



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 520 OF 2009**

**SULEIMAN UKURE ABDI..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 375 of 2008 of the Senior Resident Magistrate's Court*

*at Wajir by A. Ingutya – Senior Resident Magistrate*

**JUDGMENT**

The appellant, **SULEIMAN UKURE ABDI**, was convicted for the offence of Defilement of a child contrary to **section 8 of the Sexual Offences Act**. He was then sentenced to life imprisonment.

In his appeal to the High Court the appellant has raised three issues, namely;

*(a) The medical evidence adduced was ambiguous and also contradictory;*

*(b) An essential witness was not called to give evidence;*

*(c) The investigations were wanting; and the sentence handed down was excessive.*

The appellant drew this court's attention to the fact that the Investigating Officer had testified that the appellant was a habitual offender.

However, after the appellant was convicted, the prosecution informed the court that the appellant was a first offender. In those circumstances, the appellant submitted that the Investigating Officer was an unreliable witness, whose evidence should have been rejected.

On the issue regarding the medical evidence, the appellant pointed out that the doctor who examined the complainant did not give evidence. The doctor was said to be un-available.

In his place, a clinical officer from Wajir District Hospital, produced the P3 Form. However, the clinical officer is said to have failed to give the name of the doctor who examined the complainant.

As far as the appellant was concerned, the initials MOH, which the clinical officer referred to, stood for "MINISTRY OF HEALTH". Therefore, that would imply that the complainant had been examined by an anonymous doctor.

In any event, the appellant believes that the medical report was contradictory, and was thus of no evidential value. The contradictions in the medical report are attributed to the evidence of the clinical officer who said that the complainant had no tears; but then went on to say that the complainant had tears.

Furthermore, the report talked about the complainant having been raped on 15<sup>th</sup> December 2008, whereas the complainant said that she was raped on the nights of 8<sup>th</sup> and 9<sup>th</sup> December 2008.

In the light of the foregoing, the appellant asked me to quash the conviction and set aside the sentence.

In answer to the appeal, Ms Gateru, learned state counsel, submitted that the evidence on record was sufficient to sustain the conviction.

She pointed out that the appellant was well recognized by the complainant, who was his niece.

The learned state counsel also pointed out that the evidence of the complainant was duly corroborated by the medical evidence. As far as the respondent was concerned, there were no contradictions in the medical evidence tendered.

As regards the contention that an essential witness did not testify, the respondent submitted that the complainant's grandmother was not an essential witness. Although the said grandmother had been informed of the sexual molestation which the appellant visited upon his niece, the grandmother took no action at all. In those circumstances, if the appellant believed that the complainant's grandmother was an essential witness, the respondent submitted that he was free to have called him as his witness.

In determining the appeal, I will re-evaluate all the evidence on record, and will draw therefrom my own conclusions. When drawing-up my said conclusions, I will make an allowance for the fact that I did not have the benefit of observing the witnesses as they testified.

However, the starting point in determining the appeal is a restatement of the law relating to the burden of proof in criminal cases. The law recognizes that at all times in a criminal case, it is the prosecution that has the burden of proving that the accused person is guilty. That burden does not ever shift to the accused person.

Therefore, whether the accused person chooses to say absolutely nothing, in his defence, or not; and also if he should not call any other witnesses, that cannot be held against him; unless the prosecution proves the guilt of the accused, he shall be acquitted.

In this case, the prosecution called five witnesses. **PW 1, F. M.**, was the complainant. She was 11 years old, and lived in the

same house with her grandmother and the appellant. The appellant was an uncle to the complainant.

**PW 1** testified that on the night of 8<sup>th</sup> December 2008, she was sleeping in her bed, inside her grandmother's house. At that time, there was a hurricane lamp inside the house.

**PW 1's** sleep was disturbed when someone lifted up the net covering her bed. She woke up and saw the appellant. **PW 1** said that the appellant, who was her uncle, had lived with them for years.

Before **PW 1** could raise an alarm, the appellant covered her mouth with his palm. He then got into **PW 1's** bed, and defiled her. Whilst he was doing so, he covered **PW 1's** face, using her dress. When he finished, **PW 1** felt wetness on her thighs.

**PW 1** got up, after the appellant left, and informed her grandmother. Her grandmother woke up and went into the appellant's room. But nothing came out of that.

On the following night, **PW 1** was again defiled by the appellant. Again, **PW 1** told her grandmother about the incident, but she did nothing.

Later, as **PW 1** was crying, **PW 2, E.D.A.**, found her, and inquired what was wrong. **PW 1** told **PW 2** the whole story. **PW 1** also told **PW 2** that she was in pain.

**PW 1** was taken to hospital by her aunt, after **PW 2** had informed the said aunt about what **PW 1** had told her. **PW 1** was examined at the hospital, and then issued with a P3 form.

**PW 1** was escorted to the Manderu Police Station, where she reported the incident. Thereafter, the appellant was arrested.

**PW 2** corroborated the evidence of **PW 1**. After **PW 1** had informed her that she had been defiled by the appellant, **PW 2** informed several people, including the area chief. She also sent a message to **PW 1's** father.

At the request of the chief, **PW 2** and some other ladies examined **PW 1**. They verified that **PW 1** had been penetrated.

During cross-examination, both **PW 1** and **PW 2** said that it was the appellant who had defiled **PW 1**. Of course, **PW 1** was giving a first-hand account of what had transpired, whilst **PW 2** indicated that it was **PW 1** who gave her the information.

**PW 3, B.D.A.**, testified that **PW 2** told her that **PW 1** had reported to her, that she (**PW 1**) had been defiled by the appellant.

**PW 3** accompanied **PW 2** to the chief's place, where they reported to the chief. At the request of the chief, **PW 3** was together with **PW 2** when they examined **PW 1**. It was the evidence of **PW 3** that when they were examining **PW 1**, the complainant's grandmother was also present.

If it is after they verified that **PW 1** had been defiled that **PW 3** organized for the vehicle which ferried her to the hospital.

**PW 4, MOHAMED ABDI JIMALE**, was a clinical officer working at Wajir District Hospital. He started his testimony by saying that he was standing in for the "**MOH Manderu**"

**PW 4** said that he was familiar with the handwriting of the said **MOH**. He then proceeded to produce in evidence, the P3 form which the **MOH** filed after he had examined **PW 1**

The record of the proceedings shows that **PW 4** told the court that **PW 1** was examined on 15<sup>th</sup> September 2008. The record also shows **PW 4** as saying that there were no stains or tears. But, he is also shown as having stated that there were tears around the labia and next to the anus.

I believe that it is those apparent contradictions which caused the appellant to submit that the medical evidence was ambiguous and contradictory.

As the said contradictions were too obvious; and because they followed one another, during examination-in-chief, I decided that there was need to verify if the hand-written original record of the proceedings had been correctly captured in the typed records.

It does appear that the learned trial magistrate recorded **PW 4** as saying that **PW 1** was seen by the doctor on either **10<sup>th</sup> or 15<sup>th</sup> September 2008**.

A perusal of the P3 form itself confirms that the complainant was examined at the Mandera District Hospital on **15<sup>th</sup> December 2008**. As that date is very clearly shown on the P3 form itself, I cannot understand where the date 10<sup>th</sup> or 15<sup>th</sup> September 2008 came from.

Furthermore, it is obvious, from the date entered by the police officer at Mandera Police Station, that **PW 1** was only sent to the hospital on 15<sup>th</sup> December 2008.

The police officer also indicated on the P3 form that;

*(a) PW 1 reported the incident to the police on 12<sup>th</sup> December 2008; and*

*(b) PW 1 reported that she was defiled between 5<sup>th</sup> and 10<sup>th</sup> December 2008.*

Therefore, there can have been no basis, factual or otherwise, for **PW 4** stating that the complainant was examined on 10<sup>th</sup> or on 15<sup>th</sup> of September 2008, when the person who examined her had indicated that he did so on 15<sup>th</sup> December 2008.

I can only attribute that piece of evidence to a genuine error.

**PW 5, BENJAMIN WAMBUA**, recorded the statement of the complainant on 13<sup>th</sup> December 2008. He then issued her with a P3 form, and also escorted her to the hospital where she was examined.

**PW 5** also testified that the appellant was examined by a doctor.

When the appellant was examined, the doctor found bruises on the glands of his penis.

Thereafter, when the appellant was put to his defence, he chose to remain silent. He also called no witnesses.

After re-evaluating the evidence on record, I find that the complainant was a niece to the appellant. They had lived within the same house for several years. Therefore, when **PW 1** saw the person who assaulted her sexually, there was no room for any

mistaken identity.

Although the assailant covered her face whilst he was molesting her sexually, the complainant had already seen and recognized him.

Immediately after the incident, **PW 1** informed her grandmother about what had happened. Her grandmother went to the appellant's room. Even though her grandmother did not take any action against the appellant, the fact that **PW 1** told her that it was the appellant who had defiled her, coupled with her visit to the appellant's room immediately thereafter, indicate that the complainant was very sure about the identity of the person who violated her sexually.

When the appellant defiled **PW 1** on the next evening, **PW 1** again informed her grandmother. But, once again, her grandmother did not take any action.

It is for that reason that **PW 1** was in so much pain on the following day. She was suffering both physical and psychological pain. She must have felt beaten, violated and then betrayed by her uncle and her grandmother who refused to take any action. That she was defiled is not in doubt, as the medical report states so, in no uncertain terms. And, as documents speak for themselves, if the clinical officer mis-represented the contents of the said medical report, that would not change the contents of the report. In other words, I do find that there were bruises on the complainant's labia, with some tear. Also, her hymen was not intact. And because of those findings, the doctor concluded that rape had taken place.

Contrary to the appellant's contention that the initials "**MOH**" stood for the **MINISTRY OF HEALTH**, the P3 form clearly indicates that those initials, as used on the P3 form, stood for "**MEDICAL OFFICER OF HEALTH**", Mandera District. In effect the medical examination of the complainant was not conducted by an anonymous doctor.

By dint of the provisions of **section 77 (2) of the Evidence Act**, the court may presume that the signature to the P3 form under the hand of the Medical Officer of Health, Mandera District, was genuine, and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

In the event, I find and hold that the offence of defilement was proved beyond any reasonable doubt, and that the appellant was the perpetrator of the said offence.

Although he was under no obligation to say anything in his defence, when he did so in this case, the overwhelming evidence tendered by the prosecution remained unchallenged, thus proving his guilt.

As regards the sentence, the trial court acted within its discretion. The appellant said that he did not care. He then asked for a short sentence. But he did not give to the trial court any reasons why it ought to consider giving him a short sentence. He cannot now be heard to complain that the sentence was excessive.

He is an uncle to the complainant. Yet he defiled her; not once, but on two consecutive nights. He did so inside the house which the complainant called home. And even after the trial court convicted him, and asked him to mitigate, he said that he did not care.

In those circumstances, I find that the sentence was well merited.

Accordingly, the appeal is dismissed. I uphold both the conviction and sentence.

**Dated, Signed and Delivered at Nairobi, this 19<sup>th</sup> day of May, 2011**

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**FRED A. OCHIENG**

**JUDGE**