



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 129 OF 2008

SIMON NGOTHO MBUGUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Simon Ngotho Mbugua was charged before the Nakuru Chief Magistrate (Children's) Court in No.16/2008 for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. It was alleged that on 10/2/08 in Nakuru District, in the Rift Valley Province, intentionally and unlawfully, had sexual intercourse with M.W, a girl aged 12 years. In the alternative, he was charged with the offence of committing an indecent act on a child contrary to **Section 11(1)** of the **Sexual Offences Act (2006)**. The case was heard by Ms Tanui, Resident Magistrate, who found the appellant guilty of the offence of defilement and sentenced him to 35 years imprisonment. He is aggrieved by the conviction and sentence and filed this appeal. The grounds upon which the appeal is brought are as follows:-

- 1. That the court relied on the evidence of one witness;**
- 2. That there was no medical evidence to support the charge;**
- 3. That the exhibits were not produced;**

4. That the court failed to consider the appellant's defence;

5. That the sentence is excessive.

A brief summary of the prosecution case is that the complainant, M.W (PW1), a girl aged 12 years, was at her grandmother's home where she lives with her grandmother, grandfather, mother and her small brother. The appellant was employed by the grandmother as a houseboy. On 10/2/05, PW1 was at home alone, she went to pick clothes from the bedroom so that she could wash. The appellant followed her, grabbed her, carried her to the sitting room, placed her on the three seater sofa seat, removed her skirt and pants and made her lie face upwards. He removed his trousers, underwear, lay on her, removed his male organ and inserted in her. He then let her go and she ran away to the neighbour because he threatened to beat her if she disclosed what had happened to anybody. At that time, her 5 year old brother was outside the house playing. When her grandmother returned that evening, PW1 reported the incident to her, the grandmother (PW4) examined her, informed the complainant's mother (PW2) of the incident and they went to report at the Police Station. PW1 was examined and treated. Appellant was arrested the same day.

The complainant's mother is G.N.K (PW2). On 10/2/2008, PW2 had gone to where she works as a casual labourer and on arriving home that evening, she did not get her daughter, M. PW1 came home later and reported that the appellant had defiled her. On being asked, the appellant denied the allegation. PW2 examined PW1's private parts and found her to be wet with an unusual discharge and they decided to take her to Njoro Health Centre.

PW4, M.K.N, grandmother to the complainant also testified that she returned home from Church on the evening of 10/2/08, found PW1 missing. The appellant denied knowing where PW1 was. Later, PW1 came crying and said that she had been defiled by the appellant and that is when she went to hide at her neighbour's house. PW2 and PW4 examined PW1 and found that PW1 had a lot of discharge. The grandfather got transport to take them to the police station on that night and the appellant was arrested on same night.

Tabitha Ngugi (PW3), a clinical Officer, was at work at Njoro Health Clinic when PW1 was taken to her with a history of defilement. Upon examining PW1, she found that her vagina was widened, was bleeding and she had bruises on the labia region and sperms around the vaginal opening. Her colleague treated PW1. PW3 filled the P3 form (Ex.2). The report was made to PC woman Nellius Nyambura (PW5), who interrogated the complainant and later arrested the appellant. She is the one who escorted the complainant to Njoro Health Centre on the next day.

In his sworn statement in his defence, the appellant admitted having been at work on 10/2/08; that he was owed Kshs.15,000/- being his salary from November 2007. He approached the complainant's mother for the money but she got upset that he was disturbing her. He continued with his work as usual and later went to his room and at about 10.00 p.m., he was called outside and found police who arrested him. He denied committing the offence.

As the first appellate court, it is required of me to analyse the evidence afresh and arrive at my own conclusions, not forgetting that I did not have the opportunity to see the witnesses and weigh their demeanor.

It is not in dispute that the appellant was known to PW1. PW1 said that the appellant had worked for her grandparents for long. PW2 said that the appellant had worked for her parents for over 7 years. PW4 said that the appellant had been working for her for 10 years. It means that the complainant had seen and known the appellant since her birth or as a baby. He was at home on the date the offence was committed. He therefore had the opportunity to commit the offence.

PW1 gave evidence on oath after the court found her to have understood the meaning of oath and intelligent enough to testify. She told the court that she is 12 years and in class 6. PW2, the complainant's mother also told the court that PW1 is 12 years and so did the Clinical Officer, PW3.

PW1 vividly recounted how the appellant forced her onto a sofa seat, removed her pants, removed his own trouser and innerwear and put his male organ into her '**thing**' which I believe is her vagina. PW2 and PW4 who examined her later that day found that she had an abnormal discharge. PW3 further corroborated the evidence of PW1, PW2 and PW4 when she examined PW1 on the next day and found that her vagina was widened, was bleeding, bruises on the labia and spermatozoa on the vagina entrance. That there was overwhelming evidence on record that the complainant was defiled.

For an offence of defilement to be proved, there should have been penetration. Penetration is defined in **Section 2(1)** of the **Sexual Offences Act 2006** as:-

“Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”

The evidence of PW1 and PW3 does prove that there was penetration of PW1.

The only other question is whether it is the appellant who committed the offence. The complainant was alone at home. She is the only witness to the said offence. The trial court did observe that such offences as rape and defilement are normally committed in secluded places and most of the time corroboration is lacking. The court would therefore rely on circumstantial evidence. In this case, I do note, as did the trial court, that the appellant was not a stranger to the complainant. The offence was committed in broad daylight. PW1 vividly recounted what happened to her and her evidence was not challenged on cross examination. She reported the matter as soon as her mother and grandmother (PW1 and PW4) came back home. **Section 143** of the **Evidence Act** provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. Further it is no longer a requirement that there be corroboration of the evidence of a child to prove commission of a sexual offence. Under **Section 124** of the **Evidence Act**, the court can accept the evidence of alone

witness/victim in a sexual offence and the court can base a conviction on such evidence provided that it is satisfied that the child/victim is telling the truth. The trial court which had a chance to see the witness believed the evidence of PW1 and this court has no reason to doubt it.

The appellant's defence is that he was framed because he asked for his unpaid salary. He never put any such question to PW2 whom he alleged started it all because he asked her for money and she became upset. It is only to PW4 that the appellant alleged that she had not paid him and PW4 did accept that she had not paid him at the time of arrest. The appellant never alleged that he had not been paid for several months. I find that the defence is an afterthought and untrue. It is rejected. The trial court considered the appellant's defence and rejected it as untrue. It is unacceptable to even consider that PW1's mother could get her daughter of 12 years to come and stand before the court to lie about such a serious issue. PW1 was alone at home with the appellant who took advantage of her and defiled her.

In the end, I find that the trial court considered all the evidence before it and came to the correct finding that it is none other than the appellant who defiled the complainant. Under **Section 8(3)** of the **Sexual Offences Act**, a person who defiles a child aged between 12 and 15 years is liable upon conviction, to imprisonment to a term not less than 20 years. The appellant was sentenced to 35 years imprisonment. I find that the sentence is not excessive in the circumstances and find no good reason to interfere with it. In the result, I dismiss the appeal.

DATED and DELIVERED this 16th day of March, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Appellant in person - present

Mr. Nyakundi for the State

Kennedy – Court Clerk

