



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 6 of 2011

SAMUEL GITAU MUGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Nyahururu criminal case No.3306 of 2007 by Hon. C.K. Obara, Resident Magistrate, Nyahururu dated 7th January 2011).

JUDGMENT

The trial court (C.K. Obara, RM) found the appellant guilty of the offence of defilement of a girl contrary to **Sections 8(1) and 8(2)** of the **Sexual Offences Act** and upon conviction, sentenced him to life imprisonment, The appellant was aggrieved and now brings this appeal on the grounds contained in the written submissions to the effect that:

- i) the appellant was detained by the police beyond 24 hours contrary to **Section 72(3)(b)** of the former **Constitution**;
- ii) the complainant failed to promptly report the alleged defilement;
- iii) the prosecution case was no credible and was full of contradictions and;
- iv) the prosecution failed to call key witnesses.

It is the appellant's contention that he was arrested on 30th October, 2007 and only taken to court on 14th November, 2007 against the aforesaid **Section 72(3)(b)**; that the trial court ought to have found the evidence of the complainant unbelievable for her failure to report to her mother the alleged defilement immediately.

According to the appellant the doctor who examined failed to ascertain when the alleged defilement took place and further that the requirements of Section 36 of the Sexual Offence Act which provides for the conduct of DNA and other forensic examinations was not complied with.

Finally, it is submitted by the appellant that there was no consistency in the evidence of the complainant and that of her mother regarding whether or not there were blood stains on the former's pant; that the complainant told the trial court that her pant was blood stained, yet her mother did not see the blood.

Learned counsel for the respondent opposed the appeal arguing that the alleged defilement took place during the day and the complainant knew the appellant, hence there was no mistaken identity.

From the medical evidence, it is not in issue that the complainant was defiled. Her hymen was found to be torn; she had bruises on the vaginal walls from which the doctor concluded that there was penetration. It was her evidence that it was the appellant who defiled her.

The appellant for his part stated that on the day in question, he had gone for casual work at Sipili Trading Centre in a lodging. As he was not on duty the next day, he went to his maize farm where he worked until 1.30p.m when he heard that the village elder wanted to see him in connection with this matter. He was arrested. The only eye witness to the commission of the crime was the complainant, who gave her age at the time of the incidence as 5 years. In terms of the proviso to **Section 124** of the **Evidence Act**, a conviction can be based on the evidence of such a child if, for reasons to be recorded by the trial court, the court is satisfied that the child (victim) is telling the truth. The complainant narrated to the court how on the day in question the appellant lured her to his house and defiled her. She said:

“I went to borrow water from the accused person. I knew him. My home is near his home. He gave me water to drink. He then lifted me up and took me inside his bedroom and placed me on his bed. He removed my pant and lied on top of me. He did bad manners to me. He unzipped his trouser. There was no other person in that house. He gave me sugar which I licked. I put on my pant. He escorted me to their land and I went home. I went home but I did not tell my mother that day.”

The trial magistrate in her judgment found that the complainant was a witness of truth and observed that:

“She was then aged only 5 years. P.W.1 gave a consistent account of what happened on 29/10/2007 after she left school. She stated that the accused person is their neighbour. Accused on the other hand never disputed that fact. The court has no reason at all to doubt the evidence of P.W.1. She was very young then. I am not able to imagine of any reason why she would frame the accused person.”

The learned trial magistrate also noted that there was no grudge between the appellant and the complainant's family and that the complainant was certainly not mistaken as to the identity of the appellant, having spent considerable time together.

Bearing in mind that an appellate court, unlike the trial court, lacks the advantage of seeing and hearing the witnesses, the finding of the learned magistrate cannot be faulted. On my own evaluation of the evidence on record, I am persuaded that the appellant was a neighbour to the complainant's family. He was known to the complainant. The complainant, although of tender years, gave a clear uncontroverted account of events leading to the offence charged. Being scared of her mother, she did not tell her what the appellant had done to her until the next day.

Her mother upon examining her noticed her private parts were swollen, with rashes around the vagina. The doctor confirmed that there was penetration as a result of which the complainant's hymen was perforated and the vaginal wall bruised.

For all these reasons, I find no merit on the grounds that the offence was not proved.

The appellant has complained that certain vital witnesses were not called by the prosecution and his own witnesses too were locked out of the trial. He has not stated which prosecution witnesses were not called.

In any case, the evidence on record was sufficient to find a conviction as I have noted. Likewise, the record is clear that after the closure of the prosecution case, the appellant stated that he would give unsworn statement and that he had no witnesses to call. The apparent contradiction on the question of the

presence of blood in the pant is not material in view of the overwhelming evidence of the prosecution.

The appeal is dismissed.

Dated, Signed and Delivered at Nakuru this 17th day of October, 2012.

**W. OUKO
JUDGE**