



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL CASE NO. 63 OF 2009.

JUMA JACKSONAPPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

***(From an appeal arising from the original conviction and sentence in Criminal Case No. 624 of 2009
T Kapenguria***

before Hon. Washika – RM – Judgment made on 2th November2009.)

J U D G M E N T.

1. The appellant **Juma Jackson** was charged with offence of defilement of a child contrary to sections 8 (1) as read with sections 8 (2) of the Sexual Offences Act 2006. The particulars of the charge stated that on the 6th day of July, 2009 in West Pokot District within Rift Valley Province did intentionally and unlawfully cause his penis to penetrate the vagina of **D. C**, a child aged 12 years in violation of section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The appellant pleaded not guilty, and after trial before the Kapenguria Resident Magistrate. He was found guilty, and upon conviction, he was sentenced to life imprisonment.

2. Being dissatisfied with the conviction and sentence, the appellant appealed. The petition of appeal is also supported by the appellant's own written submissions. The appellant has faulted the conviction and sentence on the grounds that it was based on insufficient evidence by the prosecution witnesses. Moreover his Constitutional Rights as provided for under section 72 (a) of the Constitution were breached. The appellant contended that the judgment of the trial court failed to take due consideration of his defence and shifted the burden of proof upon him. The appellant further submitted that the conviction was against the weight of the evidence as the spermatozoa that was allegedly found when the complainant was examined by the clinical officer, was not matched with that of the appellant. Thus the medical examination was not conclusive. Further more according to the appellant there existed

a grudge between the appellant and the complainant's mother which was an indication that there was bad blood and thus the appellant was framed up. Lastly the evidence by the complainant that she had been defiled three times by the appellant but did not report to anybody implied that there was consent. He urged the court to allow the appeal.

3. This appeal was opposed by the state; the Learned State Counsel **Ms. Bartoo** supported the conviction which was based on cogent evidence by a complainant a girl although of tender age, she who knew the appellant well. The trial court believed the evidence of the complainant who was lured by the appellant with Ksh. 10/= to buy a *mandazi*. The appellant took the complainant to his house, covered her mouth with a polythene bag, forced her to lie on his bed, removed her clothes and defiled her. The appellant threatened the complainant with death if she reported the matter to anybody. The complainant was injured and experienced difficulties when she tried to walk. She was assisted by a neighbour who took her home. Her mother took her to Kapenguria District Hospital and the medical report confirmed that the complainant was 11 years old.

4. Upon examination at the hospital, it was confirmed that she was defiled. She had bruises on the labia mayora and the hymen was broken. She was discharging blood and yeast was found in her urine. The appellant was also examined but he had already changed into a clean underwear having changed his clothes. He had no physical injuries and his urine was dirty and he had no sexually transmitted infection. According to the state counsel, the issue of the grudge between the appellant and the complainant's mother was properly resolved by the trial court because PW2, the mother of the complainant confirmed that they had settled the dispute. She therefore urged the court to confirm the conviction.

5. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **NJOROGE VS. REPUBLIC [1987] KLR 19**. I now wish to set out, albeit briefly, the evidence before the trial court which led to the conviction and sentence of the appellant. The charge against the appellant is that on 6th day of July, 2009, he defiled the complainant. The charge sheet shows that the appellant was arrested on 7th July, 2009 and was arraigned in court on 8th July, 2009 when plea was taken thus I do not see how his Constitutional Rights were breached by the police.

6. The trial court conducted a *voire dire* examination of the complainant. The proceedings show that she gave evidence and stated her date of birth and documents were produced that showed she was born on 24th March, 1998 which means she was 11 years old. On 6th July, 2009 she testified how she met with the appellant on her way from school. The appellant gave her 10/= to buy *mandazi* and then lured her to his house. Previously he had also given her money the first day he gave her Ksh. 20/=-, the second day Ksh. 30/=- and this time Ksh. 10/=-. Thus the complainant knew the appellant as because they were also neighbours. The complainant gave graphic details of how the appellant removed her clothes, covered her mouth and defiled her. He threatened her with death if she should tell anybody what he had done to her. He would cut her into pieces and throw her in the maize plantation.

7. After the appellant finished defiling the complainant, she was experiencing pain walking and it was a neighbour that helped her to walk home. **S.K.C PW2** also the mother of the complainant testified that she found the complainant lying on the bed. The state in which she found the complainant worried her because the child looked distressed. She inspected the complainant and found evidence of defilement. She started screaming and her husband advised her to take the complainant to the hospital. The matter was also reported the following day to Kapenguria police station. PW2 identified the appellant who was arrested by **PC Walter Otieno Ojwang**, who also investigated this matter. PW3 recorded the statements from the complainant. He obtained the P3 form and the copies of the birth certificates of the complainant and charged the appellant with the offence of defilement. **Jeremiah Kisang**, a clinical

officer based at Kapenguria District Hospital examined the complainant and found bruises on the labia mayora and the hymen was broken. He found whitish discharge and blood which were emitting a foul smell. They also found the complainant was infected with a sexually transmitted disease. The complainant had not taken a shower since the assault. PW4 also examined the appellant who had come in clean clothes but did not find any infection from the urine test although he said the urine looked dirty.

8. Put on his defence, the appellant gave unsworn state of defence and denied having committed the offence. He testified on how he was arrested and when he was taken to the police station he was asked whether he knew the complainant and said she was a neighbour. He was told that the complainant had alleged that he had defiled her and she had clothes with spermatozoa. She was found with an STD as she alleged he had defiled her. He was shocked and went for a laboratory test that did not show anything. He also said he had a grudge with the complainant's mother that is why he was framed up.

9. The trial court considered the appellant's defence alongside the evidence by the prosecution witnesses and found that the prosecution had proved its case beyond reasonable doubt. The trial court found the complainant was aged 11 years, she was defiled, she knew the appellant as a neighbour and was lured into the appellant's house on two previous occasions. The trial court also considered the allegations that there was a grudge between PW2 and the appellant. However the trial court was satisfied that the grudge had been resolved amicably and could not have been the reason that the appellant was charged with the offence of defilement. The court also believed the evidence by the complainant and stated that on examining her demeanor her evidence was clear that she knew the appellant and she was defiled as the fact of defilement was also confirmed by the clinical officer.

10. As regards the issue of a grudge between the appellant and the complainant's mother, I agree with the State Counsel that the trial court sufficiently addressed and resolved that it could not have been the source of the complaint. Besides the fact that it was amicably resolved, it also defeats common sense that one would use a child of tender age to frame up charges of this nature and plan it in such a way that a child of tender age would be inflicted with injuries of sexual assault merely to fix a neighbour. I find it illogical that one would go to such extent merely to make a score. The appellant was convicted on the sole evidence by the complainant, a child of tender age whose evidence of the injuries she sustained was only corroborated by PW4 the clinical officer. PW2, the mother of the complainant also confirmed the injuries and the fact that the complainant told her that she was defiled by the appellant.

11. This appeal turns on whether the trial court was justified to convict the appellant based on the evidence of the complainant. Under section 124 of the Evidence Act (Cap 80), it is provided that:-

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

12. The trial court that saw the complainant testify was satisfied that she was telling the truth. The only issue is regarding the examination of the appellant whereby his urine was tested and was found not to have a sexually transmitted disease while the complainant was found to have a sexually transmitted disease. However, the appellant was not found to have an STD. For this reason, the offence of defilement was not proved. The learned trial magistrate having believed the evidence of the complainant who identified the appellant could have convicted the appellant with a lesser charge of sexual assault. I accordingly find there was sufficient evidence to convict the appellant with a lesser charge of sexual assault. I accordingly set aside the conviction and the life sentence imposed on the appellant and substitute it with a conviction of a sexual assault contrary to section 5 (1) of the Sexual Offences Act. I also set aside the life sentence and substitute it with a 10 years sentence.

Judgment read and signed this 22nd day of February, 2011.

M.K. KOOME.

JUDGE.