



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

CRIMINAL APPEAL NO 111 OF 2011

JULIUS KIUNGA M'BIRITHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(APPEAL FROM THE JUDGMENT BY ROSE MAKUNGU,

SRM, IN MAUA SPMCCRC NO 1033 OF 2010 DATED 1.7.2011)

JUDGMENT

INTRODUCTION

Background Information

[1] The Appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. It was alleged that on 2nd day of March, 2010 at [particulars withheld], in Igembe District, within Eastern Province intentional caused his penis to penetrate the vagina of M K, a child aged 3 ½ years. He was tried and convicted for the offence of defilement by Rose MAKUNGU, SRM, and subsequently sentenced to life imprisonment.

[2] He was aggrieved by the conviction and sentence and filed this appeal.

The Appeal

[3] The appeal carries the following seven significant grounds:

- 1) *The learned magistrate erred in law in convicting the appellant on the evidence before her.*
- 2) *THAT the learned magistrate erred in law in relying on uncorroborated evidence to convict the appellant*
- 3) *THAT the learned magistrate erred in law and fact by convicting the Appellant on contradicting evidence of the prosecution witnesses.*
- 4) *THAT the learned magistrate erred in failing to find that the evidence adduced did not prove the offence facing the Appellant beyond reasonable doubt.*

- 5) ***THAT the learned magistrate erred in dismissing the Appellants defence.***
- 6) ***THAT the conviction of the Appellant is against the weight of evidence.***
- 7) ***THAT the sentence against the Appellant is manifestly excessive in the circumstance of the case before the learned trial magistrate.***

Arguments by the Appellant

[4] The Appellant was represented by Mr Murango advocate who argued all the seven grounds together. Counsel urged that the trial magistrate convicted the Appellant on insufficient and uncorroborated evidence. With the exception of PW1, the evidence of all the other witnesses did not implicate the Appellant in the commission of the offence. There was no single eye witness who saw the Appellant committing the act of defilement. Further, there was no single witness who was or even claimed to have been within the vicinity of the scene of crime at the time of the commission of the offence.

[5] He continued; the prosecution did not call any of the children who were alleged to have been playing with the complainant at the time the offence was allegedly committed. PW2 stated that she had been given information by a child aged nine years that the complainant was in the house of the Appellant. The name of the said child was provided but the child was not called as a witness. Counsel was of the view that the reason why the child was not called as a witness was because the child was going to give adverse evidence against the prosecution. The law is that the court should draw such adverse inference.

[6] Counsel kept the tempo high. He argued that the evidence of PW1 was improperly admitted for she was a child of the age of 3 ½ years. She was a child of alarmingly tender age and the trial court should have complied with section 19 of the Oaths and Statutory Declarations Act: conduct a *Voire dire* examination in order to satisfy itself; 1) that the child possessed of sufficient intelligence to understand the reception of the evidence; and 2) that the child appreciates the need of telling the truth and importance of the oath. A specific finding is needed to be recorded by the trial court before allowing such evidence. The record shows a superficial examination was recorded but she did not record her finding. She merely stated that the child was intelligent. What was the need of giving unsworn evidence? He quipped. Non-compliance with section 19 of the Oaths and Statutory Declarations Act renders the evidence inadmissible. According to counsel, the purpose of *Voire dire* examination is not to determine whether the child is telling the truth, but rather to determine competence of the child to give evidence. Once a child tenders evidence, the court must give reasons why it believed the witness was telling the truth. The evidence of the child-PW1- was confused and incoherent: the place of defilement was not properly ascertained from her evidence- was it at the home of the Appellant or the Complainant's-; was the money to buy the balloon given before or after the defilement-if it was after, the evidence of PW2 and PW3 cannot be true.

[7] Finally, counsel argued that, even if we assume that the evidence was properly taken, it was uncorroborated. In the event she wanted to convict on the evidence of the child, then she should have recorded reasons for believing PW1- a minor, was telling the truth, for PW1 was the only witness who gave evidence on the identification of the Appellant. He cited three cases namely; **MERU HCCRA NO 86 OF 2011; CA CRA NO 92 OF 2003; and DHAMUZUNGU v UGANDA [2002] I EA 49.**

The State Opposed the Appeal

[8] Mr Ongige opposed the appeal. He submitted that PW1 gave a chronological account of how events took place. The victim was admitted in hospital for 11 days and underwent an operation. Immediately after the act of defilement, the Appellant gave her money to buy a balloon.

[9] The trial magistrate allowed the evidence of PW1 after conducting a *Voire dire* examination and was satisfied that she was intelligent. PW1 was cross-examined by the Appellant. The evidence of PW1 was properly corroborated by the evidence of PW2 who was the only person who was in the house with PW1. He said all the authorities cited by the Appellant were not relevant to the present case.

[10] Mr Ongige submitted further, that the prosecution cannot be compelled to call all witnesses. Rather, it chooses its witnesses in every case. To him, the trial was conducted properly and the conviction was proper and just. The appeal should be dismissed.

DETERMINATION OF ISSUES

[11] It is my duty to re-evaluate the evidence recorded by the trial court and come to my own conclusions and findings. See **OKENO v REPUBLIC**. I need to decide the following issues which emerge from this appeal:

- 1) Whether the trial magistrate conducted a *Voire dire* examination in accordance with section 19 of the Oaths and Statutory Declarations Act? Depending on the answer to this question, particularly if is in the negative, I should determine whether there was any other independent evidence on which the conviction would be sustained.
- 2) Whether failure by the prosecution to call witnesses entitles the court to make an adverse inference against the prosecution in the circumstances of this case?
- 3) Whether the trial court complied with the proviso to section 124 of the Evidence Act?
- 4) Whether the prosecution proved its case beyond reasonable doubt?

[12] I propose to go directly to the issues as below.

Was Voire dire examination properly conducted?

[13] Section 19 of the Oaths and Statutory Declarations Act (hereafter section 19 of Cap 15 of the Laws of Kenya) provides that:

19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with [section 233](#) of the Criminal Procedure Code ([Cap. 75](#)), shall be deemed to be a deposition within the meaning of that section.

[14] Under section 19 of Cap 15 of the Laws of Kenya, where a child of tender age is called as a witness in a proceeding, there are two things the trial court must be severally satisfied about, namely; **1) whether the child understands the nature of an oath; or 2) if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.** The inquiry should graduate to the second level if the child does not understand the nature of the oath; then the trial court should determine if he possesses sufficient intelligence to justify the reception of the evidence, and he understands the duty of telling the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. But in both instances, the child is liable to cross-examination. See **BGM HCCRA NO 141 OF 2011 [2013] eKLR.**

[15] The above recapitulation of the law brings me to the point where I must discern from the record whether the trial magistrate complied with section 19 of Cap 15 of the Laws of Kenya. The reason why this question is of preliminary importance is because courts have emphasized that non-compliance with the requirements of section 19 of Cap 15 of the Laws of Kenya will result into quashing of a conviction unless there is other evidence before the court which is sufficient on its own to sustain a conviction. See the case of **NYASAN s/o BICHANA v REPUBLIC [1958] EA 190**. From the record of the trial and the evidence thereto, the complainant was aged between 3 ½ and 4 years. According to the Children Act, she is a child of tender age to whom section 19 of Cap 15 of the Laws of Kenya applies. The procedure for conducting the *Voire dire* examination was properly enunciated in **FRANSISIO MATOVE v REPUBLIC [1961] EA 260** and emphasized in subsequent decisions of the Court of Appeal. The trial magistrate should question the child to ascertain ***whether the child understands the nature of an oath; and 2) if the court does not allow the child to be sworn, it should record, whether or not, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.*** Applying that procedure, the record of the trial shows that the magistrate clearly recorded the *Voire dire* examination of the child. The information given by the child is in the nature of answers which I presume were elicited by question asked by the magistrate. The trial magistrate then recorded, in no uncertain terms, that she was satisfied the child was intelligent enough to testify but she will give unsworn statement. Although the trial magistrate did not specifically record a finding that the child understood the duty of speaking the truth, the record is clear on that matter, as it is borne out from what the child stated that:

...I know I'm expected to say the truth and not lie. I am going to tell the truth I know why I am in court to testify.

That notwithstanding, it is desirable that the magistrate records specifically that he is satisfied that the child understands the duty of telling the truth. Nonetheless, the trial magistrate fully complied with the requirements of section 19 of Cap 15 of the laws of Kenya by making a specific finding on the matter before receiving the evidence of the complainant. The argument by Mr Murango, therefore, fails to the extent that it claims the trial magistrate did not comply with section 19 of Cap 15 of the laws of Kenya.

Evidence of a single witness in sexual offences

[16] A small important legislative history on this matter is necessary. Section 19 of Cap 15 of the laws of Kenya initially provided for corroboration of the evidence of a child of tender age in a proceeding. But the section was amended and the proviso which required corroboration of evidence of a child of tender age was omitted, and an amendment was introduced in the ***Evidence Act, Cap 80 Laws of Kenya***, by ***Act No. 5 of 2003***, which added the following proviso to ***Section 124 of the Evidence Act*** that:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

[17] I have heard in my life as a practising advocate and a judge, some legal practitioners say that this section is a kind of a squirm as; whereas the law, on the one hand allows a conviction on the evidence of a single minor witness in sexual offences, on the other hand, especially on the evidence of identification by a single witness, the law requires that the court should take extreme care to analyse every evidence on identification before it convicts on such evidence of a single witness. It should be understood that there is absolutely no contradiction between the statutory provision in section 124 of the Evidence Act with regard to sexual offences and case law on the subject of identification by a single witness in general. Indeed, case law has always insisted that there is no legal prohibition on convicting on the evidence of identification by a single witness, except that the court should take extreme care to eliminate any possibility of mistaken identity.

Similarly, for a conviction to ensue under the proviso to section 124 of the Evidence Act, the trial magistrate must be satisfied that the child is telling the truth, and record the reasons for that belief. Accordingly, under the proviso, there is a sense of caution on the part of the trial court when convicting on the evidence of a single minor witness. The law on the point was settled in the case of **CHILA v REPUBLIC (1967) EA 722 at 273** that;

“The law of East Africa on corroboration in sexual cases is as follows. The judge should warn the assessors and himself of the danger of acting on the uncorroborated evidence testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice”.

[18] But before I pose the question whether the trial magistrate warned herself as required by the law, I should first determine whether there was any or other evidence which corroborated the evidence of the complainant on identification. Only, the complainant identified the Appellant. She knew the Appellant. Her evidence was, therefore, the only evidence of identification by recognition on which the Appellant was convicted. The law is that the court, before convicting on the evidence of identification by a single witness, should warn itself of the possibility of mistaken identity on the part of the witness. The trial court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should, therefore, consider any other independent evidence on the matter. See **ABDALA BIN WENDO V R [1989] KLR 424**, and **R V TURNBULL (1976) 3 All ER 549**. That law is underpinned by the fact that, although identification by recognition is more reliable than identification of a stranger, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. There are a great many decisions of the Court of Appeal on this issue which I need not multiply.

[19] Being guided by the above decisions, the evidence of the other witnesses, particularly PW2 and PW4 was largely circumstantial. For such evidence to be regarded as a robust support to the evidence of a single witness on identification, it must satisfy the conditions of the law on circumstantial evidence. The principles that guide the court when considering circumstantial evidence are now well settled. The decision of the predecessor of the Court of Appeal in the well-known case of **R v KIPKERINGARAP KOSKEI AND ANOTHER (1949) 16 EACA 135** settled it all when it held:

“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused.”

The principle was elaborated upon in a later case of **SIMON MUSOKE v R. CRIMINAL APPEAL NO. 188 OF 1956** when the court added that at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of the accused person.

[20] The evidence of PW2 and PW4 stated categorically that they found the complainant on the bed in the house of the Appellant badly injured in her private parts. They were in the company of some two gentlemen whom they referred to as community policing officers-a Mr Kibaki/Kobia and Muriungi. PW2 is the one who physically removed the complainant from the bed. PW4 witnessed all these happenings. The two gave an account of how PW1 was taken to hospital and treated. The evidence of PW3, the clinical officer confirmed that there was forceful vaginal penetration which caused extensive damage to the complainant’s genitalia. PW3 gave his findings and the state in which the complainant was left as a result of the penetration only reflects a beastly act committed by a person who was not at all attended by any reason. Bad times come. A girl

child, barely four years, was savagely attacked by a fellow human male being. It was a sexual assault. She did not understand and was incapable of understanding the nature of the sexual activity which caused her great trauma, and why it was inflicted on her. The force of the penetration was enormous, disproportionate and a dynamite on the physical and emotional health of such a beautiful petite creation of God; she was unable to walk; she sustained laceration on the vaginal opening with blood on the external genitalia; there was extensive swelling and tenderness on the opening of the vagina; she was in great pain. That is not all; she was operated upon; she developed a perinea tear from the vaginal to the anal side; another operation was carried out to separate sigmoid colostomy and the faeces was diverted to the abdominal and evacuated using a bag. She was admitted again into Nairobi Women Hospital where the perinea were repaired. She is now undergoing counselling. She was left with a life-long yolk. Her suffering is untold suffering. The story is headlong towards one thing only; a misanthrope of the worst kind committed the orgy, debauchery act and inflicted such insidious harm on an innocent child. I wish I could condemn the act in other stronger terms, but words can only go so far. Despite my disgust on this cruel act, as a judge of law, my mind should and is not crowded in relation to my duty to do justice to the Appellant as much as to the complainant. The foregoing narrative is simply proof of penetration of the complainant in legal terms.

[21] The above evidence by the complainant as well as the circumstantial evidence place the complainant in the scene of the crime, that is, the house of the Appellant. The evidence of identification by the complainant that the Appellant is the person who penetrated her finds appropriate legal boost in the evidence by PW2, PW3 and PW4. I now resume the other question I had posed: Did the trial magistrate record the reasons for believing that the complainant was telling the truth? She did. She believed the testimony by the complainant and stated the reasons as follows:

“From the evidence on record the minor was very clear as to who defiled her; a fact corroborated by the medical report which shows the extensive injuries and trauma the child underwent as a result of the defilement”.

The trial court recorded further reasons that:

“PW2 physically removed the child from the accused’s house and PW4 witnessed the child being removed. There is strong evidence of penetration as per the P3 form and medical notes”.

It is not, therefore, correct to state that the trial magistrate did not record her reasons for believing that the complainant was telling the truth. It was a combination of the clarity of the evidence by the complainant and the other circumstantial evidence that the trial magistrate convicted the Appellant.

Failure by prosecution to call witnesses

[22] What about the claim that the prosecution did not call critical witnesses and that failure should entitle the court to make an adverse finding against the prosecution case? I am aware that **Section 143** of the Evidence Act provides that:

“No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact.”

I am also aware of the decision of **BUKENYA AND OTHERS V UGANDA [1972] EA 549** which set out 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.

[23] 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, clearly show that the evidence provided was adequate. PW1 gave clear evidence as to how and who penetrated her. She said it was the Appellant, a person she knew. She was playing with other children whose names she does not know. He pulled her into his house and closed the door. He gave her money to buy a balloon. He ordered her to get into the bed and removed her clothes. He then laid her on his bed and lay on her stomach. He asked her if she was feeling pain, and at first she said no. After a while, he then inserted his penis into her vagina, and that is when she felt pain and she screamed. He threatened to beat her up and cut her with a knife. After the penetration, he went away and left her in the house. She was removed from the house of the Appellant and taken to hospital. The evidence of PW2 and PW4 placed the complainant into the house of the Appellant. They found the complainant on the bed in the house of the Appellant and she had already been defiled. A combination of that evidence, and the fact that the trial magistrate believed the complainant to be telling the truth, leads to an irresistible conclusion of guilt on the part of the Appellant. The complainant was cross-examined and confirmed that she had not been told by anyone to say that the Appellant lay on her.

What about the defence offered?

[24] The Appellant gave unsworn evidence and called two witnesses. His evidence and that of his witnesses explained his whereabouts at the time of arrest. It did not at all address the whereabouts of the Appellant on the material day, that is, 2.3.2010 when the offence was committed. The evidence did not raise any alibi for the Appellant on the material day and so there was not really anything for the prosecution to dislodge. The trial magistrate correctly dismissed the defence.

FINDINGS AND ORDERS

[25] After the re-evaluation of the evidence, I find that there was sufficient evidence to convict the Appellant. The trial magistrate believed that PW1 was telling the truth, her testimony was clear and was sufficiently supported by the evidence of PW2, PW3 and PW4.

[26] I also find that the trial magistrate properly conducted a *Voire dire* examination on the complainant- a child of tender age- and was satisfied that she possessed sufficient intelligence to justify reception of her evidence, and she understood the duty of speaking the truth. It is not correct, therefore, that the trial magistrate conducted a superficial examination. Accordingly, the testimony of PW1 was properly received in evidence.

[26] Further, the Appellant was properly identified and the trial court sufficiently warned itself of the dangers of convicting on the evidence of a single witness on identification. It applied the law appropriately and coupled circumstantial evidence with the evidence of PW1 to convict. Corroboration was provided by PW2 and PW4.

[27] Whereas the prosecution is under a duty to call all witnesses who will assist the court to establish the truth, it is not obliged to call a superfluity of witnesses. The evidence in this case was adequate and there was no basis for making any adverse inference for the un-called witnesses.

[28] The three constituent elements in the offence of defilement were proved beyond reasonable doubt. The elements are that: 1) the complainant was a child; 2) there was penetration of the

complainant; and 3) the penetration was by the Appellant.

[29] For the reasons above, I uphold the conviction for defilement of a child contrary to section 8(1) of the Sexual Offences Act and the sentence imposed by the trial magistrate. The Appellant shall suffer life imprisonment in accordance with section 8(2) of the Sexual Offences Act.

Dated, signed and delivered at Meru this 28th day of November, 2013

F. GIKONYO

JUDGE