



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
(CORAM: F. GIKONYO J)

CRIMINAL APPEAL NO 229 OF 2009

ABDUBA GALANA WAKO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from the judgment by CHARLES OBULUTSA, SRM in MOYALE SRMCCRC NO 177 OF 2008 dated 17.12.2008)

JUDGMENT

INTRODUCTION

[1] The Appellant was charged with defilement contrary to section 8(1) and (3) of the Sexual Offences Act. It was alleged that on the 20th day of May, 2008, at about 1100hrs between [particulars withheld] Township and [particulars withheld] in [particulars withheld] within Moyale District of the Eastern Province, the Appellant defiled D A, a child aged 15 years.

[2] He was tried and convicted for the offence by CHARLES OBULUTSA, SENIOR RESIDENT MAGISTRATE. The magistrate sentenced the Appellant to a term of 20 years imprisonment.

The Appeal

[3] Being aggrieved by the conviction and sentence, the Appellant filed this appeal. From the grounds which he filed on 29.10.09 and those he added through his written submissions, the significant grounds of appeal are that;

- 1) The trial magistrate did not consider that his rights under section 72(3) of the Constitution (hereafter the repealed Constitution) were contravened;
- 2) The trial magistrate failed to note that the prosecution did not take him for medical examination;
- 3) The trial magistrate did not observe the charge was defective;
- 4) The trial magistrate did not observe the exhibits were not proved to belong to the complainant;

- 5) The trial magistrate did not observe that the evidence by the prosecution was a fabrication and contradictory;
- 6) The trial magistrate did not find that his defence had not been challenged by the prosecution instead it dismissed his defence without a good reason; and
- 7) The trial magistrate did not indicate the section under which he convicted him thus contravening section 169(2) of the Criminal Procedure Code (hereafter CPC)
- 8) There was no proper identification

The Appellant's submissions

[4] The Appellant argued that his rights under section 72(3) of the repealed Constitution were contravened. He stayed in police custody for 19 days. The trial magistrate did not make any finding on this matter.

[5] He argued further that there was no proper identification particularly by PW1. Two important things were lacking; PW1 did not state the period the alleged offence lasted; and for how long she observed the person who defiled her. Thus, her evidence on identification of the Appellant was not worth of believe. He quoted **KAVETA AND OTHERS v REPUBLIC CR APP NO 65 OF 1986**. There ought to have been an identification parade for PW1 did not know him before the alleged offence. This omission nullified the evidence by PW2 and PW3. PW4, PW5 and PW7 gave a description to the court which does not fit him. The evidence by PW2 and PW3 that they followed the tracks by an alleged wheelbarrow he was pushing was pure fabrication. The witnesses did not describe the condition of the surface on which the tracks were alleged to be visible. The wheelbarrow was not even produced as exhibit. Therefore, the evidence by PW1, PW2, PW3, PW4, PW5 and PW7 was rendered not worth of believe.

[6] The Appellant also wondered how PW1 could not raise any alarm or scream after she had been defiled. The scene of the offence was a public path and he wonders how nobody else witnessed the "grabbing" of PW1. All these lapses discredit her testimony and create reasonable doubt on her story.

[7] He further submitted that the prosecution did not prove its case beyond reasonable doubt. According to him, PW1 talked of medicine and sugar without providing any evidence that she had purchased the items. She did not provide the identity of the doctor who prescribed the medicine or a letter of permission from school to go for medical treatment.

[8] That is not all. He submitted that he was not examined and therefore, was not connected to the offence. Even the P3 Form produced in court was not but a part of the wider scheme to fabricate this case against him. It has no date when the examination was done on PW1, the age of the injuries is not stated and classification of the injuries is not stated. All these lapses deny the prosecution's case the vitality of the requisite proof beyond any reasonable doubt. He relied on the case of **CHARLES KIBARA MURAYA v REPUBLIC CA CR APP NO 330 OF 1987**.

[9] The Appellant did not stop there. He submitted that he raised an alibi defence which was not challenged by the prosecution as required by section 211(3) and 212 of the CPC. This evidence was not evaluated by the trial court and it may have provided the circumstances in which he came into possession of the medicine and sugar. He was not even charged with an offence on the said items he was allegedly found with. He relied on **STEPHEN MUNGAI MACHARIA v REPUBLIC CA CR APP NO 1 OF 1994**.

[10] The trial magistrate erred as he did not specify the section under which he convicted and sentenced which violated section 169(2) of the CPC.

[11] For those reasons, he prays that his appeal be allowed and he be set to liberty.

The state opposed the appeal

[12] M/S Muriithi submitted on behalf of the Respondent. She opposed the appeal and submitted that the prosecution adduced sufficient evidence to prove the charge. The Appellant was found in possession of the medicine and sugar which she had purchased. The defence offered was considered by the trial court and found it not to be credible. The sentence of 20 years imprisonment imposed on the Appellant was proper as it is the prescribed penalty where the victim is aged 15 years. PW1 was 15 years old. She asked the court to dismiss the appeal.

COURT'S RENDITION

[13] I have the onus of re-evaluating the evidence as recorded by the trial magistrate and come to my own conclusions and findings. See **OKENO v REPUBLIC**.

[14] PW1 was aged 15 years at the time of the offence. The trial court conducted a *Voire dire* examination and allowed her to give sworn evidence. She was in standard 8 at [particulars withheld]. On 20.5.2008, at about 10:00am, she left school for a dispensary at [particulars withheld]. On her way home, she met the Appellant on [particulars withheld] Oba Road and went past him. The Appellant had a wheelbarrow. He followed PW1 and grabbed her, gagged her, took her to the bush, undressed her-skirt, petticoat and pant. He then defiled her. After the defilement he fled with her medicine and sugar. She went home and reported to her mother what had happened. She was taken to the police. She was issued with a P3 Form. She was then examined. She also told her teacher about the incident and the teacher arrested the Appellant. She said the Appellant was wearing a red pant.

[15] B B testified as PW2. He is a resident of [particulars withheld] and a teacher at [particulars withheld]. He was at home on the material time. He found a group of people and a man who claimed that his granddaughter had been defiled. The description given showed that the assailant had a wheelbarrow. They then followed the track marks made by the wheelbarrow which led them to the home where the Appellant was. He denied that he had defiled PW1. PW1 was called and identified the Appellant.

[16] Bro G S was PW3 and the head teacher of [particulars withheld]. On the material time, PW1 was absent from school due to sickness. He heard commotion and sent a teacher to find out what was happening. The teacher brought a report that there was a girl who had been defiled. He asked the teacher to trace the assailant. He was later called to the house where the Appellant was. PW1 was called to identify the Appellant, which she did. She had given them his description. They recovered some medicine from him. He identified the medicine in court.

[17] The chief for [particulars withheld] also testified as PW4. He said that on 20.5.2008 at midday, he was in town when he heard a woman crying. Upon enquiry, the lady told him that her daughter had been raped. The girl was also there crying and her dress was torn. He then quickly clarified that it was her petticoat which had been torn. He organized for the girl to be taken to the police station. They also looked for the suspect and also took him to police station. They searched him and found some medicine in his jacket which the girl identified as the ones she had been given at the hospital.

[18] PC Peter Nthumbi and PC Rotich of Sololo police station were investigation officers in the case. They testified as PW5 and PW7 respectively. PW5 recorded the report for defilement in the Occurrence Book (OB) on 20.5.2008 at 1.30pm. The complainant was PW1 who was accompanied by her mother. At 4:00pm, the suspect was brought to the police station by the chief and teachers. He searched the suspect and found some tablet and complainant's prescription card in his jacket. The suspect was the Appellant.

[19] PW7 recorded the statement by PW1 and issued her with a P3 Form. He also visited the scene. The suspect was then brought by the chief and teachers and was received by him. He searched his jacket and found sugar and medicine, which the complainant identified as hers. He also kept the girl's petticoat as an exhibit.

[20] PW6 was the doctor who examined and filled in the P3 Form for PW1. On examination he found

bruises on the thighs, stains on the inner cloths which could have been secretion or sperms, the hymen was not freshly perforated, and there were bacteria. There was also presence of blood cells in the vagina which showed trauma. The examination was done after three days of the incident.

Issues

[21] In defilement cases, there are three inextricable constituent elements which must be proved by the prosecution. The constituent elements constitute the issues for determination in this appeal which are as follows;

- (i) Whether the complainant was a child;
- (ii) Whether there was penetration; and
- (iii) Whether the penetration was by the Appellant. This issue will entail a determination on whether the Appellant was properly identified as the person who defiled the complainant.

Whether the complainant is a child

[22] PW1 told the trial court that she was 15 years having been born in 1991. The incident took place on 20.5.2008. Simple mathematics rule show that she was not 15 years at the time. She was 17 years or thereabout. Besides the evidence of PW1, the only other evidence on age is the P3 Form which merely indicated age as 15 years. A P3 Form alone is not enough to prove age. The evidence of PW4, although it mentioned that a girl aged 15 years reported the defilement, was not helpful also, for it was based on nothing and is not evidence by an expert. I am aware that age assessment does not mean certificate of birth as the court could use other methods and information to settle the question of age of the complainant. But in this case, as I have stated earlier, there was no evidence of the age of the complainant. See the decision by Prof Ngugi J in **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC**:

"...that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".

[23] Looking at the evidence before the trial court, this could be a borderline case, if I go by the year of birth provided by the complainant. In such circumstances, where there is uncertainty on the age of the complainant, it is imperative that the court orders for a formal age assessment. The complainant is not a child of tender age which the court would easily observe. Therefore, without the evidence which the court can use to assess the age of the complainant, it is extremely difficult to answer the question: Whether the complainant was a child. The age of the victim serves important juridical purposes: 1) minority age brings the victim within the provisions on sexual assault on children; and 2) the age of the victim determines the penalty applicable on the assailant. The lapse herein creates untidy state of affairs and everything is confused. For instance, the section under which the Appellant has been charged is completely obscured, and any possibility for the court to consider the offence of rape, which would be a lesser offence, is also blown away for the court cannot even place her under the majority age. The court is lost and is unable to discern whether she was 15 years or 17 years or 18 years or of any other particular age. On this ground alone the appeal succeeds. But let me decide on the other issues for completeness of record.

Was there penetration?

[23] Section 2 of the Sexual Offences Act defines penetration as:-

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

organs of another person"

PW1 did not specifically tell the court that there was *partial or complete insertion of the genital organs of the Appellant into her genital organs*. The trial magistrate just recorded that...*he then defiled me and on finishing he fled...* The word ‘‘defiled’’ in the context of the Sexual Offences Act has a legal meaning. It would have been most appropriate for the trial magistrate to have recorded the actual things which took place as narrated by the victim rather than contracting them into technical terms of law. Further, the evidence of PW6, the doctor who examined PW1, did not clearly turn up the aspect of penetration. He was not categorical on whether there was penetration in the sense of the law. He did not also state that PW1 was involved in sexual activity. He simply said... *there was presence of blood cells showing trauma*. He made other inconclusive findings for example that...*there were stains on the inner cloths which could be vaginal secretion or sperms....* Accordingly, there was no evidence that there was penetration.

Whether the Penetration was by the Appellant

[24] This question is answered in the negative for two reasons: One, the finding of the court in paragraph 23 of this judgment so settles the question; and two, identification of the Appellant was not properly done. The Appellant was a stranger to PW1. She did not give incontrovertible evidence which would eliminate any possibility of making a mistake. She did not provide any description to the police regarding her identification of the Appellant as the person who assaulted her. See **R V TURNBULL [1976] 3 All ER 549** on how the court should carefully handle evidence on identification by a single witness. The other witnesses especially PW2, PW3 and PW4 did not provide any cogent circumstantial evidence which would reinforce the evidence by PW1 on identification. Even if penetration had been proved, which I have said was not, there was no evidence sufficient to tilt the scales of the law toward a finding that the Appellant is the person who committed penetration to the genital organs of PW1.

ORDERS

[25] For the reasons above, I quash the conviction and set aside the sentence meted out by the trial magistrate. The Appellant shall be set to liberty forthwith unless he is lawfully held in custody.

Dated and signed this 28th day of November, 2013

F. GIKONYO

JUDGE