REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 13 OF 2011

KEBBY CHIVOLI …….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being Appeal against Judgment from Eldoret Chief Magistrate's Court delivered on 19th January, 2011 by Hon. D.K. Kemei – Principal Magistrate)

J U D G M E N T

This appeal arises from the decision of the Principal Magistrate at Eldoret in CMC. Criminal Case No. 5129/2009 in which the appellant, **Kebby Chiroli**, was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act.

It was alleged that on diverse dates of the 15th/16th August, 2009 in Uasin Gishu District, the appellant intentionally caused penetration of his genital organ into the genital organs of C.O a girl aged 11 years. There was an alternative charge of indecent assault contrary to Section 11(1) of the Sexual Offences Act in which it was alleged that the appellant intentionally and unlawfully committed an act of indecent assault by touching the genital organs of C.O, a girl aged 11 years. Upon his plea of not guilty for both counts, the appellant was tried, convicted and sentenced to serve life imprisonment with hard labour. Being dissatisfied with the conviction and sentence, the appellant lodged the present appeal on the basis of the thirteen (13) grounds contained in the petition of appeal filed on the 28th January 2011.

The said grounds were argued on behalf of the appellant by the learned counsel, **Mr. Keter** who firstly submitted that the charges as framed were incurably defective in that instead of Section 8(2) of the Sexual Offences Act, the prosecution applied Section 8(4) of the Act yet the particulars indicated that the complainant was aged 11 years. Consequently, the evidence before the court could not support the charge under Section 8(4) of the Sexual Offences Act yet the sentence imposed was under Section 8(2) of the Sexual Offences Act.

Mr. Keter went on to submit that the issue pertaining to the aforementioned defect in the charge was raised but no finding was made by the trial court with regard thereof.

Citing the decisions of the High Court in the case of **Zachariah Otieno Charles Vs. Republic (2011)e KLR** and the case of **Mathew Karema Githui Vs. Republic (2007) e KLR**, the learned counsel contended that due to the defect in both the main and alternative counts, the conviction of the appellant by the learned trial magistrate cannot stand.

Referring to grounds two to thirteen of the grounds of appeal, Mr. Keter, submitted that the evidence before the trial court was insufficient and contradictory. The complainant, a minor aged 9 years, was the

sole identifying witness who gave a contradictory and inconsistent unsworn statement and stated that she was in the house with her younger brother and PW4 at the time of the offence yet no screams were heard by those inside the house nor was the younger brother called to testify. Learned counsel submitted that PW4 did not receive any defilement report from the complainant and since the complainant was the only witness against the appellant she could not be believed. It was also submitted by the learned counsel that the offence occurred in the night such that conditions favourable for identification of the offender were non-existent. It was therefore possible that the offence was committed by PW4 and not the appellant.

Learned counsel further submitted that it was possible that the appellant was framed by the complainant's relatives who testified in court and that it was also possible that the complainant was defiled by a person other than the appellant since the medical report (P3 form) was filled five days after the alleged offence.

Learned counsel proceeded to submit that the appellant was not medically examined and that the clothes worn by the complainant were burnt instead of being presented in court as exhibits. Further, the prosecution did not discharge its burden of proof and the defence raised by the appellant was not given due consideration by the learned trial Magistrate.

On sentence, the learned counsel submitted that the mitigating factors were not taken into consideration and that the sentence imposed by the learned trial magistrate was manifestly excessive. Learned counsel urged this court to allow the appeal.

On his part, the learned Senior State Counsel, **Mr. Chirchir**, representing the respondent, agreed with the submissions by the appellant's counsel regarding defectiveness of the charge and went ahead to concede the appeal. The learned State Counsel contended that the charge ought to have been under Section 8(2) of the Sexual Offences Act and not Section 8(4) of the same Act and made observations that there was no application by the prosecution to amend the charge nor was there any attempt by the trial court to apply Section 214 of the Criminal Procedure Code. The learned State Counsel also observed that the trial magistrate imposed a sentence under section 8(2) of the Sexual Offences Act and included hard labour which is not provided for. The learned State Counsel urged this court to allow the appeal solely on the basis of the appellant's ground one.

Having heard the foregoing submissions by both the appellant and the respondent, the role of this court is to re-visit the evidence adduced before the trial court and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness.

Briefly, the prosecution case was that on the 15th August, 2009 at midnight, the complainant, **C.O (PW2),** was asleep at their home in Eldoret. She was sleeping in a bedroom on a mattress on the floor with her younger brother when the appellant who was in the same house sleeping on a sofa set in the sitting room went into her bedroom, gagged her mouth with a T-shirt and a pair of trousers, removed her underpants and defiled her. She could not scream in the process and on the following day reported the incident to her uncle who promised to inform her father. She also later informed her father of what had happened. Her father took her to hospital and reported the matter to the police. The complainant's father, **J.K.O (PW3),** resided in Nairobi at the time. His Eldoret residence was under the care of **S.K.N (PW4)** with whom the appellant lived. He (PW3) arrived in Eldoret at 7.00 p.m. on 17th August 2009 and was informed by the complainant that she had been defiled by the appellant. The accusation was repeated by the complainant in the presence of the appellant but he vehemently denied. The complainant's father thereafter handed over the appellant to the police and took the complainant to hospital.

Simon (PW4) confirmed that he stayed with the appellant at the complainant's father's residence but on the material night he (PW4) was not there. He slept out leaving the children including the complainant with the appellant. Later, he was informed by the complainant's father that the appellant had defiled the complainant. The accusation was repeated by the complainant in his presence but the appellant vehemently denied the same. The matter was then referred to the police.

P.C. Stanley Kesier (PW5) of Baharini Police Post investigated the complaint and thereafter

charged the appellant with the offence of defilement.

Dr. Paul Kipkorir Rono (PW1) of the Moi Teaching & Referral Hospital produced a medical examination report (P3 form) completed and signed by Dr. Embenzi of the same hospital. The report confirmed that the complainant was indeed defiled.

The appellant was placed on his defence on the basis of the foregoing facts by the prosecution. His case was that on the material date, he left the complainant's father's residence and went to the local trading centre to watch a football match on television. The match was between two English teams i.e. Everton Vs. Arsenal. He was in the company of his friends Josephat and Ashley. After the match he went to Ashley's home for the night. The home was three hundred (300) meters from that of the complainant. We returned to the complainant's home on the following day and slept there in the absence of Simon (PW4) but in the presence of the complainant's father. Later, on the 18th August, 2009 he was summoned by the complainant's father and in the presence of Simon (PW4), the complainant alleged that he (appellant) had defiled her. He denied the allegation and was handed over to the police and locked up. He was later arraigned in court. He denied the offence and stated that he did not sleep at the complainant's home on 15th August, 2009 but slept there on the 16th August 2009 in the presence of the complainant's father.

D.M (DW2), a teacher at R.V Academy confirmed that the appellant brought two pupils for tuition on the 17th August 2009. The children attended tuition on the following day but on the third day one of them (a girl) failed to turn up.

A local consideration by this court of the evidence placed before the learned trial court reveals that there was no dispute that the offence of defilement was indeed committed against the complainant. The fact was indeed established by the medical report dated 19th May, 2009 compiled and signed by the examining doctor (i.e. Dr. Embenzi) who described the complainant as a highly eloquent and intelligent girl.

The basic issue that fell for determination was whether the appellant was the person responsible for the offence. In that regard, the sole evidence was that of the complainant (PW2). She knew the appellant. They lived in the same house and this fact was not disputed by the appellant although he indicated that he did not sleep in the same house at the material time of the offence and that he slept there when the complainant's father was present. This line of defence was carefully considered by the learned trial magistrate and overruled on the basis of the evidence by the complainant's father (PW3) and Simon (PW4) as well as the appellant indicating that the offence was committed on the night that the appellant was left alone with the children in the house. This court finds no reason to interfere with such findings and would not have agreed more.

In holding that the appellant was responsible for the offence the learned trial magistrate noted that the complainant was the only identifying witness and duly warned himself of the danger of convicting on the evidence of a single witness. He was however alive to the provisions of section 124 of the Evidence Act which provides that in criminal case involving a sexual offence where the only evidence is that of the alleged victim, the court may convict the accused person if it is satisfied that the alleged victim is telling the truth.

The learned trial magistrate was satisfied that the complainant spoke the truth, was forthright and consistent in her evidence.

The learned trial magistrate thus found that the credibility of the complainant was not shattered in any manner. He was better placed than this court to make findings based on credibility. He saw and heard all the witnesses.

This court is therefore hesitant and finds no good reason to interfere with the findings by the learned trial magistrate based on credibility. In that regard, this court holds that the evidence by the complainant was credible enough for a finding that the appellant was the person responsible for defiling her. His conviction was sound and proper and is hereby sustained.

In sum, on evidence, the appeal is not, in the opinion of this court, merited. It is unfortunate that the respondent did not find it necessary to address the court on the evidence and seemed comfortable in addressing issues pertaining to technicality only. e.i. the first ground of appeal. On that ground one, it is contended that the charge facing the accused was defective. This is an implication that it was improper in convicting the appellant on the basis of a defective charge.

The defect alluded to by learned counsel for the appellant and more or less by the learned state counsel relate to the punishment limb of the charge i.e. instead of Section 8(2) of the Sexual Offences Act, the prosecution invoked section 8(4) of the Act.

Whereas section 8(2) of the said Act provides for life imprisonment for the offence of defilement on a child aged eleven years or less Section 8(4) provides for an imprisonment term of not less than fifteen years for defilement on a child between the age of sixteen and eighteen years. There was no defect alluded to section 8(1) of the Sexual Offences Act which is the operating provision creating the offence of defilement. In the circumstances, the question arising would be whether the inclusion of the wrong provision in the punishment limb of the offence rendered the charge incurably defective given that necessary amendment was not sought by the prosecution neither was it instigated by the court pursuant to section 214 of the Criminal Procedure Code.

The evidence adduced in court proved that the complainant was less than eleven years at the time of the offence. The correct punishing provision would have been section 8(2) of the Sexual Offences Act and not section 8(4).

Indeed the learned trial magistrate appreciated the lapse but went on to impose sentence under section 8(2) instead of 8(4) of the Sexual Offences Act. In the opinion of this court, the learned trial magistrate was not in error in imposing life imprisonment. However, he was in error in imposing hard labour. Section 8(2) of the Sexual Offences Act does not provide for hard labour.

The error in relation to the punishment provision did not go into the substance of the offence . It did not prejudice the appellant. It would have been an act of injustice to the complainant if sentence was imposed under section 8(4) of the Sexual Offences Act and not Section 8(2). The error is curable by this court under section 382 of the Criminal Procedure Code.

In any event, the charge was not defective as the evidence was in accord with section 8(1) of the Sexual Offences Act. (See, **Yongo Vs. Republic (1983) KLR 319)**

The authorities cited by the appellant's learned counsel in support of ground one of the appeal are clearly distinguishable and irrelevant in the present circumstances.

In the end result, the appeal is dismissed. The appellant's conviction by the learned trial magistrate is upheld and the sentence for life imprisonment is confirmed with alteration to the effect that hard labour be excluded.

J. R. KARANJA
JUDGE

(Delivered and signed this 12th day of May 2011)