REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 255 of 2011

SILVANO ROTICH KIPTOO :: APPELLANT

AND

REPUBLIC :: RESPONDENT

[Being an appeal from the judgment of H.M.Nyaga, (SPM) delivered on 16th December, 2011

at the Senior Principal Magistrate's Court at Kabarnet in Criminal Case No. 522 of 2011]

JUDGMENT

The appellant, **Silvano Rotich Kiptoo,** was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of indecent assault contrary to section 11 (1) of the same Act. In the principal count, it was alleged that the appellant, on the 28th day of July, 2011 in Marigat District within Baringo County, did intentionally and unlawfully cause his penis to penetrate the vagina of **J.N,** a girl aged 9 years in violation of the said Act.

In the alternative count, it was alleged that on the very day at the same place, the appellant did intentionally and unlawfully cause his penis to come into contact with the vagina of **J.N**, a girl aged 9 years in violation of the same Act. I will refer to the said girl as the complainant.

The appellant appeared before **H.M. Nyaga** (P.M) at Kabarnet Principal Magistrate's Court on 1st August, 2011 and pleaded not guilty. The prosecution called six (6) witnesses and after hearing their evidence, the court found that the appellant had a case to answer and put him on his defence. The appellant made an unsworn statement in which he denied the offence and contended that he had been framed. He also called two witnesses: his wife, **Rhoda Sirma,** (DW.2) and **Joshua Komen,** (D.W.3)**.** D.W.2 told the court how, on the material date at 2.00 p.m., she met the appellant at Libri Centre who gave her Kshs 100/= for groceries. She stayed at the centre upto 5 p.m. And left in the company of the appellant. On the way, they found **Hellen Micah**, (P.W.1) and walked together before meeting the complainant and a younger girl. The appellant, according to D.W.2, gave the girls Kshs 20/=. As they went home, they found a child's shirt which P.W.1 gave the children to take home.

D.W.3, on his part, told the court that he had been asked to take the appellant and the complainant to the police station and he did so. Upon analyzing the evidence of both the prosecution and that of the appellant, the learned Senior Principal Magistate, found the appellant guilty on the principal count of defilement, convicted him, and after regarding the appellant's mitigation, sentenced him to life imprisonment.

The appellant was not satisfied and has appealled to this court agaisnt both conviction and sentence. When the appeal came up before me for hearing on 1st November, 2012, the appellant appeared in person and **Mr. Chirchir**, Learned Senior State Counsel, appeared for the state. The appellant, in his address to the court, stated that he would rely upon his written submissions. He however, emphasized that P.W .2 was not a reliable witness as she mentioned two shirts and further that P.W.6 mentioned clothes, yet P.W.5 stated that the complainant changed clothes.

Mr. Chirchir on his part, submitted that the conviction of the appellant was based on sound evidence as the complainant and the accused were neighbours and knew each other well. Counsel further submitted that P.W.2 saw the appellant putting on his trousers and recognized him at the scene where the complainant was. The defilement, acording to counsel, was confirmed by P.W.5, the Clinical Officer who testified that the complainant in addition, suffered fistule due to pressure exerted on her by the appellant.

Briefly, the facts were as follows:- The complainant and another young child called **Chepkemei** were playing near **Mama Chebon's** home at about 6.00 p.m., when the appellant approached. He called the complainant and led the young girls into the bush. According to the complainant, the appellant asked her to remove her clothes but she refused. The appellant forcefully removed them and knocked her to the ground and proceeded to assault her sexually as the other girl watched. As he did so, he covered the complainant's mouth with his shirt. When the appellant was through, he gave her Kshs 20/= and then left.

At about the same time, **H.M** (P.W.2), arrived at the scene on her way home. She saw a man putting on his trousers. She recognized the man as the appellant who is her neighbour. At about the same time, P.W.2 saw the complainant and another girl at the scene where the appellant had been. She was suspicious and enquired of the girls what had happened but the girls said nothing at first. P.W.2 then told them to go home. They asked her about a lost shirt and walked ahead of her. On their way, they found the appellant who joined them. He infact carried the younger girl and gave them a shirt. P.W.2's suspicion increased and she again enquired of them what they had been doing in the bush. This time round, the complainant told her what the appellant had done. P.W..2 then escorted the girls to their home. She met the complainant's mother, **Christina Kiprop**, (P.W.3) and told the complainant to tell her mother what had happened. The next morning, she informed her what she had witnessed.

As the complainant, her playment **Chepkemei** and P.W.2 were on the way to the complainant's home, they met P.W.3. P.W.2 told P.W.3 to enquire of the complainant where they had been. The complainant did not do so but showed P.W.3 the money which the appellant had given her.

The next morning, P.W.3 took the complainant to Marigat hospital where they met their Chief **Samwel Chepriten,** (P.W.4). After treatment, P.W.4 led them to Marigat Police Station. P.W.4 then mobilized youths who arrested the appellant.

The complaint was on 29th July, 2011 examined by **Michael Mengich**, (P.W.5) ,a Clinical Officer at Marigat Hospital. The Clinical Officer found laceration of the labia majora and labia minora. He also found that the complainant's hymen was broken and the vagina was discharging a whitish substance and had blood stains. He concluded that there had been Sexual penetration.

Later, the complainant was seen by P.W.5 who found that she had viginal fistula which affected the bladder walls. In his view, the same was caused by exreme pressure on the vagina. His findings were contained in a P.3 form which he produced at the trial.

P.W.5 also examined the appellant and found that he had Syphilis for which he was treated.

On 29th July, 2011, CPL **Hamisi Gwaya Wabungo** (P.W.6) re-arrested the appellant from P.W.4. at Marigat Police Station. He then charged him as already stated.

On the above facts, the Learned Senior Principal Magistrate found that the offence of defilement had been proved agaisnt the appellant as required in law and convicted him as already

stated. He then sentenced him to life imprisonment as already stated. In convicting him, the Learned Senior Principal Magistrate warned himself of the danger of convicting on the evidence of a child of tender years but did so all the same as he believed that the complainant told him the truth.

As the Learned Senior Principal Magistrate himself said, the case of the prosecution depended on whether he believed the complainant or not. He chose to believe her . Was there sound basis for doing so? I have on my own re-considered, re-evaluated and analysed the same testimony. I have found that the incident took place at about 6.00 p.m.. It was not therefore dark. I have also found that the complainant and the appellant were neighbours. They therefore knew each other prior to the incident. There can therefore be no question of mistaken identity.

The complainant testified that on the material date at the said time, as she played with **Chepkkemei,** the appellant arrived and led them into the bush where he ordered her to remove her clothes. She refused, but the appellant removed her clothes by force and knocked her to the ground. He removed his clothes and then according to the complainnt, did "t**abia mbaya**" to her. She felt some liquid pour on her from the appellant. The appellant gave her Kshs 20/= and asked her to tell no one. The appellant's testimony was not shaken in cross-examination at all.

The testimony of P.W.2, **Hellen Michah,** corroborated the complainant's testimony. In her own words:-

> **"On 28/7/2011 at 6.30 p.m., I was going home from the local centre. When I got near home, I saw a man in the bush. I saw him wearing [putting on] his trousers. I recognized him as the accused person ….. I then saw the complainant and another young girl at the scene where the accused had left.**
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> **….**
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> **I was now suspicious so when the accused left, I followed the two children. I asked them again what they were doing with the accused in the bush. The complainant told me that he had done tabia mbaya to her and had covered her mouth …."**

The above evidence clearly corroborated the complainant's testimony. In cross-examination, P.W.2, stated as follows:-

> **"It was around 6.00 p.m. When I saw you. You had not merely unzipped your trouser, you were wearing them."**

So, P.W.2 saw the appellant almost immediately after the incident. If she had arrived a few seconds earlier, she would have found the appellant red-handed.

The testimony of P.W.2 was also not shaken in cross-examination.

The evidence of P.W.2 also completely displaced the testimony of the appellant and his wife D.W.2. I say so, because it is the same P.W.2 who, the appellant alleged, in his testimony, that he met at around 5.00 p.m. of the material date and walked together before they met the complainant. It is significant that in his cross-examination of P.W.2, the appellant did not suggest to her that they were indeed together before meeting the complainant on the material date. It is also significant that the appellant never suggested to P.W.2, in cross-examination, that he was infact accompanied by his wife at the material time.

There is then the medical evidence adduced by **Michael Mengich,** ((P.W.5) . He testified that the complainant had lacerations of the labia minora. He also found her hymen broken. There were blood stains in the vaginal vault and there was a whitish discharge. A vaginal swab revealed isolated spermatozoa. So, the evidence of penetration was obvious.

P.W. 5 examined the complainant later and observed vaginal fistula caused by extreme pressure on the vagina.

The injuries sustained by the complainant were therefore life changing and I am not surprised at the revulsion exhibited by the lerned Senior Principal Magistrate.

I have considered whether the infection the appellant had (Syphilis) when he was examined and its absence in the complainant should be resolved in favour of the appellant. I have found the answer in the evidence of P.W.5. In his own words:-

"Syphilis manifests itself in women in two to three weeks."

So, obviously, examination of the complainant at the time would not be of assistance at all. Even subsequent examination would also not be helpful because it would pre suppose that the complainant received no treatment at all which was not the case.

In my above analysis, I have considered all the grounds of appeal which are without merit. Like the trial magistrate, I find the allegation of a frame-up far fetched. I also find that nothing turns on the fact that P.W.2, P.W.3 and P.W.4 were related to the complainant.

With regard to sentence, the same was lawful and in my view, deserved. In the event the entire appeal is devoid of merit and is dismissed.

DATED AND DELIVERED AT ELDORET
THIS 27TH DAY OF NOVEMBER, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

The appellant and **Mr. Chirchir** for the State.

F. AZANGALALA

JUDGE
27/11/2012.