REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 97 OF 2009

JOSEPHAT INGONGA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **Josephat Ingonga**, was charged with **defilement contrary to Section 8 (1) (2) of the Sexual Offences Act Number 3 of 2006**. It was alleged that he, on 18th October 2008, in Uasin Gishu District of Rift Valley Province intentionally and unlawfully caused penetration of his genital organ into the genital organ (vagina) of **L. M;** a girl child aged 1 ½ years old. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to section 11 (1) of the same Act. The allegation was that the appellant at the same place and on the same date committed an indecent act with the same child by touching her vagina.

The trial Court, **A.B. Mongare, (S.R.M)**, found the appellant guilty of the main count of defilement and after considering his mitigation sentenced him to life imprisonment.

Being dissatisfied with the conviction and sentence, the appellant has appealed before me against both conviction and sentence. In his amended grounds of appeal, the appellant has challenged his conviction because no independent witness was called; that the prosecution case was not proved as required in law; that the trial was conducted in a language he did not understand and that his defence was not considered.

When the appeal came up for hearing before me on 4/11/2010, the appellant wholly relied upon his written submissions which he had previously filed. **Mr. Oluoch**, Learned Counsel who represented the State opposed the appeal contending that, the appellant was convicted on sound evidence adduced by the complainant's mother and the Clinical Officer who completed a P.3 on the injuries sustained by the complainant.

As the first appellate Court, it is my duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach my own independent conclusion bearing in mind that I neither saw nor heard the witnesses testify and should give allowance for that (see **Okeno –vrs- Republic [1972]**

E.A. 32).

The prosecution case was that **C.M** (P.W.1) the complainant's mother, left the complainant, then aged about 1 ½ years, in the care of the appellant on 18/10/2008 at about 1.00 p.m.. She returned at about 5.00p.m. She tried to breastfeed the complainant but she could not. She tried to carry her on the back but the complainant tightened her legs. She then forced open her legs and observed that she was bleeding. She consulted her neighbour who advised her to take the complainant to hospital which she did. The doctor confirmed that the complainant had been defiled. The appellant was arrested and charged as stated. **Patrick Naimbili, (P.W.2),** a Clinical Officer at Webuye District Hospital testified that when the appellant attended the hospital, her napkin was blood-stained as she bled from her genital area. On examination, she had a torn labia minora and majora and there was blood on her vulva. He classified the injuries as **"grievous harm".**

P.W.3, P.C. Banson, received P.W.1's report and re-arrested the appellant. He also issued the P.3 which was subsequently completed by P.W.2.

When put to his defence, the appellant gave a sworn statement that he was arrested when he left his place of work at Kipkaren, taken to Webuye Police Station and later to Turbo Police Station where he was charged as stated. He denied the charge and testified that the complainant's mother framed him because of bad blood between them.

After reviewing the evidence, the learned trial magistrate believed the testimony of the complainant's mother and found the appellant's statement in his defence an afterthought and tailored to get him off the hook.

I have re-evaluated and re-considered the evidence which was adduced before the learned trial magistrate and agree with her that the complainant's mother's testimony was believable. She on the material date at 1.00 p.m., left the complainant, then aged only about 1 ½ years in the care of the appellant who was then her worker as she went to Turbo. She returned at 5.00 p.m. only to find the complainant unable to breastfeed and bleeding from her private parts. She rushed the complainant to hospital where she was found to have been defiled. She had a torn labia minora and majora and there was blood on her vulva. Those findings were made a mere six (6) hours after the defilement. The appellant did not suggest to P.W.1 that she had framed the charge against him because of a previous disagreement nor did he suggest that he was not in her employment at the time of the offence. The cross-examination indeed suggested that the appellant was present when P.W.1 returned from Turbo. In those circumstances, the learned trial magistrate was entitled to reject the appellant's defence as an afterthought.

The learned trial magistrate believed the complainant's mother P.W.1. She stated as follows:-

" I believe the complainant's story because she wanted to go with the baby to the market but it was raining, accused offered to remain with the baby. This was a good offer to avoid exposing the child to cold. In any event, accused person never challenged the witness (on) the issue of her having gone to market and there having been rain and him having to offer to take care of the baby. Secondly I believe the witness because when she arrived home, she tried to breastfeed the baby, it could not breastfeed, she tried to carry her on the back, it could not be carried on the back- the legs were painful.

I again believe her because immediately she discovered this, she went to hospital, and the doctor confirmed the baby was bleeding from the genitalia. He confirmed there was penetration, the child was lacerated on the vulva and labia."

It is plain therefore that the learned trial magistrate accepted the testimony of P.w.1 as true and found corroboration in the medical evidence given by the Clinical Officer P.W.3. Even if she had not found corroboration, she could still have convicted the appellant given the provisio to section 124 of the Evidence Act which reads as follows:-

" 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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."

In this case, the victim's evidence was given through her mother (P.W.1) and the medical evidence of the Clinical Officer (P.W.3). It was accepted as true by the learned trial magistrate and she gave her reasons for the same. Absence of an independent witness did not in my finding weaken the prosecution case.

The other complainants made by the appellant that his defence was not considered and that the proceedings were conducted in a language he did not understand have in my judgment no merit. The learned trial magistrate carefully considered the appellant's defence and properly rejected it as already stated.

With regard to the complaint about the language used at the trial, the record shows that the proceedings were conducted in English and translated into Kiswahili. The appellant infact testified in Kiswahili. He also fully participated in the proceedings by thoroughly cross-examining all the prosecution witnesses. He did not complain at the trial that he did not understand the proceedings. In the circumstances, the complaint made about the language used at the trial is, in my view, without merit. I therefore dismiss the appeal against conviction. The appellant was sentenced to life imprisonment. The sentence is provided for and is lawful. The appeal against sentence is also dismissed.

It is so ordered.

DATED AND DELIVERED ELDORET THIS 20TH DAY OF JANUARY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:

1. **Josephat Ingonga,** (the appellant in person) and
2. **Mr. Chirchir**, state counsel for the State.