



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: F. Azangalala J.]

CRIMINAL APEAL NO. 116 OF 2009

BILLY KIPCHUMBA KIMOSOPAPPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the judgment of Hon. H.M. Nyaga, Senior Resident Magistrate dated 17/07/2009 at Kabarnet Senior Resident Magistrate's Court in Criminal Case No. 139 of 2009]

JUDGMENT

Billy Kipchumba Kimosop, the appellant, was charged in the Senior Resident Magistrate's Court at Kabarnet, with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act Number 3 of 2006. The particulars stated that the appellant, on the 14th day of February, 2009 at about 3.00 p.m., in Baringo district of the Rift Valley province, did cause his penis to penetrate the vagina of **J.K.**, (hereinafter "**the Complainant**"), a girl aged 10 years. He also faced an alternative charge of committing an indecent act.

The appellant was tried by **H.M. Nyaga**, then a senior Resident Magistrate. The prosecution called seven (7) witnesses and after hearing their evidence, the said learned Senior Resident Magistrate found that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement in which he denied the offence and contended that the mother of the complainant had a grudge against him over a fence.

Upon analyzing the evidence of both the prosecution and that of the appellant, the learned Senior Resident Magistrate found the appellant guilty of the Principal charge of defilement, convicted him and sentenced him to life imprisonment.

The appellant was not satisfied and has appealed to this Court against both conviction and sentence. When the appeal came up before me for hearing on 26th January, 2012, the appellant, who appeared in person, relied upon written submissions whilst **Mr. Kabaka**, learned State Counsel orally opposed the appeal. The appellant complains that he was convicted on a defective charge; that the charge was not proved; that his defence of a frame up was not considered and that the arresting officer was not called to testify.

Mr. Kabaka on his part submitted that the charge was not defective as it contained all the relevant ingredients and was proved to the required standard. With regard to the alleged grudge, the learned State

Counsel contended that the same was irrelevant and was rightly rejected.

This is a first appeal. It is therefore the duty of the Court to analyze, re-evaluate and re-consider the evidence upon which the appellant was convicted and arrive at its own independent conclusion bearing in mind that the court did not see and hear the witnesses testify and should give allowance for that. (See Okeno –vrs- Republic [1972] E.A. 32)

The brief facts of the case were as follows: The complainant was, at the material time, playing with three other children including V.K (P.W.2) in the home of **Mama K**, when the appellant went there and chased the other children. He enquired of the complainant where **Mama K** was. On being told that she was away, he took the complainant to the kitchen pressed her against the wall, removed his pants and “**did tabia mbaya**” to her. She felt pain but was told to keep quiet. He then carried the complainant to the bush and repeated the “**tabia mbaya**” to her. When he was through, he warned her not to tell anyone of the incident and he left. The complainant ran home carrying her pants. She found her brother to whom she narrated her ordeal. Later, her sister in law arrived and she also informed her of the same. Her sister in-law, **B.K** (P.W.3), arrived at about 4.00 p.m. of the material date. She confirmed receiving the complainant’s report and that of **V.K** (P.W.2). She examined the complainant’s vaginal area and observed blood spots there. The complainant was taken to hospital and a report was made to the police.

Moses Suswa (P.W.7), the Baringo District Clinical Officer, examined the complainant and observed bruises on her vaginal wall. Her hymen was also broken and there was blood in her genitalia. He produced the P.3 which he had completed in respect of those observations.

P.C. Nancy Appo of **Kabarnet** Police station received the complainant on the 15th February, 2009 and issued her with the said P.3. She also confirmed that the accused had at the time been arrested.

On being put on his defence, the appellant denied committing the offence but alleged he was framed because of a grudge he had with the complainant’s mother.

On the above facts, the learned Senior Resident Magistrate found that the offence of defilement had been proved against the appellant as required in law and convicted him as already stated hence this appeal.

The appellant faced a very serious charge. The minimum sentence provided on conviction is imprisonment for life. The evidence to be relied upon for conviction must therefore be water-tight. The appellant has complained that he was convicted on a defective charge. He has made that complaint on the basis that the words “**intentionally**” and “**unlawfully**” were not used to describe the offence and further that the charge sheet was not signed by the officer commanding the relevant Police Station. I have perused the charge sheet and note that the said terms are not indeed used. The appellant was however charged under sections 8 (1) as read with section 8 (2) of the Sexual Offences Act. The words “**unlawfully**” and/or “**intentionally**” are not used in the said provisions. The appellant’s complaint is therefore clearly misconceived. With regard to the complaint that the charge sheet was not signed by the relevant O.C.S., I am of the view that such a defect, even if it were well founded, would be an irregularity which would not be fatal. A perusal of the charge sheet however, reveals a signature endorsed on the said charge sheet on 16th February, 2009. It is in my view the signature of the officer who prepared the charge sheet. It does not bear the Officer’s rubber stamp but the charge sheet has a police file and O.B. numbers both demonstrating that the charge sheet originated from a police station. In any event, there is no disputed that the appellant was charged as already stated. In the premises, the complaints made against the charge are without merit and are dismissed.

The second main complaint made by the appellant is that an essential witness namely, the arresting officer, was not called to testify. That may very well be the case but the fact of the arrest of the appellant was beyond dispute. It is indeed the arrest which subsequently culminated into his prosecution and conviction. Then there is the testimony of **B.K** (P.W.3). She testified, *inter alia*, that the appellant was arrested by other people which evidence was supported by that of P.C. **Nancy Appo** who told the Court that by the time she issued the complainant with the P.3, the appellant had already been arrested. Lastly, there is the appellant’s own testimony at the trial. He was categorical that he was arrested by a mob who

beat him over an unknown reasons.

In the premises, I find and hold that the failure of the arresting officer to testify did not occasion a failure of justice as the appellant was not prejudiced in any way.

The final complaint of the appellant is that his defence of having been framed was not considered. That complaint with respect is not well taken. I say so, because, a plain reading of the judgment of the learned Senior Resident Magistrate shows that he carefully considered the alleged grudge and rejected it. In his own words:-

“The accused blames the complainant’s mother for the charges facing him. I have looked at the evidence and cannot see anything to support that assertion. The complainant’s mother was not at home at the material time. She only came to learn of the incident later. Further, I don’t see how she can brutalize her own daughter just to fix the accused, merely because of a fence.”

It is plain that the allegation of a grudge was considered by the learned Senior Resident Magistrate and was rejected and properly so in my view.

On the evidence placed before the learned Senior Resident Magistrate and as analyzed above, the conviction of the appellant turned on the testimony of the complainant, and that of the Clinical officer at Baringo District hospital. The complainant testified that the incident took place at about 3.00 p.m. and that the appellant is her neighbour. The identification of the appellant was therefore positive. The complainant further described the defilement in such detail that would exclude a concoction. The learned Senior Resident Magistrate believed the complainant and gave his reasons for that belief. In his own words:-

“Both P.W.1 and P.W.2 knew the accused well as he hails from their neighborhood. They were pretty sure as to who they saw. Their evidence is consistent and does not contradict each other”

Having believed the complainant, the learned Senior Resident Magistrate could still have convicted in the absence of corroboration, given the proviso to section 124 of the Evidence Act. But there was ample corroboration.

The complainant informed **B.K** (P.W.3) of her ordeal shortly after the same. P.W.3 examined her and found blood in her vaginal area. **S.K**, (P.W.4) also saw the complainant shortly after. She was walking awkwardly and looked distressed. She could not even eat and her underpants were torn.

Then there was of course the testimony of **Moses Suswa**, the District Clinical Officer – Baringo. The Officer described her condition as **“sleek looking”** On examination of the genitalia, he observed that her hymen was broken. The vaginal wall had bruises and the examining finger had blood, suggesting that the complainant was bleeding from the genitalia. He produced the P.3 form he had completed in respect of the complainant’s condition.

In view of the above analysis, I am satisfied that the learned Senior Resident Magistrate’s conviction of the appellant on the principal count of defilement of a girl aged 10 years was safe. The appeal against conviction is therefore dismissed.

The appellant has not appealed against sentence but even if he had, I would dismiss the same as the Senior Resident Magistrate imposed the only sentence the law provides for the offence the appellant was charged with.

In the end, this appeal has no merit and is dismissed.

DATED AND DELIVERED AT ELDORET

THIS 23RD DAY OF FEBRUARY, 2012.

F. AZANGLALA
JUDGE

Read in the presence of
Billy Kipchumba Kimosop the appellant and
Mr. Chirchir for the state.

F. AZANGALALA
JUDGE
23/2/2012