REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 104 of 2011

JOSIAH ZEDEC OGOLA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No. 149 of 2009 by Hon. E. Tanui R.M, Nakuru dated 12th April, 2011)

JUDGMENT

The appellant was charged that on 15th day of July, 2009 at Nakuru District within Rift valley Province he caused his genital organ (penis) to penetrate the genital organ (vagina) of SNN a girl aged 14 years contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006.** He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act, No. 3 of 2006.**

The trial court upon consideration of the evidence presented before it found that there was sufficient evidence to prove the main charge and accordingly convicted the appellant of that offence and sentenced him to serve twenty (20) years imprisonment.

Aggrieved by both the conviction and sentence the appellant has filed an appeal to this court on eight (8) grounds that can be summarized as follows:-

1. that the conviction was against the weight of the evidence;

2. that the learned trial magistrate failed to consider his defence.

3. that the learned trial magistrate shifted the burden of proof to him.

4. that the sentence passed by the learned trial magistrate was manifestly harsh and excessive.

Learned counsel for the appellant contended that, according to the evidence (P3 form and clinical card), the offence was committed on 12th/13th July, 2009 and not 14th July, 2009; that since no spermatozoa was noted, the offence could not have occurred on 14th July, 2009 but on 13th; that the complainant did not identify the pants (exhibit 3) and that as the blood stains on the pants was not subjected to laboratory tests there was no basis for linking the blood stains to the complainant. He also contended that the appellant's evidence that the complainant's relatives demanded money from the appellant, was not considered and that the trial magistrate did not give reasons for believing the complainant even when D.W.3 confirmed that on the material night she slept with the complainant in the

same room and that nothing happened to her.

Learned counsel for the respondent while conceding the appeal submitted that the evidence of prosecution witnesses was contradictory; that the complainant was not a truthful witness and that there was evidence that the complainant had sworn to do everything to enrich her mother.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

It was the case for the prosecution that the complainant, P.W.1, SNN, was at the material time aged 14 years and employed by the appellant's wife as a house help. On the material night she had been left in the house with the appellant and his son aged six years as the appellant's wife had travelled. After preparing and serving supper to the appellant and his son, she washed utensils as the appellant and his son went to sleep in their bedroom. The complainant subsequently also went to sleep in the sitting room. At about 10.00 pm, the appellant came to her bed and started holding her breasts before he removed her clothes and defiled her. The following day she reported the incident to a neighbour, P.W.4, Susan Wanjiku Njeri, who assisted her with a phone and she contacted her mother. She reported the incident to the area chief and the police and was later on taken to Njoro Hospital for treatment.

According to the complainant's mother, P.W.2, Alice Muthoni, upon being informed of the defilement by the complainant, she went to the appellant's house and noticed the complainant's blood stained pants which she identified in court. P.W. 3, Tabitha Ngugi, a Clinical Officer at Njoro Health Centre examined the complainant on 15th July, 2009 and filled a P3 form for her. She noticed that the complainant's underwear was blood-stained and that she looked frightened. She also noted that the complainant's genetalia had a perforated hymen and that her vaginal walls were inflamed. In addition, there was whitish foul smelling vaginal discharge but there were no pus cells or spermatozoa. She concluded that the complainant had been defiled.

After the report of this incident was made to the police, the appellant was arrested and charged. P.W.5, P.C. Richard Mureu visited the appellant's house and took an inventory of the complainant's clothes including the complainant's blood stained pant which he later on produced in court as an exhibit.

In his defence the appellant denied having committed the offence. He alleged that when he arrived home on 14th July, 2009 at about 5.00 pm he found the complainant and another man watching T.V. in the sitting room; that he proceeded to his bedroom to change and when he returned to the sitting room the complainant and the gentleman had left. Shortly thereafter the complainant returned and when he inquired who the gentleman was she said that he was her friend. The complainant prepared supper for them but did not eat as she had fed on bread. At about 9.00pm, he went to his bedroom and left the complainant with his sister in law watching TV. When he woke up at 7.00am he noticed that the complainant had prepared breakfast and put it on the table but was nowhere to be seen. After failing to trace the complainant, he locked the house, took his son to school and later proceeded to work. Later in the day, at about 3.30pm, he was arrested and taken to his house where he found the complainant and some other people. He learnt that the complainant had complained to the police that he had defiled her.

D.W.2, Meshack Mange, a neighbour of the accused alleged that on 14th July,2009 at about 2.00pm he saw the complainant leaving the appellant's house with another man and that she returned with the man after 5.00pm; that on that night he slept at midnight and had heard nothing unusual in the appellant's house. He alleged that the police were asking for Kshs.50,000/= to drop the case against the appellant.

D.W.3, Susan Mwihaki Muthoni, the appellant's sister-in-law alleged that she slept in the same with the complainant on the material day and saw nothing peculiar happen; that the next morning, she left for work very early. At about 7.30am, the appellant called her and told her that the complainant had left. She returned home and took the appellant's son to school. Later in the day, the police came with the complainant and the appellant. She also alleged that the complainant had told her that she would do all

she could to buy her mother a plot at E.

D.W.4, Gladys Wambui Ann, the appellant's wife got the news of the alleged defilement when she visited the police station on 15th July, 2009. She alleged that the complainant, through her boyfriend, Njenga, was asking for Kshs.50,000/= to secure the release of the appellant. She confirmed that she knew the complainant's mother and that no grudge existed between them.

The foregoing constitutes the evidence upon which the trial court found the offence of defilement proved beyond reasonable doubt and convicted the appellant.

The complainant, although a minor was an employee of the appellant at the time of the alleged offence having only been employed a few days earlier. It is equally common ground that the appellant and the complainant slept in the same house on the day in question. The broad issue for determination is whether there was sufficient evidence to prove that the appellant indeed committed the offence.

The only direct evidence against the appellant was given by the complainant who described the events leading to the incident as follows:-

" I slept at 10.00pm, when I heard the accused enter the sleeping room. He started removing his documents. I continued sleeping. While sleeping the accused came to my bed and started holding my breasts. I screamed. He held my mouth and removed my clothes including skirt and my pant. He started having sex with me. I asked him what have you done? He left me while saying "*sorry I didn't know it would go this far*." I told him I did not want his sorry. He promised to give me something small. I told him I didn't want and that I would tell mama junior."

The complainant was barely one week old in the appellant's house when this incident occurred. There was no grudge between her and the appellant or any of their family members. For this reason she had no reason to implicate the appellant. At the time of the alleged offence the appellant's wife was away. The only people who slept in the house were the complainant, the appellant and his child. The appellant, therefore had the opportunity to commit the offence. The story of the complainant on what transpired on that night is quite consistent as was indeed found by the trial magistrate. She reported the incident to P.W.4, a neighbour and her mother immediately after daybreak. Although corroboration is not a requirement, the clinical officer who saw her a day after she was defiled confirmed that indeed she had been defiled.

The alleged contradictions in the prosecution case are not material as they relate only to various dates. As a matter of fact, from the evidence of all prosecution witnesses, the incident took place on the night of 14th/15th July, 2009.

The trial court which had the opportunity of observing the witnesses found the complainant to be a truthful witness whose story was corroborated by the evidence of P.W.2 and P.W.4. On the other hand the court disbelieved the defence witnesses. At pages 8 and 9 of the judgment the learned magistrate observed:-

"Surely the complainant had only been employed three days earlier, how could she have possibly disclosed such malicious intention to D.W.3 who was a relative of the accused. All in all I watched the complainant as she testified. I observed her demeanour in court and I believed her testimony to be true. I believed that it was only her and the accused and his son who had slept in the accused person's house that night and that the accused person took advantage of the situation and proceeded to defile her".

From the totality of the evidence, I find nothing warranting the interference with the finding of the trial court as I am also of the view that the defence evidence is very incredible as it was displaced by the complainant's account of the events. Both D.W.3 and the appellant, for instance, materially contradicted each other. Whereas the appellant stated that he took his son to school, D.W.3's contradicted him on that averment by stating that she is the one who took the child to school after returning home from the market.

D.W.3 also contradicted the appellant by stating that when the police visited the appellant’s home, they were with the appellant and the complainant. The appellant had told the court that when they visited his house with the police they found the complainant at his home. I also find the defence evidence on the alleged blackmail inconsistent. Whereas D.W.2 alleged it was the police who asked for the money to bail out the appellant, D.W.4, on her part, alleged that it is the complainant’s boyfriend who asked for the money on behalf of the complainant's mother. As a matter of fact, I have already found that the complainant having worked for such a short stint could not have made that kind of plot against people she hardly knew.

For the foregoing reasons, I find no good reason for interfering with the decision of the trial court.

Before I conclude this judgment, as the complainant was subjected to child labour contrary to **Section 10** of the **Children Act**, it is important that I comment on this illegal but rampant practice in our society. The parents of the complainant and the appellant violated the rights of the complainant. Parents who allow their children to participate in child labour, irrespective of the reason for so doing, expose their children to abuse and exploitation. In the complainant's words, the incident herein was not the first time she was facing from abusive employers.

As regards the sentence imposed by the trial court, I note that the same was proper and lawful in the circumstances of this case. Consequently, I affirm the trial court's decision and dismiss the appeal.

Dated, Signed and Delivered at Nakuru this 28th day of September, 2012.

W. OUKO
JUDGE