judgment delivered this 22nd day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court Clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

22ND OCTOBER, 2013