



T.K.M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's court criminal Case no. 4 of 2010 by Hon. F.M. Nyakundi, P.M on 22/7/2010)

JUDGMENT

The appellant, **T.K.M.** was charged before the Principal Magistrate's Court at Makueni with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the 3rd January, 2010 at around 8.00 p.m at Makueni District within Eastern Province, he unlawfully assaulted one **N.T.** occasioning her actual bodily harm.

On count 2 he was charged with the offence of attempted defilement contrary to section 9(2) of the Sexual Offences Act. The particulars of the offence being that on the same day, place and time, he attempted to cause penetration of his genital organs to **N.T.**, a child aged 7 years

As an alternative to the above charge, the appellant was charged with the offence of indecent assault of a girl contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that, on the same date, place and time he indecently assaulted **N.T.** by touching her private parts. He denied both counts and he was soon thereafter prosecuted.

The case for the prosecution in brief was that on 3rd January, 2010, the complainant, **N.T.** (PW1), aged 7 years was at home at about 8.00 p.m with her father who is the appellant and her other siblings as their mother had separated from the accused. She went to school the next day but her teacher took her to Wote Hospital as she had an injury on her right leg, which had been caused by the accused who had apparently assaulted her the previous night after she allegedly refused to go to the farm. At Wote she was treated. Her teacher, **Kamanthe John** (PW2), on 4th January, 2010 reported to school at about 7.30 a.m. At about 8.30 a.m. she saw PW1 walking into the school compound late though with some difficulty. Upon asking her and checking the right leg which was swollen, and noting an injury on the head with dried blood as well as a bruised face on one side; PW1 told her that she had been beaten by her father after she refused to go to the farm. PW2 in turn informed the head teacher and other teachers and they all decided to call the grandmother of PW1 to the school. They knew that her mother was not staying with the appellant following marital differences between them.

PW2 advised PW1 to rest under a tree in the meantime. It was then that PW2 noticed that she was sleeping on her stomach with her legs wide apart. Further inquiries from her revealed that on the previous night she had washed her uniform and gone to bed naked and her father had come and inserted something in her private parts causing her pain and that she even cried. The grandmother to **PW1, N.M.** on her part confirmed that the appellant lived alone in his house with his five children, among them, PW1 after his wife left him. His house was 2 roomed with the appellant sleeping in one room and the children in the other. On 3rd January, 2010 while in her house which is not far from that of the appellant, she heard a

child crying at about 8.00 p.m but did not take any action. She woke up the next day and continued with her chores but she was called at about 10.00 a.m to go to PW1's school. She did so and on arrival, met the head teacher and other teachers who called PW1. She noticed that PW1 had an injury on the head and was walking with a limp. She was further informed that PW1 had reported that her father had beaten her. PW2 and the other teachers organized for a vehicle to take the complainant to hospital at Wote after they informed PW3 that the child had also been defiled.

PW4, **Corporal Agnes Ikiba** received the report from PW1 on 4th January 2010 and she too, noted the injuries inflicted on her. She booked the report and referred the complainant to hospital for treatment and issued a P3 form to her. PW5, **Onesmus Katua**, a clinical Officer at Makueni District Hospital filled the P3 form on 14th January, 2010 using treatment notes by a different clinical officer, who had seen the complainant on 4th January, 2010. He also physically examined her on the 14th January, 2010 in order to make his findings. He stated that when seen on 4th January, 2010 PW1 was presented with a history of assault and attempted defilement. He had an open wound on the head and neck which was bleeding, bruises on the face and her right leg was swollen and tender. That on the genitalia, there was nothing abnormal seen except for a whitish discharge which was itching and contaminating the upper inner thighs which was examined and found to contain moderate pus cells which were found to be gonorrhoea. The hymen was however intact. H.I.V test were negative and X-rays done revealed no fractures. She was then put on necessary treatment. This witness produced the P3 form in which he had formed the opinion that there had been attempted defilement and assault. He classified the injuries sustained as harm. Following the findings of PW5, PW4 caused the appellant to be arrested and he was then charged with the offence.

Upon being placed on his defence, the appellant gave a sworn statement and did not call any witness. He denied committing the offence. He admitted though that he had a wife and five children, one of them PW1, but that at the time in question his wife had left the matrimonial home for reasons she did not disclose and attempts to bring her back had failed and so he was taking care of the children alone. On 3rd January, 2010 he woke up and prepared breakfast for the children, went to the farm and picked vegetables which he started cooking. He then told PW1 to mind them, as he left with a friend who had come visiting. He returned home at about 3.00 p.m and found only 3 children. The rest including the complainant were missing. He was informed though that they had gone to their grandmother's house. He sent one of the children, **M.** to go and call the two absent children but she never came back. He then sent another, **A.**, who too never came back. He then decided to go looking for them himself. He went to his mother's house but did not find them. He made enquiries from his brother who denied having seen them either. On his way back home he saw the four girls playing nearby and called them but the complainant ran away and he decided to pursue her. As she ran tripped on the rope used to tether a heifer and was injured on the leg. She tried to jump over a trench but again fell inside and hit her head on the stone. He caught hold of her and asked her why she was running away. She informed him that they had harvested mangoes, cooked and eaten. They then left for home. At home he cleaned the complainant and applied ointment on the areas that were bleeding. He served her with food and went back to the farm where he worked upto 7.00 p.m. He later left them sleeping and went away until 8.00 p.m when he returned and he too went to sleep. The next day, they woke up and the complainant prepared for school, as he prepared the maize she was to carry to school. Later he went to his place of work where he worked until 1.00 p.m and came back and prepared lunch for the children and went back to work. He came home later to find the complainant had not come back home only to learn that she had gone with **Mrs Muteti**, PW2 her teacher who is also a neighbour. He learnt that there was a report at the assistant chief's office filed by PW2 that PW1 had been defiled, and she had been taken to hospital in the company of her grandmother. He never saw the complainant again. On 5th January, 2010 he was arrested by his father, brother and Assistant Chief and the other children handed over to their grandmother. He was brought to Makueni Police Station where he was charged with the offences which he has denied committing.

Having evaluated the evidence on record, the trial magistrate determined that the main counts charged had been proved. She accordingly convicted the appellant and sentenced him to 2 years on 1st count and 40 years imprisonment on the 2nd count. She rightly ordered that both sentences to be served concurrently.

Appalled by the conviction and sentence aforesaid, the appellant lodged this appeal through **Messrs Paul Kisongoa & Company Advocates** on 10 grounds to wit-

- “1. *The learned magistrate erred in law in failing to appreciate that there was no corroboration at all to the evidence of the complainant who gave unsworn evidence and was a minor below the age of 12 years.*
2. *The learned magistrate erred in law and fact in basing his conviction on uncorroborated evidence of the complainant.*
3. *The learned magistrate erred in law in relying on conflicting medical evidence*
4. *The learned magistrate erred in holding that there was defilement basing her findings on conflicting medical evidence.*
5. *The learned principal magistrate misdirected herself in the law of rape and defilement.*
6. *The learned magistrate erred in failing to appreciate that the complainant did not implicate the appellant with the commission of the offence of defilement yet she proceeded to hold that he appellant defiled the complainant.*
7. *The learned magistrate erred in law in failing to direct her mind on the failure by the prosecuting to have the appellant medically examined to ascertain the source of the white substance on her thighs and the infection.*
8. *The learned magistrate erred in law and fact in her evaluation of her evidence which failed to appreciate that the whole evidence pointed to chastisement of the complainant by her father but did not arose (sic) to an assault.*
9. *The learned magistrate erred in law and fact in relying and placing weight on the evidence of PW2 whose evidence did not corroborate the evidence of the complainant.*
10. *The sentence is excessive in the circumstances of the whole case”.*

When the appeal came before me for hearing *interpartes* on 13th June, 2012, the State through **Mr.Mukofu** conceded to the same. He submitted in support thereof that on the whole, the evidence on record was unsafe to find a conviction. That the learned magistrate introduced theories in her judgment not supported by the evidence, there was no corroboration and finally, the prosecution case was full of inconsistencies.

Mr. Amadi, learned counsel for the appellant agreed with the position taken by the state and urged me to allow the appeal, quash the conviction and set aside the sentence imposed.

I have no doubt in my mind that the State was right in conceding the appeal. Having carefully read and considered the evidence on record as well as the judgment on the learned magistrate, I am satisfied that the conviction was unsafe. Throughout her evidence in chief, the complainant does not as much as refer or mention anywhere that she was assaulted or defiled by the appellant. The issue of assault only comes out during cross-examination. Even here the evidence is scanty. She does not tell when, where and how she was beaten nor does she mention any defilement or attempted defilement of her by the appellant. Infact she is emphatic that-

“... I slept in one room and daddy slept in his room.”

It is instructive that the appellant was staying alone with his 5 children, the complainant included. If indeed the complainant was assaulted by the appellant in the house at about 8.p.m as the prosecution wanted the court to believe, these other children were present. Why were they or even one of them not called to testify in support thereof. Further if the complainant had been defiled, couldn't she have

mentioned to her siblings. Alternatively couldn't siblings have discovered? The complainant does not even testify as to where the alleged defilement or the attempt thereof took place. The siblings notwithstanding, couldn't she even have told her grandmother, who seems to have been very close to her.

In her judgment, the trial magistrate appreciates this problem. She states thus –

“...although PW1 did not come out openly and state that she had been defiled by her father in her testimony which was unsworn... she did state that the accused person beat her after she refused to dig in the shamba...”

Later in her judgment she states;-

“...PW1 did not mention any other person as being involved. She probably did not mention the part about being defiled in her testimony following threats or fear of reprisals from the accused person...”

With great respect to the learned magistrate, there was no basis for that finding. There was no evidence before the court that could have led to that finding. No such theory was canvassed during the trial. It has been said time without number that trial courts should refrain themselves from advancing theories in their judgments not captured in evidence Courts should leave the evidence to speak for itself. It is quite apparent that as a result of this unsubstantiated and or unsupported theory, the trial courts approach to the issues at hand for determination became hazy, clouded and led to the unfortunate conviction of attempted defilement. There was no direct evidence of attempted defilement nor did the complainant allude to the same. Apparently, the complainant was found to have been infected by gonorrhoea. Why was the appellant not subjected to similar examination to establish whether he too was suffering from such infection as well. If that had been done and results were positive, the case would have been an open and shut one against the appellant.

The State Counsel also pointed and correctly so in my view that the prosecution evidence was uncorroborated. The evidence of a clinical officer to the effect that she noted an open wound bleeding on the head and neck, cannot provide corroboration on the 1st count of assault; since this observation was made 10 days after the incident. In any event it does not tie in with the evidence of PW2 who testified that she had found an injury with dry blood on her face which was bruised on one side. Of course corroboration is generally required in criminal cases except in sexual offences where the only evidence is from the victim and the court is satisfied that the victim is telling the truth. See section 124 of the Evidence Act. In this case, the victim herself never testified as to the defilement or the attempt thereof. Neither did the trial magistrate make a finding in her judgment that the victim was telling the truth. This is a mandatory requirement before a conviction can be entered on the basis of the evidence of the victim only.

I think I have said enough to show that the appellant's conviction cannot be defended. This appeal is accordingly allowed, conviction quashed and the sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY, 2012

ASIKE-MAKHANDIA
JUDGE