



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 73 OF 2009.

CHALU ASIBER.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence by T. Nzyoki – SRM in Criminal Case No. 782 of 2007

delivered on 22nd April, 2009 at Lodwar.)

J U D G M E N T.

1. The appellant was charged with the offence of defilement of a girl contrary to section 9 (1) of the Sexual Offences Act 2005. The particulars of the charge stated that on the 22nd day of October, 2007 at K[...], Z[...]in Turkana North district within Rift Valley Province, he attempted to penetrate the genital organ of K.K. a girl aged 6 years. The appellant was also charged with an alternative count of indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act but upon trial he was only convicted for the first count and sentenced to 10 years imprisonment.
2. Being aggrieved by the conviction and sentence, he has now appealed and challenges the quality and quantity of the evidence which the appellant contend failed to prove an offence of defilement. The judgment of the learned trial magistrate was faulted for failing to resolve the contradictions in the evidence of PW1 and PW2. Lastly the constitutional rights of the appellant were not respected as he contends he was held in the police custody for 15 days, which is against the letter and spirit of the constitution that required him to be charged in a court of law within 24 hours. The appellant also tendered lengthy written submissions in support of this appeal.
3. This appeal was opposed; the learned State Counsel **M/s. Bartoo** supported the conviction and sentence which she submitted is supported by the evidence of PW1 and PW2. There were no material contradictions in the evidence of PW1, PW2 and PW2. PW2 testified that she was with PW1 when PW1 was lured by the appellant to take to him a broom in his house. While in the appellant's house, PW1 testified that the appellant removed her clothes and forced her to lie on the back. The appellant attempted to defile PW1 by inserting his penis on her genitalia until he ejaculated. The appellant removed some whitish substance which was on PW1's clothes. PW2 found PW1 naked and her clothes under the appellant's bed and immediately the appellant ran away. The State urged the court to uphold the

conviction and sentence.

4. This being a first appeal, the court has a duty to re-evaluate the evidence before the trial court and arrive at its own independent conclusion on whether to uphold the conviction and sentence. I will briefly analyze the evidence before the trial court. K.K., **PW1**, a minor aged 6 years was found too young to understand the meaning of an oath, she gave unsworn evidence. She testified that the appellant was well known to her as a neighbor. The appellant asked PW1 to take to him a broom in his house, while in the appellant's house; he held her hands, placed PW1 in his bed and ejaculated on her clothes which were produced as exhibits.

5. G.H. **PW2** aged 12 years was with PW1 when the appellant requested PW1 to take to him a broom. PW2 heard PW1 crying and when she went to find out what was happening in the appellant's house, she found PW1 naked. The appellant left the house immediately PW2 arrived, and PW1's clothes were under the bed. The clothes had whitish substance. PW1 told PW2 how the appellant removed her clothes and placed her on his bed and tried to defile her. The matter was reported to the police. PW1 was examined by Dr. Ouma of IRC hospital. Dr. Ouma who completed the P3 form could not attend court, the P3 form was produced by his colleague Dr. Wambugu Simon under section 33 and 77 of the Evidence Act. It was stated that Dr. Ouma could not be traced as he left IRC Hospital to work in Southern Sudan. According to the P3 form PW1 had a bruise on the hymen, the labia majora and minora were normal. The Doctor formed the opinion that there was attempted penetration of PW1's genitalia. The appellant was arrested by **PC Januaris Abwowo (PW4)** a police officer based at Kakuma police station.

6. Put on his defence, the appellant gave a sworn statement of defence and denied having committed the offence. He contested that on the material day, he was busy at H[...] Primary school where he was preparing for mock examinations. He was surprised when he was arrested and taken to Kakuma police post where he stayed for 15 days and was arraigned in court on 5th November, 2007. The learned trial magistrate considered the prosecution's evidence as well as the defence by the appellant. He was satisfied that the defence was not credible and the prosecution had proved the charge against the appellant to the required standards. The appellant was convicted and sentenced to 10 years imprisonment.

7. This appeal turns on the issue of credibility of the evidence by the complainant and her cousin PW2. The attempted defilement was also confirmed by the medical report that was prepared in respect of the complainant by **Dr. Ouma**. As regards the identity of the appellant, I find the evidence of PW1 and PW2 consistent. Both of them knew the appellant who was a neighbor. PW2 met with the appellant on the door of the appellant's house when she went to check on what was happening to PW1. PW1 had been asked by the appellant to take to him a broom but she had started to cry while inside the appellant's house. PW2 found the complainant naked; her clothes were beside the bed and they had whitish substance on them. The same substance was on the thighs of the complainant. The complainant confided with PW2 and narrated to her what had happened which was further confirmed by the medical report.

8. 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) especially the proviso thereto, 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”.

9. I am in agreement with the findings of the learned trial magistrate that the prosecution's evidence was sufficient to support the charge of attempted defilement. Similarly, I disregard the defence for the same reasons given by the trial court. The sentence of 10 years which was imposed by the trial court is within the provisions of the law. I find no merit in this appeal which is dismissed. The conviction and sentence imposed by the trial court is hereby upheld.

Judgment read and signed this 3rd day of June, 2011.

MARTHA KOOME.

JUDGE.