



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR. NO. 77 OF 2007

G.K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant in this case was convicted of defilement of a girl under the age of 11 years contrary to section 8(1) as read with section 8(2) of the sexual offences Act. He was sentenced to 15 years imprisonment. Being aggrieved by the condition and sentence he filed this appeal.

The appellant has been served notice by the state that if he proceeded with this appeal, the state will be seeking for enhancement of his sentence from 15 years imprisonment to life imprisonment. Despite the notice the appellant opted to pursue his appeal.

The appellant is relying on his amended grounds of appeal. In which he raised his seven grounds. I summarized the grounds as follows:

The appellants challenges the conviction and grounds the evidence of the prosecution was perjured and therefore could not prove the case in the required standard. The appellant also challenges the conviction on the bases that he was not taken for medical examination as required by the law. The appellant also challenged the learned trial magistrates decision to reject his defence.

The facts of the prosecution case is that the mother the complainant left the complainant at home with her father the accused person when she returned she found her daughter crying. The daughter who is PW 1 in this case informed her that her father the appellant had defiled her. The complainants mother PW2 first went to her mother who is PW3 to in from her of the incident before reporting the matter to the police. The appellant was eventually arrested and charged for this offence.

The appellant gave a sworn defence. He denied the offence. The appellant stated that on the 30th July 2008 he was summoned by the head teacher K Primary School where the complainant his daughter was a student. He said that the head teacher informed him that his daughter had been raped on the 21st July. As he returned from the school he met an AP Constable Mugambi who asked him some questions of where he was coming from. He said that at one o'clock that day his children E, B, T and P went home for lunch only B returned to School after lunch. He went to the farm where he stayed till 7 pm. He says that he later learnt the complainant and his wife PW1 and 2 had been seen at the local dispensary he did not find them when he went to check on them. He said that he went to the AP camp where he found Ap. Constable Mugambi and Cpl. Mutuma who arrested him saying that his wife had reported that he the appellant had

defiled their daughter on the same day.

I have subjected the entire evidence adduced before the trial court. They were fresh analysis and evaluation one bearing in mind that I neither saw nor heard any of the witnesses. I have given due allowance of the same.

In the case of **OKENO V. REPUBLIC [1972] EA 32**, the role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

This appeal has been opposed by the state. Mr. Solomon Kimathi the learned state counsel informed the court that he supported the conviction but that he was asking for enhancement of the sentence to life imprisonment. The appellant has raised four issues for consideration in this case. These issues are all related. It is the appellant’s contention that the evidence by the complainant in this case i.e. PW1 his ten year old daughter was contradictory, inconsistent, uncorroborated, and perjured. The appellant also contends that the case was a fabrication against him. That prior to the date in question the complainant had been defiled by a neighbour who was never arrested for the offence.

Mr. Kimathi for the state urged the court to find that there was no issue of a mistaken identity because the complainant was a daughter of the appellant and therefore knew her father very well. Mr. Kimathi urged that the complainant reported the incident that the appellant had grabbed her taken her to his bed and defiled her. Mr. Kimathi also urged that the distressed state in which the complainant was seen as testified to by her mother PW2 and grandmother PW3 were a corroboration of the fact that the complainant had been defiled. Mr. Kimathi also urged the court to find the findings of the doctor PW6 which confined that the complainant had been sexually assaulted. I have considered the testimony of the complainant. The court carried out a voire dire examination and found the complainant intelligent enough to testify in the case.

The complainant’s evidence is very clear that the appellant ceased an opportunity when there was no one else at home to defile his daughter. The complainant’s testimony was that the appellant pulled her to his bed removed her underpants and defiled her. She says that she was in great pain after the incident and that she started crying that by the time the mother came home much later she found her crying and she reported the matter to her. The complainant’s mother PW2 corroborated his daughter’s evidence as she found her daughter crying at home and that the daughter reported the incident to her at the earliest opportunity.

The complainant was taken for treatment and later was examined by a doctor who completed a P3 form. This doctor examined her one day after the incident. He found that the complainant vulva was reddish with no tears and that there was tenderness of the outer vaginal he assessed the injury as maim in his evidence in court PW6 testified that the injuries were consistent with the defilement.

The appellant contended that there was a grudge between him and the family of his wife because the appellant had refused to be compromised by one K.D who defiled his daughter on the 21st of July 2008. The appellant had stated in defence that his wife was paid 2000/- which was against his position that K.D should be taken to the police for the offence. I have confirmed from the cross examination of PW2 that the appellant that the same question was put to PW2. PW 2 denied having been compromised by

K.D. PW2, in answer to the appellant's question told him that it was him who took money from Kinyua and that he kept what he was given to himself. PW3 the mother of the appellant in answer to the appellant's questions testified that she had never quarreled with the appellant and was not implicating him with any offence.

PW4 a brother in law of the appellant denied implicating the appellant with this offence.

Having carefully examined the evidence on record, I find that it is true that the complainant had been defiled one week before the incident in question by one K.D. According to PW2 K.D disappeared after the incident and therefore no action was taken against him. What the appellant says is a contradiction inconsistent and perjury is actually not an inconsistent in the case. PW4 the complainants uncle was referring to the earlier incident of 21st July when he said that he took his niece to Marimati Hospital for treatment. PW'2 evidence that she took the complainant to the daughter for treatment accompanied by PW5 AP Police Constable Fabian on the 31st July was in fact not a contradiction. I find no inconsistency in the evidence of the prosecution. I also find that the complainant was forthright in her testimony and that she did not perjure herself in her evidence.

The medical evidence before the court and the doctors testimony (PW6) is very clear that the injuries found on the complainant one day after the incident were fresh injuries consistent with the defilement as complained by the complainant. Those injuries were fresh and were consistent to having been inflicted within the time complained of in this case. The doctor did find the injuries confirmed that the complainant had been defiled. I have no doubt in my mind that the complainant was telling the truth. I also find that there is no question of mistaken identity as the complainant was 10 years old and therefore capable of knowing who her father is. The fact that the complainant had been defiled ten days before this incident does not exonerate the appellant for his own actions against the complainant. The earlier defilement if any was totally unrelated to the charge before the court.

The appellant has decried the rejection of his defence in which he claimed that his in laws had a grudge against him and that was the reason why they had fabricated him. The learned trial magistrate in his considered judgment observed:

“the offence was committed during the day and the complainant could easily identify the attacker. PW2 came from the river and found PW1 the complainant crying. She disclosed that she had been defiled by the accused. This was confirmed at Kathagacini Dispensary and at Marimati Hospital. That allegation was corroborated by the P3 that was produced by Dr. Maingi Mukami PW6. I do not see any malice at all on the part of the prosecution witnesses. I see no reason as to why a doctor and her mother could just gang up against the father. The evidence by the prosecution was flowing and it clearly pointed that it was the accused who defiled PW1 the complainant. The defence by the accused did not hold any water as it was never corroborated by any evidence.”

I am satisfied that the learned trial magistrate directed his mind to the matters that were in issue in the case. I am also satisfied that he considered the appellant defence before he rejected it. There was a misdirection by the learned trial magistrate when he required the appellant to call evidence to corroborate his defence. That misdirection led to the shifting of burden against the accused person which was a mistake.

I have as a 1st appellant court reanalyzed and reevaluated the evidence adduced before the trial court. I am satisfied that the evidence adduced before the appellant was overwhelming. He defiled his own daughter in broad day light. The daughter reported the incident to her mother immediately the mother returned home on the same day. The complainant was found with serious injuries in her private parts which the doctor assessed as maim and which the doctor confirmed were consistent with defilement of the complainant. I find that the appellants defence did not create any doubt in the prosecution evidence against him. I therefore find his appeal against conviction is without merit. As to the sentence the appellant was sentenced to 15 years imprisonment. A person convicted of an offence under section 8(2) is liable to imprisonment for life. The sentence of 15 years imprisonment was in the circumstances against the law. I accordingly set aside the sentence of 15 years imprisonment and in substitution thereof sentence

the appellant to imprisonment for life.

Before I end I must comment that the appellant was charged under a general section the more appropriate charge that should have been preferred against him is incest by a male contrary to section 20(1) of the Sexual Offences Act. Having said so the charge of defilement he faced is still appropriate as a general offence which he committed against a child aged below 11 year.

The upshot of this appeal is that the appeal against conviction is dismissed and the conviction is upheld. The sentence is substituted under section 354 of the Criminal Procedure Code and enhanced from 15 years imprisonment to life imprisonment as provided under section 8(2). Those are my orders.

DATED SIGNED AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2011

**J LESIIT
JUDGE.**