



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: Fred A. Ochieng]

HCRA NO. 74 OF 2012

BOAZ KIPLETING KEMBOI ::: APPELLANT

=VERSUS=

REPUBLIC ::: RESPONDENT

JUDGMENT

The Appellant was jailed for 30 years after being convicted for defilement. The Appeal before me was based on two substantive issues, being:

- (a) Identification, and
- (b) Sentence.

Mr. Angu, the learned advocate for the Appellant submitted that the evidence of the Complainant should have been treated with a lot of caution, considering that the Complainant was not sworn.

Secondly, as the Complainant was a child of tender years, and the only eye-witness, the prosecution ought to have been called upon to explain what happened to the other person, who had been arrested together with the Appellant. As no explanation was tendered by the prosecution, the Appellant submitted the conviction was unsafe.

It was also the contention of the Appellant, that the medical examinations conducted on him and on the Complainant, failed to connect him to the offence.

The evidence of the witness who was informed about the identity of the alleged assailant, was described, by the Appellant, as constituting hearsay.

Meanwhile, this court was invited to find that the sentence of 30 years imprisonment was excessive. The Appellant was a first offender, and he ought therefore not to have been given the maximum penalty, he said.

Furthermore, as the Appellant was 22 years old, he submitted that the sentence of 30 years in jail, would result in the loss of his youth.

On those grounds, the Appellant urged this court to quash his conviction, and also set aside the sentence.

Mr. Omwenga, learned Senior State Counsel, opposed the appeal. He drew the Appellant's attention to the provisions of Section 124 of the Evidence Act, which permitted a court to convict an accused person, even in the absence of corroboration, provided only that the court believed the evidence of the minor.

In this case, it is said that the court did find the minor to be a truthful and steadfast witness. The Respondent also submitted that the evidence of the doctor was consistent with that of the minor.

On the issue of the sentence, the Respondent submitted that the Appellant ought to have been jailed for life. **Mr. Omwenga** argued that imprisonment for 30 years constituted an illegal sentence, as the mandatory penalty was imprisonment for life.

I have re-evaluated all the evidence on record. I have also given due consideration to all the submissions canvassed before me.

The particulars of the charge were that the Appellant, **BOAZ KIPLETING KEMBO**, unlawfully and intentionally caused his genital organ to penetrate the genital organ of the Complainant, **M**. The Complainant's age was cited, in the charge sheet, as being 5 years old, as at 7th August, 2010, when the incident happened.

P.W.1, **DR. FLORENCE JABUKA**, was attached to the Moi Teaching and Referral Hospital. When she examined the Complainant, she found that the young girl genitalia had an abrasion. There was a thick yellowish discharge, and her hymen was torn. P.W.1 also found some discharge on the outside of the Complainant's genitalia.

During cross-examination, the doctor said that there was defilement, as he found evidence of penetration.

P.W.1 also examined the Appellant, and found that his genitalia were normal.

P.W.2 was the Complainant. She testified that the Appellant held her and "touched" her private parts, with his organ.

During cross-examination, P.W.2 made it clear that when she went to the police station, she found the Appellant together with **Kiptum**. However, P.W.2 made it clear that the said **Kiptum** never touched her.

It was her testimony that only the Appellant lay on her, whilst they were in the maize farm. He did so after he had removed the Complainant's trousers and under-pant.

P.W.4, **A**, was the mother of the Complainant. She testified that the Complainant was five (5) years old.

On the material day, P.W.4 noticed that the Complainant was walking with difficulty. And when P.W.4 tried to bath the Complainant, she saw some whitish discharge from her private parts. At the time, the Complainant was crying.

P.W.4 called out to her neighbour, **NELLY** (P.W.3). The 2 ladies examined the Complainant and saw some injuries on her private parts.

The Complainant informed P.W.3 and P.W.4 that it was the Appellant who had defiled her. P.W.5, P.C. **ROSA SHIKUKI**, was a police officer attached to the Kesses Police Post. She is the officer who recorded the Complaint, when P.W.2 and P.W.4 reported the incident at the police post.

She visited the scene of crime, where she found the Appellant. P.W.5 also escorted the Complainant to the hospital, where the doctor examined her.

After the Appellant was put to his defence, he gave a sworn testimony. He confirmed that he had known the Complainant. He also confirmed that he used to work for a person who was a neighbour to the Complainant's home.

On the material day, the Appellant says that he was arrested together with a brother of the Complainant's mother. Although the Complainant used to play with the children of his employer, the Appellant denied committing the offence.

D.W.2, **EMMY**, is a sister to the Appellant. She testified that the Appellant was a person of a good conduct.

Having re-evaluated the evidence, I find that there was overwhelming evidence that the Complainant was defiled. The evidence was tendered by the Complainant. The doctor who examined the Complainant also verified that she had been defiled. That evidence was tendered by the Complainant. The doctor who examined the Complainant also verified that she had been defiled.

The girl's mother and a neighbour also verified that the Complainant had been defiled. In effect, the evidence of the Complainant was amply corroborated.

As regards identification, it is only the Complainant who knew exactly who defiled her. She informed her mother and also the neighbour (P.W.3), that it is the Appellant who had defiled her.

In other words, the identity of the assailant was disclosed by the Complainant, at the earliest opportunity.

And even though 2 men were taken to the police, the Complainant made it clear that the only person who defiled her was the Appellant. In those circumstances, the reason why the other man was set free is very clear: he was expressly exonerated by the Complainant.

The learned trial magistrate was alive to the need to give due consideration to the evidence of the minor. He assessed the complainant, when she was testifying, and found her to be intelligent and steady throughout her testimony.

The trial court also found that the evidence of the Complainant was consistent and truthful.

Having re-evaluated the evidence on record, I found no reason at all, whether in law or in fact, for faulting the assessment made by the learned trial magistrate, regarding the reliability, consistency and steadfastness of the Complainant's testimony.

The said evidence could have been sufficient to found a conviction, even if there had been no corroboration. Such conviction would be lawful pursuant to Section 124 of the Evidence Act.

And if the Complainant had been the only witness, a conviction could still stand, pursuant to Section 143 of the Evidence Act.

But as already demonstrated above, the Complainant's evidence herein was corroborated by the medical evidence, as well as by the evidence of her mother and their neighbour.

The said evidence of the Complainant's mother and of their neighbour was admissible. It would only have been hearsay if the evidence stood alone, without the backing of the evidence of the Complainant.

But those two witnesses personally examined the complainant, and noted that she had been defiled. About those actions, their evidence was direct. The only bit of evidence which was not direct was that which relates to the identity of the person who defiled the Complainant.

In the final analysis, I find no merit in the appeal against conviction. It is therefore dismissed.

I uphold the conviction. What about the sentence; is it excessive?

The mother of the Complainant said that her daughter was five (5) years old. The Complainant also said so. The doctor who examined the Complainant indicated that she was under 9 years of age. He actually estimated the age as being 7 years, after using her weight to assess the age. His report is dated 23rd September, 2011.

Her mother's testimony was that the Complainant was 5 years old as at 9th August, 2010. She would then have been six years old by August, 2011. Therefore, the doctor's estimate of 7 years of age, in September, 2011 was well within the range comparative to what the Complainant's mother told the Court.

Section 8 (2) of the Sexual Offences Act addresses cases of child victims who were less than 11 years old. Thus, whether the Complainant was 5,6,7 8 or 9 years old, the sentence to be meted out against her assailant would remain the same.

The fact that the precise age of the Complainant was not proved, would not be prejudicial to the Appellant .

He would still be liable to imprisonment for life. He was jailed for 30 years. That is not the maximum sentence, as contended by the Appellant.

I hold that that sentence is lawful, and therefore it is upheld. In the result, the appeal is dismissed, in its entirety.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF NOVEMBER, 2013.

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FRED A. OCHIENG

JUDGE.