



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CRIMINAL APPEAL NO. 102 OF 2009**

**PATRICK MUGO NDERI.....ACCUSED**

**VERSUS**

**REPUBLIC.....PROSECUTION**

**J U D G M E N T**

Patrick Mugo Nderi hereinafter referred to as the Appellant was charged before the Senior Resident Magistrate's Court Siakago with 2 main counts of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. He is alternatively charged with 2 counts of indecent Act with a child contrary to Section 11(1) of the same Act. The particulars of these charges are as in the charge sheet. He pleaded "not guilty" on all the charges. The matter went to full trial with the state lining up 4 witnesses in support of its case. On his part, the Appellant tendered an unsworn statement of defence and called one witness. After considering the evidence adduced before him, the learned magistrate rendered the judgment in which he convicted the Appellant on both counts. He applied Section 8(1)(2) of the Sexual Offences Act and sentenced the Appellant to life imprisonment. Being aggrieved by the said conviction and sentence, the Appellant filed this Appeal through Rose Njeri & Co. Advocates. She proffered 9 grounds of Appeal which I nonetheless don't find necessary to replicate for purposes of this judgment. This being a first Appeal however, it is incumbent upon this court to re-analyse and critically reassess the evidence tendered before the trial court and arrive at its own decision. This I must nonetheless do while bearing in mind that I did not see the witnesses as they testified and given an allowance for that (see OKENO VS REPUBLIC 1972 EA 32).

In a nut shell, the evidence before the trial court was to the effect that the 2 complainants who were aged 4 and 7 years of age were left at their home by their mother (PW2) on 10.06.08 at around 3.00 p.m. In her absence, the Appellant who is their uncle went to their house. According to the older child i.e. PW3, the Appellant found her with her younger sister and younger brother. She said that the kid brother fell asleep and she decided to take him to bed. As she did so, the Appellant followed them into the bedroom and locked the bedroom door behind him. He then ordered PW3 to remove her underpants which she refused to do. The Appellant then removed the child's underpants and forced her to lie on the bed. He removed his clothes and carnally forced himself into the child causing what she described as "a lot of pain in my vagina". The Appellant is then said to have taken the 2<sup>nd</sup> complainant into the same room after the 1<sup>st</sup>

complainant left crying. He also sexually assaulted her.

When their mother came home, she found her children crying and they reported to her what their under the Appellant, had done to them. She told the court that she carried out a physical check on the complainants and confirmed that the complainants' private parts had been interfered with. She immediately proceeded to the Appellant's house and confronted him. She told the court that the Appellant tried to seek for leniency but PW2 decided to go to the area chief and report the matter which she did.

The report was received at Siakago police station by PW4 – pc Mathenge Kinyua. The 2 children were referred to Mbeere District Hospital where they were examined and treated. Their P3 forms were produced as exhibit before the trial court by PW1. A P3 form in respect of the Appellant was also produced in evidence.

The P3 forms in respect of the both complainants indicated that upon examination, they were found with freshly torn hymens with tears. The Doctor confirmed that there had been penile penetration of the vaginas. The first complainant was also found to have been infected with gonorrhoea pus cells. The appellant's P3 form did not disclose any infection. The Appellant was arrested 2 weeks later and taken to the police station where he was charged with the offences now before court.

The Appellant in his short statement of defence denied having committed the offence. He said that that he was at the market selling miraa on date in question. On the same breath he denied that he ever left his home on the date in question. He said that he was found at home by the complainants' parents who confronted him with the allegations that he had defiled the complainants. His wife testified to the effect that the Appellant was fetching water at a nearby borehole on the date time the complainants say they were defiled.

The learned magistrate after considering this evidence found it sufficient to convict the Appellant. I have reconsidered the said evidence along with the 9 ground of appeal proffered by counsel for the Appellant. The first issue for decision is whether the complainants were indeed defiled. Evidence on this point was in my view overwhelming PW3, one of the complainants narrated to the court in detail how the Appellant defiled her and how he also defiled her younger sister as the 1<sup>st</sup> complainant went to cry behind the house. The mother PW2, confirmed their story as told to her and on checking the private parts confirmed that indeed her children had been defiled.

This evidence as also corroborated by the medical evidence as contained in the P3 forms exhibited in court.

The only other issue is whether it was the Appellant who defiled them and whether the learned trial magistrate erred in convicting the Appellant on the uncorroborated evidence of a minor. What then is the position in law relating to corroboration in sexual offences and particularly as it relates to the evidence of a minor?

Ground 6 of appeal in the Appellant petition of Appeal is to the effect that the learned trial magistrate erred in law in convicting on the uncorroborated evidence of the first complainant. So did he truly err in law and fact in so doing?

Under section 143 of the Evidence Act, no minimum number of witnesses is necessary to prove a case. A conviction is not therefore necessarily unsafe for the sole reason that it is based on the uncorroborated evidence of one witness. Sexual offences are no exceptional since the land mark decision of the court of appeal in the case of MWANGI VS REPUBLIC which held that the hitherto requirement that evidence in sexual offences cases must be corroborated was discriminatory against women. There was therefore nothing wrong with the learned trial magistrate in convicting on the evidence of PW3 which was uncorroborated. The law nonetheless requires that before the court can convict on the evidence of a single witness, that evidence must be watertight and free from any possibility of error. Further, the trial court must treat such evidence with great circumspection and satisfy itself that the said evidence is credible and free from error. In this case, the learned trial magistrate did analyze the evidence of the minor. He

believed the evidence as he said that the offence was committed in broad daylight and that the complainants knew the appellant well before.

I agree with his analysis and the treatment of that evidence. What I find however is that the learned magistrate should have gone a step further and cautioned himself of the danger of convicting on the evidence of the minor which was apparently uncorroborated. This failure nonetheless does not invalidate his conclusion.

In this case, one of the complainants was too young to testify and so she did not testify. The evidence on the identity of the perpetrator of the crime was PW3 herself. This therefore calls into play the provisions of Section 124 of the Evidence Act which provides:-

***Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of the 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 implicating him. Provided that where 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”.***

The question the learned magistrate should have asked himself and which I do now as a first Appellate court is whether PW3's evidence was credible and watertight so as to support the conviction. I have gone through that evidence and considered the same carefully. In my view, she gave a candid, consistent and very straight forward account as to what happened. She knew the Appellant very well before that date as he was their uncle. The issue of visual identification does not therefore arise.

The identification of the Appellant was one of recognition as opposed to visual identification. It was credible and foolproof. Indeed, I note that the issue of identification is not a ground of Appeal and I will not therefore delve into it. The issue of penetration is also not disputed. The medical evidence adduced clearly showed that there was penile penetration of both complainants. This corroborated the evidence of the complainants as well as that of their mother PW2.

The issue as to why the Appellant was found to not have been infected with a sexually transmitted disease while PW2 was in my considered view peripheral. There could have been several reasons for it, one of which was proffered by the learned trial magistrate. My finding is that that did not exonerate the Appellant from blame. It did not lessen the credibility of the complainant's evidence. I am satisfied that the evidence of the complainant (PW3) though unsworn and uncorroborated was truthful. The appellant who was her uncle went to their home at about 3.00 p.m. (in broad daylight) and defiled her and her younger sister in the manner that she described. They reported the matter to their mother (PW2) immediately she went home and she went to the chief and Appellant's home immediately thereafter. This was not a case of fabrication or second thought. The Appellant did say that he went to the shamba and thereafter went to fetch water. This did not mean that he could not have within that time gone to the complainants' home and committed the offence and then went back to his home.

My independent analysis of the evidence adduced before the trial court is that the Appellant did defile the 2 minors both aged below 10 years of age as clearly indicated in the P3 Forms. I am satisfied that he was properly convicted on the 2 main charges of defilement. He nonetheless ought to have been specifically acquitted on the alternative charges. On the sentence, the same is lawful as provided for under Section 8(1) (2) of the Sexual Offences Act as the complainants were aged below 10 years. My finding is that this Appeal is devoid of merit. The same is hereby dismissed in its entirety.

**W. KARANJA**

**JUDGE**

Signed by the above but delivered and dated at Embu by the undersigned this **10<sup>th</sup> day of February 2011.**

**H. M. OKWENGU**

**JUDGE**

**In presence of:- Okwaro holding brief for Njeru for Appellant**

**Appellant present**

**Ms. Matiru for state**