



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 116 OF 2010.

CHARLES EKAI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(An appeal from the original conviction and sentence of T. Nzyoki – SRM in Lodwar Criminal case No. 444 of 2009 delivered on 13th October, 2010.)

J U D G M E N T.

1. The appellant **Charles Ekai** was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act. The particulars of the charge stated that on the night of 16th and 17th July, 2009 at [PARTICULARS WITHHELD] in Turkana North District within Rift Valley Province, he intentionally and unlawfully committed an act which caused penetration to the genital organs of B.A. a child aged 13 years. The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 2006. The particulars of the charge stated that on 16th and 17th July, 2009 at [...]Turkana North District within Rift Valley Province, intentionally and unlawfully committed an indecent act with B.A., a child aged 13 years by touching her genital organs namely vagina.

2. The appellant pleaded not guilty, after trial he was convicted and sentenced to 25 years of imprisonment. Being dissatisfied with the conviction and sentence; the appellant appealed. He has raised several grounds of appeal in the petition of appeal as follows:-

(1) *The learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond any reasonable doubt in the absence of any or any credible evidence to that effect.*

(2) *The learned trial magistrate erred in law in convicting the appellant on a charge of defilement in the absence of any evidence regarding the age of the complainant.*

(3) *The learned trial magistrate erred in law in allowing Dr. Lawrence Kioko to produce the P3 and Medical notes as prosecution exhibit 1 and 2 without any legal basis as the prosecution did not demonstrate that the presence of the maker of the documents would not be procured without any unreasonable delay hence leading to a miscarriage of justice.*

(4) *The learned trial magistrate erred in law and fact in holding that the absence of a hymen constituted evidence that the appellant had defiled the complainant in the face of evidence that the complainant had a normal genitalia, no tears and no evidence of bleeding.*

(5) *The learned trial magistrate erred in law and fact in failing to find that the complainant was actually assaulted by administration police after being presented to them by a furious brother-in-law and this was an inducement to speak lies to please the brother-in-law who was a guardian.*

(6) *The learned trial magistrate erred in law in holding that a charge of defilement had been proved in the absence of evidence of assessment of the age of complainant or production of birth certificate.*

(7) *That the sentence was excessively harsh.*

(8) *That the judgment was against the weight of evidence.*

3. In further arguments in support of this appeal, **Mr. Samba**, learned counsel for the appellant submitted that the charge of defilement was not proved. This is borne out of the medical report that was produced in evidence. The complainant testified that she was a virgin and on 16th July, 2009, she was defiled by the appellant. However, on medical examination no injuries were noted on her genitalia, this was despite the fact that the complainant alleged that the appellant raped her twice on the material night. The medical report also lacked credibility for failure to examine the complainant's age. Lastly, there were contradictions in the evidence of **J.L.E.**, PW3 who testified that the complainant lied to him that she had spent the night with a girlfriend. PW3 took the complainant to the police station and disciplined her that is when she agreed to disclose that she had spent the night with the appellant. There are material variances between the evidence of PW3, PW2 and PW4, the investigating officer in this matter which according to counsel should have been resolved in favor of the appellant.

4. The state conceded to this appeal, **M/s. Bartoo** the learned State Counsel submitted that the age assessment was not carried out to establish the age of the complainant before the appellant was sentenced. Under section 8 (1) and 3 of the Sexual Offences Act the offences are categorized according to the age of the complainant. Secondly, the State pointed out that there were material discrepancies in the evidence of the complainant who informed PW3 that she had spent the night in a girlfriend's house but later changed the story while at police station and disclosed that she had spent the night with the appellant who had defiled her. For those two reasons, the State conceded to the appeal and urged the court to allow the appeal.

5. 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 and sentenced passed by the trial court. In so doing this should bear in mind that I never saw or heard the witnesses give their evidence and give due allowance for that. I shall now set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant. The prosecution's case was supported by the evidence of 4 witnesses.

6. **B.A.**, PW2 testified that she was 13 years of age and a pupil at L[...] primary School in class 6. On 16th July, 2009 she was watching a video at [...] with a friend called R. She left the video house at 6.00 p.m and met with the appellant who lured her into his house together with her friend R. However, R. left them at about 9. 00 p.m. that is the complaint with the appellant. The appellant insisted that the complainant should spend the night in his house and locked the compound gate. They slept on the mattress and the appellant had sex with the complainant twice. The complainant said she cried for help but the appellant had locked the door and the gate. He only opened for the complainant in the morning.

7. At about 7.00 a.m. when the complainant was on her way home, she met with **J.L.E.**, PW3. PW3 asked the complainant where she had spent the night and she said she had spent the night with the appellant that is when she was escorted to the AP's offices who assaulted her until she revealed to them the name of the appellant and what had happened, she then and led them to the house of the appellant and he was arrested. According to PW3, on 17th July, 2009 he arrived at his home at about 4.30 a.m. when he was informed by his wife that the complainant had spent the night away. PW3 went to the chief's office but on the way, he met with the complainant and when he enquired from her where she was coming from, she lied to him that she was coming from a girlfriend's house.

8. PW3 decided to report the matter to the AP's office and while at the DC's office, he disciplined the complainant that is when she disclosed that she had spent the night with the appellant. She led them to the house of the appellant who was arrested. The complainant was referred for medical examination at IRC hospital. She was examined by **Dr. Wanyama**. According to the treatment notes, the complainant stated that she was defiled twice on 16th July, 2009 by a person known to her. She claimed that she was a virgin prior to the defilement. Upon examination of her genitalia, no tears were noted. The hymen was not present. The HIV and syphilis test were negative. The doctor found the complainant was 13 years old.

9. The matter was reported to [...] police station, to **PC Paul Sum** on 17th July, 2009. The appellant had been escorted to the DC's office together with the complainant. He interviewed the complainant and recorded her statement. The complainant was escorted to IRC main hospital where she was examined by **Dr. Wanyama**. As at the time of the hearing of this matter, **Dr. Wanyama** had relocated to Southern Sudan. The learned trial magistrate found that **Dr. Wanyama** could not attend court without unreasonable delay and inconvenience. He allowed **Dr. Kioko** who was familiar with **Dr. Wanyama's** handwriting to produce the medical report pursuant to the provisions of section 33 (b) and 77 of the Evidence Act.

11. When the appellant was put on his defence, he gave a sworn statement of defence and denied having committed the offence. He contested that on 16th July, 2009, while on his way from K[...] centre, he met with two girls who conveyed a message of condolence because the appellant had lost his father. They asked whether they could escort the appellant because they were going to attend night vigil at E[...] church. The appellant testified that he declined their offer and walked home alone and slept in his house with his wife. He was arrested the following day by the AP officers on allegations that he had raped a girl. The appellant was escorted to K[...] police station and while at the station PW3 demanded to be paid some money but the appellant refused to pay the money. That is how he was charged with the offence of defilement.

12. The learned trial magistrate evaluated the above evidence and was satisfied that the prosecution proved its case to the required standards. He dismissed the case by the appellant as mere afterthought and convicted the appellant and sentenced him to 25 years imprisonment.

This appeal turns on whether the prosecution proved the charge of defilement and also the credibility of the evidence by the complainant and PW3 who is her brother in law. The inconsistencies pointed out by the counsel for the appellant in the evidence of the complainant and the medical report need to be subjected to fresh analysis. The learned trial magistrate who heard and saw the complainant testify believed that she was telling the truth. This is as it is provided under 124 of the Evidence Act especially the proviso thereto which provides as follows:-

“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”.

13. I am afraid that upon re-evaluation of the evidence of the complainant, the medical report and the evidence of PW3, I am not satisfied that the complainant met the tests of being a truthful witness. According to PW1, **Dr. Lawrence Kioko**, the complainant said she was a virgin prior to the act of defilement. She was defiled twice that night. However, no bleeding was noted and no tears on the genitalia. Further, the complainant testified that after the appellant lured her into his house and defiled her throughout the night, he released her in the morning and while on her way home, she found her brother-in-law, PW3 and told him that she had spend the night with the appellant. There is sharply contrasted by the evidence of PW3 who stated and I quote:-

“I met with B. PW1 and I inquired from her where she was coming from. She lied to me that she was coming from a girlfriend’s house. I decided to report the matter to the AP camp at the DC’s office. While at the AP camp at the DC’s office I disciplined B. PW1 and she informed me that she spend the night at the house of Ekai the accused person. B. led me and 3 AP officers to the house of the accused person at N[...] village.”

14. Had the learned trial magistrate addressed his mind to the above inconsistencies no doubt he would have arrived at a different conclusion. Lastly, on the issue of sentencing, the Sexual Offences Act categorizes the sentences according to the age of the victim. The appellant was sentenced to 25 years for an offence of defilement, that is according to section 8 of the Sexual Offences Act. It was imperative for the prosecution to ensure the age of the victim was ascertained. The medical report did not show there was age assessment of the complainant and no evidence was adduced by the complainant or PW3 to confirm that she was 13 years old.

15. For the above reasons the conviction is not safe. I find this appeal has merit. I allow the appeal, the conviction is quashed and the sentence of 25 years is set aside. The appellant shall be released forthwith unless otherwise lawfully held.

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

**MARTHA KOOME.
JUDGE.**