



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[CORAM: AZANGALALA, J]

CRIMINAL APPEAL NO. 127 OF 2007

B E T W E E N

ANDREW KIMUGE KEMBOIAPPELLANT

A N D

REPUBLIC..... RESPONDENT

[Being an appeal from the Judgment of the Resident Magistrate - A.B. Mongare dated 5th December, 2007 –

in Criminal Case No. 9347 of 2007 at Eldoret Chief Magistrate's Court]

JUDGMENT

Andrew Kimuge Kemboi, the appellant herein, was charged in the Chief Magistrate's Court at Eldoret with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. It was alleged that the appellant, on 7th October, 2007, in Uasin Gishu District within the Rift Valley province unlawfully and intentionally caused penetration of his genital organ in the genital organ of **D.M.L**, a girl aged 8 years.

The appellant was tried by **A.B. Mongare**, then a resident Magistrate. The prosecution called five witnesses and after hearing their evidence, the learned Resident Magistrate found that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement in which he put forward an alibi defence contending that on the date of the alleged offence he was looking after his employer's cattle and could not therefore have committed the offence.

Upon analyzing the evidence of both the prosecution and that of the appellant, the learned Resident Magistrate found the appellant guilty as charged, convicted him and sentenced him to twenty (20) years

imprisonment.

The appellant was not satisfied and has appealed to this Court against both conviction and sentence. When the appeal came up for hearing before me on 17th March, 2011, the appellant appeared in person and **Mr. Oluoch**, learned Senior Deputy Prosecution Counsel, appeared for the republic. The appellant complains that he was not medically examined to prove whether he committed the offence and that he was sick during the trial. He also complains that the sentence imposed against him was excessive in the circumstances.

Mr. Oluoch on his part supported the appellant's conviction. With regard to sentence, he submitted that the same was unlawful. In his view, hard labour is no longer allowed and that the appellant was liable to be imprisoned for life on conviction.

Briefly, the facts were as follows:- The complainant, **D.M**, (P.W.2) was at the time of the incident, on 7th October, 2007, staying with her aunt **J.K** (P.W.3). The latter sent her to collect milk from her grandmother. On her way back, she was followed by a person she recognized as the appellant. The person carried her to his house, closed the door and removed her pant. He then pushed his male organ into hers warning her not to scream. He also held her neck. When he was done, he warned her not to tell her aunt.

The complainant however informed her aunt the following morning who took her to hospital where she was treated. P.W. 3 reported to APC **Isaiah Kogo** (P.W.4) of Kesses D.O.'s office that morning who then arrested the appellant. He escorted him to Tarakwa Police Station where he was re-arrested by CPL **Philip Ngutho** (P.W.5). The latter issued the complainant with a P.3 form which was completed by **Dr. Joseph Imbenzi** (P.W.1) of Moi Teaching and Referral Hospital. The doctor observed that the complainant's genitalia was painful on touch and had a bleeding tear. He also observed that her hymen was torn. In his view, the injuries supported the offence of defilement.

J.K (P.W.3) supported the complainant's testimony. She testified that on the morning after the incident, the complainant informed her of the attack by the appellant who was known in the area by an alias "**Japan**". She then took her to Kesses Health Centre where the defilement was confirmed. She reported to P.W.4 who arrested the appellant and then took the complainant to Moi Teaching and Referral Hospital. The appellant was then charged as already stated and on being put on his defence, put forward an alibi as already stated.

On the above facts, the learned Resident Magistrate found that the offence of defilement had been proved against the appellant as required in law and convicted him as already stated. In her own words:-

"The child is very clear in her evidence. She narrated the whole episode without waver. Accused person could not challenge her evidence. I find the defence of alibi an afterthought and meant to get accused off the hook."

This is a first appeal. It is therefore my duty to analyze, re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at my own independent conclusion bearing in mind that I did not see and hear the witnesses testify and must give allowance for that (**See Okeno –vrs- Republic [1972] (EA 32)**).

Being a charge of defilement, the testimony of the complainant was crucial. She was at the time of the incident aged only about 8 years. However, after a *Voire dire* examination, the learned Resident Magistrate formed the opinion that she was intelligent enough to testify on oath and she did so. Although the time when the incident took place is not specified in the proceedings, the identification of the appellant does not seem to have been an issue at all. The complainant was in no doubt as to who carried her and to which place. She was categorical that it was the appellant who carried her to his house and

defiled her. In cross-examination, the complainant stated as follows:-

“It is true you held me by neck. You carried me to your house. I identified you, it was you Japan. You were talking to me. You took me to your house. You are known as ‘Japan’.”

The complainant narrated the attack to her aunt (P.W.3). She may have delayed to do so but she explained the reason why: She had been warned against disclosing the attack by the appellant.

The learned Resident Magistrate believed the complainant. Having believed her, corroboration was not necessary in view of the provisions of Section 124 of the Evidence Act. The learned Resident Magistrate however found corroboration in the testimony of the complainant’s aunt (P.W.3) and in the medical evidence adduced before her by **Dr. Joseph Imbenzi** (P.W.1).

The learned Resident Magistrate seemed to place a burden on the appellant to prove his alibi. In her own words:-

“In the case the accused person never called any evidence. He alleged that he was not in. Nothing would have been easier than accused calling his employer to confirm the allegation.”

With all due respect to her, that was a misdirection. The appellant had no burden to prove his alibi. The misdirection notwithstanding however, the testimonies of the prosecution witnesses especially that of the complainant displaced the alibi put forward by the appellant.

In the premises, I find and hold that the appellant was convicted on sound evidence. I therefore dismiss the appeal and uphold the conviction. With regard to the sentence of twenty (20) years handed down to the appellant, the same is not provided for. The complainant was aged about 8 years by the time of the offence. The section under which the appellant was charged and convicted, did not give the learned Resident Magistrate any discretion. The sentence provide is that of life imprisonment. The sentence of twenty (20) years imposed by the learned Magistrate was therefore unlawful and so is the order to serve the same with hard labour. The said sentence and order are accordingly set aside. The same is substituted with Life Imprisonment which was the sentence the learned Resident Magistrate should have imposed.

The appeal against sentence is therefore dismissed and the sentence varied as stated. Right of Appeal explained.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY, 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

(i) **Andrew Kimuge Kemboi**, the appellant and

(ii) **Mr. Oluoch** , Senior Deputy Prosecution Counsel, for the State

F. AZANGALALA

JUDGE