REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 46 OF 2012

JOHN MWINZI……………….APPELLANT

VERSUS

REPUBLIC………………RESPONDENT

(Appeal from the conviction and sentence of Principal Magistrate at Kyuso (B.M. Mararo, PM) in Criminal Case No. 71 of 2010)

JUDGEMENT

John Mwinzi, the Appellant, filed two sets of petitions of appeal. He informed the court during the hearing of this appeal that he wishes to rely on both. The original Petition and Grounds of Appeal was filed on 4th April 2012. He has raised issue with the evidence that he terms as contradictory; that evidence in the lower court was tailored and fabricated because there was a grudge between him and the parents of the complainant who had employed him and that the trial court failed to consider his defence.

In the amended petition filed on 16th October 2013, the appellant has listed the following grounds:

i. **That the charge sheet is defective**
ii. **That the record of the lower court does not disclose who the complainant is**
iii. **That the language used by the complainant is not indicated in the court record**
iv. **That the court changed the evidence of the complainant by stating that she was defiled when she did not state this in her evidence**
v. **That the evidence is inconsistent and uncorroborated**
vi. **That the evidence of the doctor is contradictory**
vii. **That the age of the complainant is not ascertained**

The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(4) of the Sexual Offences Act No 3 of 2006. The particulars read that on the 26th day of August 2010 at *[particulars withheld]* sublocation in Tseikuru District within Eastern Province intentionally committed an act which caused penetration of his penis into the vagina of R M a child aged 10 years.

The Appellant faced the alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006 with similar particulars in respect to the time, place and the victim.

After a full trial the Appellant was found guilty on the main charge. He was sentenced to life

imprisonment. He is aggrieved and has challenged the conviction and the sentence.

He has submitted that the particulars of the main charge do not support the offence under section 8(1) and 8(4) of the Sexual Offences. His claim is that an offence under Section 8(4) is for a victim aged between 16 and 18 years. He has stated that the particulars disclose that the complainant is aged 10 years and therefore the correction section is section 8(1) as read with section 8(2) of the Sexual Offences Act.

He has submitted that there are two complainants indicated in the record of the lower court; R M and Grace Mumbe; that R.M did not testify that she was defiled and all she stated was that the appellant slept on her; that the trial court went beyond prosecution evidence to find that the appellant defiled the complainant when there is no such evidence; that the trial court failed to indicate what language the complainant testified in.

The Appellant submitted that the case is fabricated because he was employed by the parents of the complainant and they had denied him his monthly salary; that the complainant did not complain of defilement and the mother concluded that she had been defiled; that the age of the complainant is not ascertained and her allegation that she was aged 10 years was not corroborated; that the magistrate ought not to have sentenced the Appellant to life imprisonment since the penalty under section 8(4) a minimum of 15 years.

The Appellant asked the court to allow the appeal, quash the conviction, set aside the sentence and acquit him.

The appeal was opposed by the learned State Counsel. Counsel submitted that the charge is not defective because it complies with section 134 of the Criminal Procedure Code and that the appellant was not prejudiced as all procedures were following in hearing the case.

It was further submitted that the complainant is R M and that Grace Mumbe was stepped down for reasons shown on the record; that the complainant testified to what had happened to her and she had been cross examined by the appellant; that there is medical evidence that the hymen was broken and that she had sustained bruises on the genitalia and therefore this confirms that defilement occurred; that the case was not fabricated as there was evidence confirming that defilement took place and that the allegations that the appellant was not paid his dues was vehemently denied during cross examination.

Counsel further submitted that section 124 of the Evidence Act allows courts to convict on the strength of a single witness in Sexual Offences and therefore corroboration is not required and that the evidence of PW1 was well corroborated by that of PW3 and PW4; that the complainant had testified she was aged 10 years and was in class 4 and that this was confirmed in the P3 form. Finally counsel submitted that there is no contradiction in the evidence of PW8. Counsel asked the court to dismiss the appeal for lack of merit and uphold the conviction and sentence.

The facts of this case are that R.M a girl aged 10 years and pupil at Makena Academy, PW1, was grazing goats pm 26th September 2010 when the appellant who was collecting firewood nearby called her and told her they go to the river. PW1 refused. The appellant held PW1's right arm and pulled her. He pushed her to the ground and removed her clothes. He removed his clothes as well and lay on top of her. PW1 said she felt pain and went home thereafter and told her mother. The matter was reported to the police and she was referred to hospital.

The evidence of PW1 was confirmed by that of her mother, L M, PW3, who testified that on arriving home from the market on 26th August 2010 she found her daughter PW1 looking distressed. She noticed that PW1's skirt was wet and she asked her what the matter was. PW1 told her that she had wet herself with urine but later told PW3 what had happened. PW3 checked the girl and confirmed she had been defiled. They went to report to the police who issued them with a note to go to hospital.

Evidence shows that the appellant fled after the incident. He was arrested by Esther Syombua, PW2, the Assistant Chief after the information was passed to her by Titus Mutuli, PW4, the area Chief. The

appellant was found at his former employer’s home. He was handed over to Police Constable Thomas Kinyanja, PW7. He was charged with this offence.

In his defence the appellant stated that he asked PW3 for Kshs 5,000 that she owed him but she refused to pay him; that he decided to leave and go to his aunt’s home from where he was arrested. He denies knowledge of the charges.

The trial magistrate considered this evidence and was convinced that the offence was proved beyond reasonable doubt. He convicted the appellant and sentenced him to life imprisonment.

Bearing in mind the requirement that this court has to examine all the evidence afresh and re-evaluate the same, I have read all the evidence. I have noted that among the exhibits produced in the lower court was a skirt that PW1 had been wearing. According to the evidence of PW7 the skirt was stained with semen. I take note that there was no forensic examination on the same to determine what those stains were. I have however noted the evidence of the clinical officer, Eunice Kiema PW6, who examined PW1. She found PW1 with a whitish discharge, multiple bruises on both labia (I understand this to mean Labia majora and minora) and a small bruise on the left side of the vaginal wall. PW1’s hymen was broken. PW1 was treated on 26th August 2010 and the P3 form was filled on 28th August 2010, two days later.

My reading of the petition and grounds of appeal reveal four main issues, namely defective charge, age of complainant, issue surrounding evidence and alleged failure by the trial court to consider appellant’s defence.

The appellant is right. The charge as drawn has issues. The section of the law quoted is section 8(1) as read with section 8(4) of the Sexual Offences Act. Section 8(1) defines defilement. It is worded thus:

> **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

Section 8(4) deals with penalty for the offence of defilement to a girl aged between the age of sixteen and eighteen years. It is worded thus:

> **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

This is an error by the drafter of the charge. However, the particulars show that the complainant is aged 10 years. The evidence shows that the complainant was aged 10 and was in standard four at the time of the offence. I have read the proceedings of the lower court and found that the appellant knew the charges he was facing and he participated in the trial. He knew what he was being tried for. In my view the appellant did not suffer any prejudice because of this error. The trial magistrate after making his opinion that the charge had been proved beyond reasonable doubt convicted and sentenced for life. This penalty is provided under section 8(2) of the Sexual Offences Act and not section 8(4). It did not escape the trial court that the right section is 8(2). It is, however, an oversight on his part not to have the charge amended.

After carefully considering this matter, I am of the view that the Appellant was not prejudiced and that this is an error that can be cured by the provisions of section 382 of the Criminal Procedure Code which states as follows:

> **Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice**

The age of the complainant is given in the charge as 10 years. The same age is given in the evidence of PW1 and PW6. There is also evidence that PW1 was in Standard 4. I find that I have no reason to doubt that the complainant was aged 10 years. In **Criminal Appeal No 296 of 2010, Fappyton Mutuku Ngui v. Republic** the court had this to say on the issue of age:

> **"I would be prepared to clarify that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth 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. In this particular case, I am prepared to hold that available evidence shows that the victim was less than eleven years old, which is the threshold for triggering a charge under section 8(2) of the Sexual Offences Act."**

I am persuaded to agree with the Judge in the above case.

Other than age of the complainant, the other ingredient of the offence of defilement is "the act which causes penetration" with a child. This ingredient forms part of the issue raised by the appellant on the evidence generally and the evidence of the complainant in particular.

I have considered the submissions of the appellant that the trial court changed the evidence of the complainant. It is true the complainant said the appellant slept on her without specifically saying whether she was defiled. I want to take the view that by saying that the appellant removed the complainant's clothes and his clothes and slept on her and that she felt pain leads to no other conclusion other than that she was defiled. PW3, the complainant's mother found the complainant distressed and on examining her genitalia, PW3 found that the girl had been defiled. This evidence is confirmed by that of the Clinical Officer who examined PW1 and filled P3 form. The evidence of multiple bruises on the genitalia and broken hymen confirms that PW1 was defiled.

The person who defiled PW1 is alleged to be the appellant. He was an employee of PW1's parents and had been left at home with PW1 and her siblings when the mother went to the market on 26th August 2010. Evidence shows that the appellant fled from his employer's home. He was arrested from his former employer's home by PW2 the Assistant Chief of the area.

I take the view that the evidence was not tailored nor was it fabricated against the appellant. There is medical evidence to prove defilement took place and the circumstances lead to the appellant as the person who committed this act.

I have considered the contention that the trial magistrate did not consider the appellant's defence. This is not true. The lower court considered the defence. However, I fault the trial magistrate for tending to shift the burden of proof to the appellant. It is not for an accused person to call evidence to corroborate his defence. It is for the prosecution to prove the case against the accused beyond reasonable doubt.

It is true that the record of the lower court does not show what language was used by the complainant to testify. I find the handling of the case rather casual on the part of the trial magistrate. The rights of both the complainant and the appellant were at stake and therefore the court ought to have shown the seriousness the case deserved. After the prosecutor realized that he had the wrong complainant and told the court so, the trial court did not record what happened. The record shows "PW1" followed by *voire dire* examination on the child then the court made remarks that it was satisfied that the witness understood the meaning of telling the truth. PW1 proceeded with her testimony after the court stated that "Witness sworn and states".

I however found that the appellant cross examined PW1 and the cross examination is relevant to the charge. This means that both the complainant and the appellant communicated in a language that both understood. I find no prejudice was occasioned on the appellant. I find that this is an error that is curable under section 382 of the Criminal Procedure Code.

The record is clear that the prosecutor had called the wrong complainant, Grace Mumbe. This was rectified and the right complainant called to testify. This is a non-issue.

My conclusion is that the appeal has not merit. The charge of defilement was proved beyond reasonable doubt. After re-examining the evidence and evaluating the same, I come to the conclusion that there is ample evidence to prove beyond reasonable doubt that the complainant was defiled by the appellant. She is a child aged 10 years which places her under the provisions of section 8(2) of the Sexual Offences Act. The conviction is safe. The penalty under section 8(2) is life imprisonment. I have no reason to change this. Consequently, the appeal is dismissed for lack of merit and the conviction and sentence upheld. I make orders accordingly.

Signed, dated and delivered this 28th day of November 2013.

S.N MUTUKU

JUDGE