



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 54 OF 2009.

RIJON LUBISIA KICHO.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence of Hon. D.M. Ochenja – PM. In Criminal Case No. 1909 of 2008

delivered on 2nd October, 2009 at Kitale.)

J U D G M E N T .

1. **Rijon Lubisia Kicho**, the appellant herein was charged with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars of the charge stated that on the 19th day of August, 2008 at S[...] sub location in Trans Nzoia West District within the Rift Valley Province, by use of his genital organ, unlawfully and intentionally caused penetration into the genital organ of **R.W.**, a girl aged 11 years. The appellant was also charged with an alternative charge of indecent act contrary to section II (b) of the Sexual Offences Act No. 3 of 2006 which stated that on the 19th day of August, 2008 at S[...] sub location in Trans Nzoia West District within the Rift Valley Province, unlawfully caused an indecent contact to the genital organ of **R.W.** by touching her private parts.

2. The appellant pleaded not guilty, and after trial he was found guilty and upon conviction he was sentenced to 20 years imprisonment. Being dissatisfied with the conviction and sentence, the appellant has appealed. He has challenged the decision of the trial magistrate which he claims was based on inconsistent evidence which was framed up in order to implicate him with the offence of defilement. Further the appellant contended that he was convicted on insufficient evidence because he was not taken to hospital for blood or urine test to confirm that he had sexual contacts with the complainant. The appellant also faulted the decision of the learned trial magistrate for failing to take into account his defence which was plausible. The appellant also filed lengthy written submissions as further arguments in support of his appeal.

3. This appeal was opposed; M/s. **Bartoo** the learned state counsel submitted that the conviction and sentence of the appellant was supported by the evidence and the law respectively. The complainant was able to identify the appellant who was a bicycle repairer. The complainant was dragged into a maize plantation by the appellant and she was defiled in broad daylight. The complainant reported the matter to her mother immediately. She was taken to hospital and the injuries especially the scratch mark on the neck and the injuries on her vagina were noted by the clinical officer who carried out the medical examination. The matter was reported to S[...] Police station and the appellant was arrested on the same day and taken to Kitale Police Station.

4. 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 will now set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant. The evidence that led to the conviction and sentence of the appellant was specifically adduced by **R.W.**, PW1 also the complainant in this case. After a conducting a *voire dire* examination of PW1, the learned trial magistrate found the complainant was 11 years old a standard 5 pupil, and she possessed sufficient intelligence to give sworn evidence.

5. PW1 testified that on 19th August, 1998, at about 1.00 p.m. her mother had sent her to the posho mill. On the way to her home, she was accosted by the appellant; he grabbed her from the back, pulled her into a maize plantation, removed her underpants, knocked her down and defiled her. After the ordeal, the appellant disappeared into the maize plantation leaving PW1 helpless. PW1 collected her underpants and reported the matter to her mother. She reported that she was able to identify her assailant who was a bicycle repairer at Sikhendu Trading Centre.

6. **M.M.**, the mother of the complainant who received the report from PW1 testified that after examining PW1, she confirmed that the complainant had been defiled and rushed her to police station. PW1 told the police that she knew the person who had defiled her. She was taken to Kitale District Hospital and was examined by **Reuben Bunyambi**, a clinical officer who completed the P3 form. After examining the complainant, he found that the complainant's thighs were tender. There were bruises on the left vagina wall. Both vagina walls were red in color meaning there was forced sexual intercourse. The hymen was broken and the entry of the vaginal was tender. On examination he found some white discharge from the vagina. However HIV and STD tests were negative. A vaginal swap showed some puss cells.

7. The appellant was arrested by **PC Musa Kazungu** who was based at S[...] police post and he said he was on duty on 18th August, 2008 at about 3.45 p.m. at the time, the appellant had been apprehended on suspicion of an offence of defilement and he was being held at S[...] trading centre. PW4 rearrested the appellant and took him to the police station. The appellant was placed on his defence, he gave unsworn evidence and did not call any witness. According to the appellant, on the material day, he was working at Sikhendu[...] trading centre where he repairs bicycles until 3.00 p.m when he was summoned by one police officer and informed that he was needed at the police post. When he accompanied the police officer, he was kept in police cells and later charged with the offence of defilement which he denied. He claimed that he had a difference with the complainant's mother who had threatened him with dire consequences for reporting that she was selling things belonging to refugees. According to the appellant, this is why he was implicated with the offence of defilement by the complainant.

8. After evaluating the above evidence, the learned trial magistrate held that the evidence of PW1 was cogent. It was corroborated by her mother and clinical officer who examined the injuries that she sustained during the ordeal. He was satisfied that the complainant was speaking the truth and proceeded to convict the appellant after finding the defence not plausible. This appeal raises the issue of whether the prosecution proved their case to the required standard in particular whether there was evidence to support the charge of defilement of the complainant considering the appellant was not subjected to medical examination to connect him with the offence of defilement of the complainant.

9. It is the learned trial magistrate who heard the evidence. He had the advantage of assessing the complainants' demeanor while she testified in his court. The learned trial magistrate cautioned himself as required under section 24 especially the proviso thereto, and made the following observations in page 33 of his judgment;

"In the present case, the complainant was not a child of tender years and she gave sworn evidence, hence the holding in the case of KIBANGENY ARAP KOLIL VS. REPUBLIC applies. However, going by the evidence on record it is crystal clear that the complainant's testimony was corroborated in material particulars. Throughout her evidence in chief, the complainant maintained that she knew the accused person as a bicycle repairer. This piece of evidence was corroborated by the accused person's defence when he told this court that he is a bicycle repairer who operates at Sikhendu trading centre."

10. The complainant's testified that she was defiled by somebody she described as bicycle repairer at S[...] market. Immediately after the ordeal, the complainant reported to her mother and she repeated the same description of the appellant and this is how the appellant was apprehended and arrested by the police. The learned trial magistrate who heard and saw the complainant testify, believed that she was telling the truth. Under the provisions of 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".

11. The trial court also considered the defence by the appellant and found it lacking in credibility. I am in concurrence with the

findings of the learned trial magistrate that the appellant's defence did not dent the otherwise strong prosecution's case. Further to the reasons given to the trial court, if there was a grudge between the appellant and the complainant's mother, this did not come out when the complainant's mother was being cross examined by the appellant. Thus the defence of a grudge was a mere afterthought. Moreover, it defeats common sense that a mother of a child can go to the extent of implicating the appellant with an offence of defilement merely to settle a score which was not even substantiated or brought out during cross examination.

12. The age of the complainant was confirmed by the court during the *voire dire* examination, it was also confirmed by the clinical officer who examined the complainant and also her mother. The last issue to consider is whether it was necessary to subject the appellant for medical examination before he could be found guilty of the offence of defilement. I hasten to point out that, is not a requirement in law for an accused person to be subjected for medical examination. However if the appellant intended to adduce such evidence of his medical status in his defence, he was free to do so but it is not a requirement for the prosecution to subject a suspect for a medical examination. The nature of the evidence required in sexual offences is clearly provided for under the Evidence Act, and the sexual offences Act.

13. Having re-evaluated the evidence on record, I am satisfied that the learned trial magistrate's decision is safe from any possible error. Accordingly, I find no merit in this appeal which is dismissed. The conviction and sentence imposed by this court are hereby confirmed.

Judgment read and signed on 26th day of May, 2011.

MARTHA KOOME.

JUDGE.