REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 24 OF 2013

(Appeal arising from thereafter original conviction and sentencing of the Resident Magistrate's court Tamu CR. 374 of 2010 – Hon. R.M. Oanda – Resident Magistrate)

GEORGE OWITI RAYA ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

J U D G M E N T

INTRODUCTION

The appeal before court challenges the judgment by the Resident magistrate court at Tamu dated 12/4/2011 by which the appellant was convicted for the offence of defilement and sentenced to 20 years imprisonment. The issues for determination is whether the offence of defilement was proved beyond reasonable doubt. After considering the record and submissions, the appeal could to lack merit.

BACKGROUND

The appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. the particulars of the offence were that on 3/12/2010 [particulars withheld] Muhoroni district, the appellant caused his penis to penetrate the virgin of R A O a child aged 10 years.

The appellant was also charged with alternative offence of indecent act with a child contrary to Section 11 of the Sexual offences Act No. 3 of 2006.

PROSECUTION CASE

In support of the said charges, the prosecution called 5 witnesses. R A O (PW1) stated that on 3/12/2010 she was at home when the appellant called her to his place because he wanted to send her. When she reached the appellant's house, the appellant pulled her into the house and closed the door. The appellant then removed his and her clothes and pushed his penis into her private parts. PW1 felt pain but she did not scream because the appellant had threatened her.

When the appellant released her, he threatened her not to tell her sister. She later felt pain when she went for short call and bled. She later told her sister after her sister asked why she was not walking normally. The matter was then reported to the watchman and the PW1 was taken to Homaline Clinic and later to Muhoroni Subdistrict Hospital after reporting to the police. The PW1 identified the appellant as

the person who defiled her. She knew him before the offence as a married man.

S O (PW2) is the said sister of the PW1. She was away to fetch water on 3/12/2010 at 6pm and when she returned she found the PW1 alone at home. On sending PW1 to get a cup, PW2 notice that PW1 was walking with her legs apart. When PW2 asked PW1 what happened, she told her that she fell down.

On 4/12/2010, PW2 checked PW1 after the walking problem persisted and the PW1 explained that she was defiled. The PW2 damned the private parts of the PW1 and noticed she was injured. PW2 reported to the watchman and took PW1 to clinic then reported to the Koru police station. A P3 was issued and filled at Muhoroni subdistrict hospital. Thereafter the appellant who was her neighbor was arrested and charged in court.

Alice Miruka Kajonga (PW3) is a nurse at Homaline Clinic. She examined the private parts of PW1 on 5/12/2010 at 10.30am and saw bruises and a lot of pus coming out. She then referred the matter to the police. Pw3 knew the appellant and was able to identify him on court.

Corporal Patrick Leweri (PW4) was attached at Koru police station on 5/12/2010 when PW1 was brought to the station by her aunt and Homaline Company Personnel with allegation of defilement by a neighbor. He issued P3 to the PW1 and investigated the matter. He later arrested the appellant and charged him in court. He produced clinical card confirming that the PW1 was a minor bone on 18/6/1999. He also visited the scene and found that appellant had many neighbours.

Paul Nyabanga Atera (PW5) is the clinical officer who examined PW1 and filled her P3 at Muhoroni Subdistrict Hospital on 5/12/2010. He saw PW1 walking in a hanging gait and was withdrawn. Her inner pants was stained with whitish yellow foul smelling discharge mixed with blood sports. Her lower limb had a minimal pelvic movements with bruises. Her vaginal canal was inflamed, painful on touch, reddened and had healing bruises which showed that there was superficial penetration. Her hymen membrane was however intact. She also tested negative for syphilis and HIV. PW5 also examined the appellant on 14/12/2010 and tested negative for HIV among other tests done on his urine.

After considering the above prosecution evidence the trial court found that the appellant had a case to answer and put him to his defence.

DEFENCE CASE

The appellant tendered a sworn defence. He denied the offence and blamed the charges on a grudge with PW2 dating back to 25/10/2010 when PW2 allegedly stole Ksh.200 and Omena from the appellants house.

The appellant told the trial court that he was arrested on 30/10/2010 after going there on 29/10/2010 to visit his ailing mother. On reaching the Koru police station he was told that he was arrested for defiling Pw1 for which he left the matter to God to avenge for him

After considering the evidence by the prosecution and the appellant the trial court convicted the appellate of the main charge of defilement and sentenced him to 20 years imprisonment.

The appellant was dissatisfied and brought this appeal.

GROUNDS OF APPEAL

1. THAT the learned magistrate erred in law and facts when he failed to note that the evidence of penetration was not proved by the medical officer to confirm the offence of defilement as the court was told that the complaint's hymen was not broken.
2. THAT the learned trial magistrate erred in law and facts in not observing that the complainant allegations that she was defiled in a rental house where other tenants were was not true because she could have raised an alarm

APPELLANT'S CASE

The appellant filed written submissions and relied on them in support of the approval. He raised two issues for determination in this appeal namely whether the PW1 was indeed defiled and if yes whether the appellant was the perpetrator. On the first issue, the appellant urgued that defilement was never proved because penetration was not proved. According to the appellant the evidence of PW1's hymen membrane being intact meant that penetration was never done. He faulted the alleged investigation by PW4 for failing to produce the alleged stained inner pant for the PW1 as exhibit. The appellant also submitted that the alleged superficial penetration was never proved.

He concluded by submitting that the trial court fell into error when it failed to consider the unchallenged defence evidence that there existed a grude between the appellant and PW2.

THE RESPONDENT'S CASE

Mr. Magoma learned counsel for the state opposed the appeal. He submitted that the evidence of PW5 who examined the PW1 confirmed that although the hymen membrane was not broken, PW1's genitalia was bruised, inflamed, reddened, painful and had whitish yellow discharge mixed with blood spots an indication that there was superficial penetration.

The learned state counsel further submitted that PW1 knew the appellant very well as they were neighbours and as such she positively identified him.

ANALYSIS AND DETERMINATION

The issues for determination in this appeal are whether the offence of defilement was proved and if so whether the appellant was the perpetrator. The trial court correctly identifies the ingredients of defilement as penetration and minority age of the victim. The trial court observed that the foregoing two ingredients of defilement must be proved before conviction can issue. The trial court then relied on the evidence of PW5 to find that penetration did occur. The trial court held that the extend of the penetration was immaterial even if it did not break the hymen.

As regards the issue of age of the victim, the trial court relied on the immunization (clinic card) produced as exhibit 2 to find that the PW1 was born on 18/6/1999 and therefore as at the time of the offence she was below age of 18 years. The question being raised by the appellant is whether there can be any penetration without going past the hymen membrane. PW5 opined that there was superficial penetration because there was injury on the virginal opening (canal) and a whitish-yellow foul smelling discharge was seen on the PW1's genitalia.

There is no other medical opinion to contract that of the PW5. It remains therefore that there can be penetration without going past the hymen membrane Section 2 defines penetration to include both partial or complete insertion of the genital organ into another. The foregoing view corroborates the evidence of the PW1 is further corroborated by the evidence of PW2 and 3 all of whom examined the PW1's genitalia and confirmed there was injury and discharge. The said PW2, 3 and 5 corroborated the evidence of PW1 when she stated that the appellant removed his and her clothes and pushed his penis into her private parts. The foregoing consistent evidence cannot be defeated by failure to produce the PW1's pants as exhibit.

As regards issue of whether or not the appellant was the perpetrator, this court finds that the appellant and the PW1 were neighbours and the latter knew him very well. The offence was done in broad daylight and the PW1 identified the appellant's by recognition. PW1 was consistent and gave a sworn testimony despite the appellant's threat. She was able to name the appellant after being pressed by PW2 after her walking problem persisted.

The appellant in his defence purported to raise alibi defence by saying that he was away to see his sick mother on 29/10/2010. He also alleged that on 25/102010 he had a grudge with the PW2 when the

latter stole his ksh.200 and omena.

This court however is of the view that the defence of alibi could not hold water because the date of the offence was on 3/12/2010 and not in October 2010 the time when the appellant allegedly visited his sick mother. It follows therefore that even the alleged arrest on 30/10/2010 as alleged by the appellant was not true because by then the offence forming the basis of these proceedings had not been communicated.

As a consequence of the above findings, it must be clear that this court is satisfied beyond reasonable doubt that the appellant defiled the PW1 as charged.

DISPOSITION

The appeal is therefore devoid of merit and is dismissed and the impugned conviction and sentence afformed.

Signed and dated and delivered this 21st day of November 2013

ONESMUS MAKAU

JUDGE