REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 274 of 2010

PAUL WAITHUKI KIGUR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 5185 of 2009 in the

Chief Magistrate's Court at Thika – L. W. Gicheha (SRM) on 29th April 2010)

JUDGMENT

1. The appeal herein stems from the appellant's conviction in **CM. Cr. Case No. 5185 of 2009 at Thika Law Court.** The appellant was charged with the offence of defilement contrary to **Section 8(1)** and **8(2)** of the **Sexual Offences Act, No. 3 of 2006** and in the alternative with indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. He was subsequently convicted on the alternative count, and sentenced to ten years imprisonment.

2. His appeal raised three grounds as evinced from the supplementary grounds of appeal.

3. The 1st ground of appeal was that the conviction was based on uncorroborated evidence of two unsworn minors, one of whom gave testimony that was contradictory.

4. In response Mr. Mulati the learned State Counsel who opposed the appeal on behalf of the state submitted that the complainant was aged 11 years at the time and that she gave a graphical account of her ordeal at the hands of the appellant. Further, that her evidence was buttressed by the testimony of **PW2** although she too was a minor.

5. On this ground, I have scrutinized and re-evaluated the evidence on record to draw my own conclusion and make my own findings keeping in mind that I did not see or hear the witnesses as they testified.

6. PW1 was a minor, and it was her evidence that she was defiled by the appellant who she identified as "baba Njeri". She testified that he lay on her and put his penis into her vagina. He then told her not to tell anyone. She however, told her stepmother who in turn told her father. She was subsequently taken to hospital.

7. PW2 too, was a minor and a cousin to the complainant. She testified they were coming from fetching water when they passed through the appellant's home. They happened to peep through his window and saw him lying on top of the complainant. The complainant was not wearing her panties. The appellant too

saw them and called out their names. They left and went away and it was their father who later reported to the police.

8. From the evidence of **PW5** the medical witness, the minor was aged 12 years and was mentally challenged. For that same reason the learned trial magistrate took her testimony without oath.

9. From her testimony however, she gave a coherent narrative which showed that she recognised her assailant as "Baba Njeri" although she did not know his name. She told the court that he did what she referred to as "bad manners" to her. To explain what she meant in this regard she stated as follows:

"He did me bad manners down here (witness points at her private parts) he did me bad thing with his thing for urinating he put it in the place I urinate. He removed my panty and my dress. He did me bad manners in his house. He did me bad manners on the bed. I lay on my back looking up he had worn a trouser and shirt. He removed his trouser but did not remove the shirt. He then slept on my stomach. "

10. PW2 who was a 13 year old minor was subjected to **Voir dire** examination and found to be intelligent and to understand not only the importance of speaking the truth but also the solemnity of the oath. In her sworn testimony she told the court that she peeped through the appellant's window and saw him lying on top of the complainant who was not wearing any under pants at the time.

11. Indeed it is correct that evidence which in itself requires corroboration, cannot be used to lend corroboration to other evidence that requires corroboration. In this case, by virtue of the proviso to **Section 124 Evidence Act** however, there is no legal requirement for corroboration of the victim's evidence.

12. The provision to **Section 124** of the **Evidence Act** provides as follows:

...."Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

13. It would therefore have been possible for the court to convict on the evidence of the minor alone since her evidence was creditworthy and identification was based on recognition. Secondly there was the testimony of **PW2** which was also credible.

14. On justification for conviction on the alternative count, which forms the second ground of appeal, I noted that although her medical card records the history with which the minor presented as defilement, the minor appears to have undergone no medical examination at the first medical institution to which she was taken, and whose clinical notes were used by the second Dr. to fill the P3 form for her. The learned State Counsel submitted in answer to these ground, that the offence for which the appellant was convicted had been proved.

15. A scrutiny of the proceedings shows that the evidence of the two minors proved that the appellant put the complainant in a situation where his body parts deliberately touched her genitalia. Whether he did so lying on the bed as stated by **PW1** or on the chair as stated by **PW2** who peeped through the window, does not detract from the fact that he had bodily contact with the minor's genital using his own and that at the material time both his genitals and hers were bare.

16. Lastly the appellant advanced a 3rd ground in which he stated that the charge was defective in so far as the particulars in the charge sheet were at variance with the evidence tendered by the witnesses. In answer, Mr. Mulati the learned counsel submitted that the variance was due to a typographical error and could be cured under **Section 382** of the **Criminal Procedure Code.**

17. Indeed a scrutiny of the record showed that the charge sheet indicated that the offence and its alternative occurred on 25th November 2009 while the witnesses referred to the 25th November 2009. It

however appears that the error was in the charge sheet and not the evidence. **PW4** the Arresting Officer received the report of defilement on 5th of November 2009, and was informed that the offence had occurred on 25th October 2009, while **PW5** the medical witness filed the P3 in respect of the minor on 11th November 2009.

18. The charge sheet itself indicates the date of apprehension as 6th November 2009, while the record shows that plea was taken on 16th November 2009. Neither these would not have been possible if the offence occurred on 25th November 2009.

19. The charge sheet shows that the month of November was cancelled, and the month of October substituted therefore by hand. However, since there is no application to substitute on record, and the cancellation is not signed, it is impossible to determine, at what stage, and by whom the substitution was made.

20. Analysing the entire record in totality however, I am satisfied that the error was typographical and is of the kind envisaged under **Section 382 Criminal Procedure Code. Section 382 Criminal Procedure Code** provides as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."

21. The overriding factor therefore is whether the said error occasioned any injustice to the appellant. I have anxiously considered and re-evaluated the evidence on record, and I am of the opinion that no injustice was occasioned the appellant by dint of the variance in the dates.

22. The appellant's sworn defence was brief. He told the court that he was somewhere helping to dig a grave on 4th November 2009, when at 3.30 p.m, the area headman sent for him and had him arrested. When he sought to know the reason for his arrest he was told that the judge would tell him later.

23. From the evidence therefore, there appears to be no pre-existing grudge between him and the family of the complainant. If there was, he made no such suggestions to any of the witnesses by way of cross-examination. This being a criminal case the appellant was under no obligation to prove his innocence or to explain himself. That burden of proof rests unshiftingly with the prosecution. I however find that the defence statement did not manage to debunk the otherwise strong prosecution case.

For the foregoing reasons I find that the conviction entered against the appellant was well founded. The appeal is therefore not meritorious and is accordingly dismissed.

SIGNED DATED and **DELIVERED** in open court this **8th day** of **November 2012.**

L. A. ACHODE

JUDGE