REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 251 OF 2009

(From original conviction and sentence in A/Criminal Case No. 51 of 2008 of the Chief Magistrate's Court at Nakuru - H. Barasa, R. M.)

RONALD OIGARA…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act 2006 *(No. 3 of 2006).*

The Appellant was also charged with the alternative count of the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006.

On Count I the prosecution alleged that the Appellant on the 25th day of April 2008 in Nakuru District of the Rift Valley Province of Kenya, unlawfully and intentionally defiled D.N a girl aged 5 years by penetrating her genital organs with his genital organ without her consent.

On Count II, the prosecution alleged that on 25th day of April 2008 in Nakuru District of the Rift Valley Province, unlawfully and intentionally did an indecent act to D.N a girl aged 5 years by allowing bodily contact with her genital organ with his own genital organ without her consent.

The appellant was on the evidence convicted on Count I and was sentenced to 30 years imprisonment.

Aggrieved both with his conviction and sentence, the appellant has come to this court by Petition of Appeal filed on 1st September 2009 on the following grounds -

(1) that he pleaded not guilty to the charge of defilement c/section 8 of the Sexual Offences Act of 2006.

(2) that it was a travesty of justice for the learned trial magistrate to ignore the glaring fact that the medical examination had revealed no signs of the subject having been defiled.

(3) that the learned trial magistrate erred in law and fact in disregarding the

complainant's initial testimony that he had done nothing to her.

(4) that in allowing an altered testimony from the complainant at a later date, the learned trial magistrate misdirected herself.

(5) that the doctor's report P3 was inconclusive with regard to cause of purported on the subject's private parts.

(6) that it was a miscarriage of justice for the learned trial magistrate to disregard my defence testimony without giving cogent reasons.

(7) that the sum total of prosecution evidence was grossly insufficient to sustain a conviction and the harsh sentence.

And on the said grounds the Appellant prayed that his appeal be allowed, the conviction be quashed and sentence set aside.

Mr. Ombui, learned counsel argued the appeal on behalf of the Appellant. Counsel submitted that there was no evidence to support the charge of defilement under Section 8(1) and (2) of the Sexual Offences Act *(the Act).* Counsel submitted that there was no evidence of penetration from the Doctor (PW2) as the Doctor's finding was merely that the *"hymen was broken"* and this could be broken by playing or even scratching. Counsel submitted that for the offence of defilement to be proved, there must be partial or complete penetration, and that because there is no definition of partial penetration, there cannot be partial penetration. Counsel submitted that P3 form did indicate any bleeding.

Counsel for the appellant also discredited the evidence of PW3, the mother of the complainant PW1. PW3 does not say in her evidence there was any blood, but says, she noticed spermatozoa on the complainant's thighs and her pants, and concluded that the Doctor's finding that the hymen was broken was a fabrication, leading to the fabrication of the offence.

Counsel also submitted that PW4, the officer who received the report of the alleged defilement, did not notice any spermatozoa despite the fact that the victim was taken to the Menengai Police Station almost immediately after the event. Counsel submitted that there was no basis for the allegation of the presence of spermatozoa on either the thighs or the pants of the victim.

Counsel also attacked the evidence of the victim's mother PW3, that the victim did not cry out when the mother called her name, that the victim who ought to have been in pain, would have cried out, and concluded that the complaint and the charges were fabricated because the mother of the victim had differences or a grudge against the appellant over allegations of infidelity by the victim's father with a lady, the mother suspected was procured by the appellant, an allegation which the appellant denies.

The appellant's counsel also submitted that there were no independent witnesses, and that it was only the mother who called the Police, as none of the neighbours recorded any statements with the Police.

Finally counsel for the Appellant submitted that the Appellant was not given a fair hearing because the trial court did not consider any of the appellant's evidence and the trial court was merely zealous to convict the appellant.

On those grounds, counsel prayed this court to make a finding that the prosecution evidence was shoddy and was no basis for conviction and sentence of the appellant, and prayed that his appeal be allowed, under section 354 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya).*

The appeal was opposed through Mr. Omutelema learned State Counsel who submitted that the evidence was overwhelming, and the record explains the conduct of the subject. On one occasion the court was parked and on 2nd occasion the court was cleared and the victim PW1, opened up without fear.

This counsel submitted that the Doctors evidence showed that the genitalia were tender, and said that the child was defiled, and that was the Doctor's evidence, that the child explained graphically what the appellant did to her, and urged the court to uphold the conviction and sentence.

ANALYSIS OF SUBMISSIONS AND EVIDENCE

It is the statutory duty, and command of precedent that as the first appellate court, this court must itself consider and evaluate the evidence before the trial court and make its own findings, and draw its own conclusions.

Section 8(1) and 8(2) provides -

"8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) a person who commits an offence of defilement with a child aged eleven or less shall upon conviction be sentenced to life imprisonment."

The essential element or ingredient in the offence of defilement is *"penetration"* of an organ of a person to the genital organ of another.

The evidence of PW2, the Doctor is merely that there was *"defilement"*, on the basis of tenderness of the labia. For the offence of defilement to be established, I think there must be evidence showing *"penetration"* occurred, and not merely a statement that there was defilement. There must, in view of the harsh punishments, under this Act, be strict construction of the ingredients establishing the offences under the Act, and in particular that of defilement.

The evidence of PW3, the mother of the victim was that there were spermatozoa on the thighs and pants of the victims. PW4 the Police Lady Officer who received the report almost immediately after the incident was not shown any such pants or spots of spermatozoa. If there were such sports, that could be a suggestion of pre-mature ejaculation, and not penetration, for an under 5 year child, a child of tender age, there would have been evidence of serious lacerations if there was penetration.

I would therefore agree with Mr. Ombui, learned counsel for the appellant, the evidence on Count I was choreographed by the victim's mother, and cannot be a basis for conviction and sentence under Section 8(2) of the Sexual Offences Act. I would therefore allow the appellant's appeal on Count I, quash the conviction, set aside the illegal sentence of *"thirty years"* the Act provides for a sentence of "life imprisonment, and not a number of years.

The appellant was charged on a Count II - unlawfully and intentionally did an indecent act to the victim, D.N, a girl aged 5 years, by allowing bodily contact with his genital organ with that of the victim and without the victim's consent. In this regard the victim's own evidence on affirmation is clear.

The victim was playing outside their house with her sister and brothers. The appellant, who they referred to as *"uncle"* called her, and took her a pit toilet and *"did bad manners to me"*. He removed my pant. He put me down I felt pain *(in her crouch to which she pointed at the trial court).* That man is the man who did bad manners to me *(minor points to the accused).*

Although the appellant did in cross-examination of the victim try to create an impression that the victim was couched by the mother (PW3) to testify in a particular manner so as to incriminate and nail the appellant with offence, the testimony of the victim comes out clearly as being that of an innocent child, a child without guile.

The return of the victim's mother (PW3) from the shop was timely, it interrupted the appellant from doing further sexual violence upon the victim, and found him with pants down his knees, and was immediately apprehended by the citizens and handed over to the Police.

The Appellant's own evidence was not credible at all as against that of the victim to which he avoided mentioning completely. Other than reference to the question of alleged infidelity by victim's father with another lady, there was nothing to displace the victim's evidence as outlined above. Under the proviso to Section 124 of the Evidence Act, *(Cap. 80, Laws of Kenya)* evidence of a victim of a sexual offence is admissible and may be used to convict, without corroboration.

In this case, the learned trial magistrate having found the appellant guilty on the principal Count I, did not *(quite correctly)* consider Count II. Having found no evidence, to sustain the conviction and sentence on Count I, *(as already found),* the evidence of PW1 points to an offence under Section 11(1) of the Sexual Offences - *"an indecent act"* which means an unlawful intentional act which causes -

"(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another."

"The bad manners" which the appellant did to the crouch *(private parts of the victim),* was an indecent act. It was intentional, it was unlawful, it was traumatic to the victim, who was so shocked that it even failed to cry out for rescue. Such acts and behavior by adults of 27 years of age, must be discouraged. They are old enough to find their own partners, and not prey on 5 year old little angels.

For those reasons, I find the appellant guilty of the offence of indecent act with a child, and sentence him to 10 years imprisonment as provided for under Section 11(2) of the Sexual Offences Act.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2011

M. J. ANYARA EMUKULE
JUDGE