



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 24 OF 2009

MOSES NATO RAPHAELAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4499 of 2007 in the Chief Magistrate's Court at Thika – F. Nyakundi (Ag. PM))

JUDGMENT

Introduction

1. **Moses Nato Raphael**, the appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**.

Brief Facts

2. The brief particulars were that, on the 5th day of September 2007, at *[particulars withheld]* Estate within Thika District of the Central Province intentionally and unlawfully, he committed an act which caused his genital organ to penetrate the genital organs of M. W. (identity concealed on account of her being a minor) a girl under the age of eleven years.
3. In the alternative the appellant had been charged with engaging in an indecent act with a child contrary to **Section 6(a) as read with Section 11(6)** of the **Sexual Offences Act No. 3 of 2006**. Particulars were that on the date stated above the appellant committed the offence by touching the complainant's private parts.

Grounds of Appeal

4. Upon conclusion of the trial the learned trial magistrate convicted him on the main charge and sentenced him to life imprisonment. Being aggrieved, the appellant lodged an appeal against both

conviction and sentence and put forth four grounds of appeal which, in sum, urged that:

1. *The prosecution case was not proved beyond reasonable doubt.*
2. *The court relied on the contradictory evidence of a single witness.*
3. *His constitutional rights were violated by being held in custody for over 24 hours.*
4. *That his alibi defence was not considered.*

Submissions

5. Miss Maina, learned State Counsel opposed the appeal and argued that there was sufficient evidence on record to support both conviction and sentence. That there was sufficient evidence that the appellant had defiled **PW1** and that the minor and the appellant were all well known to each other she also urged that there was no reason for **PW1** and **PW2** to fabricate the case against the appellant and that although the medical report established that the appellant was HIV positive it was not a must that **PW1** would become HIV positive immediately upon defilement.

Summary of the Case

6. M.W. who was six years old and therefore a child of tender years, testified on oath because upon being subjected to voire dire examination under **Section 19(1) Oaths and Statutory Declarations Act, Cap 15 LoK**, she was found to understand the importance and implication of telling the truth.
7. She testified that she returned home from school at 1 p.m. on 5th September 2007 and visited the toilet. While in the toilet the appellant who was well known to her, emerged from the tall grass near the toilet, entered the toilet and found her having removed her inner wear. That he lifted her and laid her by the side of the toilet and removed his trousers. That he was not wearing underpants. He then inserted his penis inside her private parts and proceeded to defile her. Meanwhile he threatened to kill her using a machete, if she revealed his identity. He instructed her to say that it was a “boda boda” person who defiled her.
8. When the appellant left, **PW1** sought her mother **PW3**, who took her to Thika District Hospital. It was at the hospital that **PW3** was referred to Thika Police Station and later on to Juja police Station where she reported the matter. The appellant was arrested two weeks later and charged with this offence.
9. When put on his defence the appellant testified without oath and raised an alibi defence. He told the court that he was away in Nairobi when the alleged offence occurred. That he had lived with **PW3** and her children well before, but was now being framed for an offence he did not commit. He called three witnesses to support his case.

Issues for Determination

10. The questions for determination are whether the evidence was sufficient to prove that the minor was indecently assaulted and if so, whether linked the appellant was the culprit.

Analysis of Evidence

Identification

11. As the first appellate court, I have re-evaluated the evidence afresh to make my own findings and draw my own conclusions. In so doing I have made allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which I did not have.
12. I am alive to the fact that the evidence against the appellant rested on the testimony of **PW1** and

that as observed in **Abdalla Bin Wendo v Republic (1953) 20 EACA pg 166**,

“Subject to certain exceptions a fact is capable of proof by the testimony of a single witness.”

I also warned myself in line with **Roria v Republic (1967) EALR pg 584** that:

“There was indeed a danger in basing a conviction on the identification of a single witness and this Court had a duty in a case where this has been done to satisfy itself that in all the circumstances the conviction was safe.”

Having so laid a basis I examined the circumstances under which the appellant was identified for possibility of error.

13. There was no dispute that the complainant, (**PW1**) was a minor. The charge sheet stated her age to be below 11 years. The child herself testified that she was about ten years but the evidence of **PW3** her mother, **PW4** the Arresting Officer, as well as the medical evidence placed her age at six years. I therefore find that although the child may not have known her age, the adult witnesses placed it at six years and this was not refuted by the appellant. In any case the complainant was aged below 11 years.

14. From the evidence before me it is clear that the appellant and the minor were well known to each other. In her testimony she stated thus:

The person who defiled me in the toilet is the accused before court. He is called Nato (Accused person identified) used to see him at Benvar”.

In the cross examination the minor also stated as follows:

“You used to come to our house and ask my mother to cook for you but you never used to buy food. You used to stay with us”.

The appellant did not deny the minor’s averments. Indeed the appellant and his witnesses too confirmed that **PW3** and the appellant cohabited at one time.

15. As stated earlier the appellant raised an alibi defence in which he said that he was away in Nairobi, at the time the offence was said to have occurred. An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge, does not in law thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. See the case of **Kiarie v Republic [1984] KLR pg 740**.

16. The appellant and his witnesses testified that they heard about the defilement when **PW3**, was trying to raise money to take **PW1** to hospital. They however said that **PW3** reported that **PW1** was defiled by a person engaged in “boda boda” business. In their view the change of story by **PW3** was meant to frame the appellant, with whom she had had a relationship that went sour.

17. The defence witnesses were telling the truth when they testified that **PW3** first stated that **PW1** had been defiled by a “boda boda” man. This must however, be considered in the context of the evidence of **PW1** who stated that the appellant threatened to slay her with a machete, if she revealed his identity. Out of fear she therefore told **PW3** what she had been instructed to say and only revealed the truth three weeks later.

18. I also observed from the record that **PW3** did not immediately blame the appellant, when she learnt that something had happened to her daughter and **PW1** would not reveal what had happened. She tried to get **PW1** to speak to her and when that did not succeed, she used her older daughter to earn **PW1**’s confidence. The older daughter was then aged 12 years and testified as **PW2**.

19. **PW2** testified that she and **PW1** went to the same school and that she kept on asking her who had defiled her. Eventually **PW1** told her that it was Nato who had done so. **PW2** testified that she knew who Nato was and that he lived in the same camp. It was **PW2** who relayed that information to **PW3**. Nato is the appellant in court.
20. I am satisfied that, whereas there may have been some falling out between the appellant and **PW3** over a love affair gone bad, **PW3** did not on her own pin the offence on the appellant. **PW1** herself through the persuasion of **PW2** revealed who the culprit was. I also observed that **PW1** and **PW2** who were both minors gave evidence that flowed, both in examination in chief and in cross examination. This would have been difficult if they had been coached.
21. The alibi defence was itself doubtful since the appellant said he was in Nairobi, while **DW3** Mohamed Ali Taro testified that the appellant had spent the day in Gachororo.

Evidence of Defilement

22. There was no dispute that **PW1** was defiled. She said so in her testimony in which she stated as follows:

“He removed his penis and put it in my private parts – the place of urinating. He then defiled me”.

The lower court record used the word ‘**defiled**’ in the minor’s testimony. This was inappropriate. In **SAMSON OGINGA AYIEGO VS. REPUBLIC CR. APPEAL 65 OF 2006** (unreported) the court of Appeal sitting at Kisumu observed as follows:

““Defiled” is a technical term. It is quite improper to use such term or any other technical term when recording evidence of a witness unless the witness himself or herself used it. The correct approach is to use the words used by the witness. We do not believe that PW1 or any other witness used that term in proceedings before the court.”

In the present case I too doubt that the minor used the word ‘**defiled**’. Be that as it may, the court record reads that the appellant inserted his genitals into hers.

23. The evidence of **PW1** was corroborated by that of **PW3**, who saw blood stains on the front of her dress, when the minor came looking for her. The appellant and his witnesses did not dispute that **PW1** had been defiled. They disputed the fact of the appellant being the culprit.
24. **PW5**, the doctor, filled the P3 form in regard of **PW1** on 18th September 2007 relying on the medical notes taken on her first visit. According to the medical record **PW1** was a six year old child who presented with a history of defilement and a blood stained dress. The findings included:
- Broken hymen*
 - Tenderness of the genitalia*
 - Blood discharge*
25. A high vaginal swab taken from **PW1** showed presence of trachomonas vaginalis. She was found to be HIV negative but was put on post exposure treatment. The doctor formed an impression of defilement, filled and signed the P3 form and produced it in evidence.
26. Finally, the appellant complained that his constitutional rights were violated since he was held in custody for more than 24 hours before being produced in court. If that be so his remedy lies in a different action and the criminal trial is not vitiated as a result thereof.
27. In sum, I have considered the appeal at length and find that the evidence on record was sufficient to sustain the conviction against the appellant on the charge against him.

28.I therefore find that the appeal is lacking in merit and dismiss it. I uphold the conviction and the sentence imposed.

SIGNED DATED and **DELIVERED** in open court this **19th** day of **December 2013**.

L. A. ACHODE

JUDGE