



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 85 OF 2011

(From original conviction and sentence in Criminal Case NO. 585/2010 of the Senior Resident Magistrate's court

at Eldama Ravine – M. KASERA, SRM)

**FELIX KIPHIRCHIR TANUI ALIAS
CHELES.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Felix Kipchirchir Tanui alias Cheles was charged with the offence of defilement contrary to **Section 8(1) and (2) of the Sexual Offense Act No. 3 of 2006**. It was alleged that on 17/5/2010 in Koibatek District, Rift Valley Province, he committed an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of P.J. a child aged 9 years.

In the alternative he faced a charge of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**. After a full trial (with the prosecution calling four witnesses and Appellant's defence) the appellant was convicted on the main charge by M. Kasera, Senior Resident Magistrate and was sentenced to serve life imprisonment on 11/11/2010. Being aggrieved by both the conviction and sentence, he filed an appeal dated 6/11/2011, through the firm of Tengekyon & Koske Co. Advocates. The grounds of appeal are as follows:-

- 1. That the conviction was bad in law and fact as the age of the complainant was not ascertained or proved by the prosecution to the required standard;**

- 2. That the trial magistrate erred on the burden of proof;**

- 3. That the trial magistrate erred in failing to appreciate that there were glaring contradictions in the prosecution case and should therefore have given the appellant the benefit of doubt;**

- 4. That the trial magistrate erred in failing to appreciate that the charge of defilement was not proved and in particular the evidence of the complainant was not corroborated and/or the corroboration offered by the prosecution was not sufficient in law;**

- 5. That consequently the sentence of life imprisonment was bad in law.**

The prosecution called a total of 4 witnesses. The complainant, P.J. who said she was 9 years old gave a sworn statement after the court conducted a voirie dire and found that she understood the meaning of the oath. She recalled that she was at her aunt's house where she lived on 17/5/2010 at about 1.00 p.m. Her aunt G. J. C. had gone for a meeting and the uncle had gone out and she was left in company of a younger child. Cheles, the appellant went to the house, asked her for water and followed her to the big house where she went to get water, got hold of her, pulled her onto the sofa in the sitting room, closed the door, unzipped his trouser, lowered the trouser to the legs, removed her pants and made her to lay upwards. He then inserted his thing for urinating and she felt pain, she cried and he left. The Appellant left and she later informed her aunt that Cheles (the appellant) used to come there. The appellant told P.J. not to tell anyone what had happened. Cheles went to the house again on 18/5/2010 and locked the door but she raised alarm and he went away. P.J. informed Nancy Rotich who later told her aunt, G. J.C. about the incident and G.J.C in turn reported to the Chief. P.J was taken to the hospital at Ravine where she was treated. She had seen cheles at the aunt's house for long but did not know where he lived. G.J.C who should have been PW3 recalled that she had left P.J in the house on 17/5/2010, with her one year child. When she returned P.J. saw her and cried and asked if she knew Cheles but G.J.C sent her for vegetables and did not follow up with the issue. G.J.C went away again the next day when upon return, one Nancy Rotich, a cripple, informed G.J.C that the children feared Cheles. G.J.C asked P why Cheles came there and it is then she explained that he had defiled her. G.J.C reported to the Assistant Chief, and then to police who issued P.J. with a P3 form and she was treated. G.J.C said that Cheles worked in a nearby butchery and used to pass near her house. She denied there being a grudge between them.

Felix Kipchirchir Boiywo, a Clinical Officer at Eldama Ravine District Hospital filled the P3 form on 24/5/2010. He assessed degree of injury as harm. He found that P.J. had bruised reddened labia majora but the hymen was intact and there was no discharge but the child felt pain when passing urine.

PW3, Cpl Sarah Situma testified that she was the Investigating Officer in the matter and that a report of

defilement was made to her, she sent the parties to hospital and later, she arrested Cheles and charged him.

The appellant in his unsworn defence said he worked in a butchery. He said Nancy was her friend and that she had alleged that he beat her. He was arrested on 22nd and charged for being drunk and disorderly, was released but later charged with this offence which he knew nothing about.

In his submissions, Mr. Tenengekyon urged that the two ingredients of the offence were not proved, namely P.J.'s age and the act of penetration of the complainant. According to counsel, the P3 form indicated that fingers were inserted in the complainant which is the same allegation made to the Clinical Officer but that evidence is at variance with that of PW1. It was his contention that PW1's evidence did not support the particulars of the charge. Counsel also urged that though the offence occurred on 17/5/2011, it was not reported till 22/5/2011 and there was no explanation for the delay. Counsel submitted that it seems the complainant was instigated by Nancy whom the appellant alleged to have a grudge with for beating her and the said Nancy was never called as a witness. It was his view that not all the evidence was laid before the court.

Mr. Nyakundi, learned counsel for the State did not support the conviction on grounds that there are serious contradictions in the evidence on record because what the police were told and what the complainant told the Clinical Officer was at variance and that the charge is at variance with the complainant's evidence. Counsel also questioned the delay in reporting the offence and that Nancy Rotich was never called as a witness nor did she bother to report the incident. Mr. Nyakundi also urged that the court erred in shifting the burden of proof onto the appellant but was of the view that the age of the complainant was proved.

Before I proceed, I have noted that the numbering of witnesses was not proper. It seems P was PW1, Felix.B PW2 and G.C should have been PW3, while CPC Sarah Situma should have been PW4.

From the evidence, the identity of the Appellant was not in doubt. P.J. knew him and so did her aunt G.J.C

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Whether age was proved:

To sustain the offence under Section 8(1) of the Sexual Offence Act, the age of the complainant must be proved. The section provides that the complainant must be 11 years and below. In this case the complainant said that she is a 9 years old, so did her aunt G.J.C. The clinical Officer who examined her also found her to be 9 years old. I find that to be sufficient evidence to prove the age of the complainant. The aunt knew her and the Clinical Officer being a medical practitioner is able to assess her age. It is not mandatory that a birth certificate be produced as proof because not all people have obtained birth certificates.

Whether the charge is at variance with the complainant's evidence:

I have already set out the particulars of the charge earlier in this judgment. It reads in part:-

“...committed an act which caused the penetration of his genital organ (penis) into the genital organ (vagina) of P.J a child of 9 years.”

In the complainant's testimony, she said:-

“He moved my pant to the side. I was sitting. He lifted my legs as I laid down upwards. He inserted his thing for urinating. I felt pain. I cried and he left.”

Contrary to Mr. Tengekyon and Mr. Nyakundi's submissions, I find that P.J.'s evidence was consistent with the charge. In fact that is the report that was made to the Investigating Officer Cpl Situma, that the complainant was defiled. She did not go into the detail on exactly what report she received.

Whether there was penetration:

I find that there was indeed penetration. The Clinical Officer (PW2) did confirm that P.J. felt pain when passing urine, she had a bruised reddened labia Majora though the hymen was intact and she had no discharge. He made his own findings that the offence committed was indecent assault. Under **Section 2** of the **Sexual Offences Act, 2006** penetration is defined as:-

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

There was evidence of partial insertion into P.J.'s genital organ which is proof of penetration.

The delay in reporting:

P.J. alleged that she was defiled on 17/5/2011, she told one Nancy about the ordeal but not G.J.C and G.J.C found out on 22/5/2011 when the said Nancy told G.J.C about the incident. PW1 told the court that the appellant had threatened her with dire consequences if she told anybody about the event and though she told Nancy, Nancy never told her aunt till 22/5/2011. It is not uncommon for defilement victims to keep quiet with such information. Once G.J.C was informed of the incident, G.J.C swung into action immediately. The delay is linked to an allegation that Nancy who informed G.J.C about the incident had a grudge with the appellant. All through the prosecution case, when P and G testified, the Appellant never alleged that he had been framed because of a grudge between him and Nancy. And in any, event if there was a grudge between the said Nancy and the appellant, how can a small child like P.J. be dragged into it. The allegation of a grudge between the appellant and Nancy was first raised in the Appellant's defence and no such allegation was put to the witnesses. I find that it was an afterthought. Besides, I have considered P.J.'s testimony which was put to the test through cross examination. She told the court that she was told by the mother to tell the truth which is that she was defiled and she vividly recalled exactly what the appellant did to her. The court has no reason to doubt P.J.'s testimony or put her demeanor to

question. Further, even if there was indeed a grudge between Nancy and the Appellant, how does one explain the injuries found in the complainant's genitalia. Would one injure P.J. just to frame the Appellant? I do not think a fabrication can be carried that far. What cannot be explained is the contents of the P3 form filled by the police, that the appellant put fingers in P.J.'s private parts. Contrary to the contents of the P3 form, the charge indicates that the appellant penetrated the complainant by use of his genitals. PW2 merely read the report recorded by police in the P3 to the court. He could not make a finding that the injury to P.J.'s private parts was by use of fingers. The court will find the contents of the P3 form which were recorded by a police officer and which are at variance with the charge sheet cannot vitiate the charge. I am persuaded to believe P.J.'s evidence that the Appellant penetrated her with his genitals and therefore defiled the minor.

Burden of proof:

In criminal cases the burden of proof rests on the prosecution to prove its case beyond any reasonable doubt and it does not shift to the defence. In this case, the magistrate erred in finding that the appellant failed to call evidence to confirm his whereabouts on that day. It was the burden of the prosecution to connect the appellant with the offence. I am satisfied on the evidence that the Appellant was the offender having been well known to P.J. and G. That fact was not controverted.

Evidence of Nancy Rotich:

Nancy was not a witness to the incident. All she did was relay the message she had received from P.J. to G. Though her evidence was important to confirm whether or not a grudge existed between her and the appellant, it was not so vital as to weaken the prosecution case or vitiate it. When G was informed of what had happened to P.J, she took steps to report the matter to police and there is medical evidence confirming that P.J. was defiled. Failure to call Nancy is not fatal to the prosecution case nor can it be presumed that it may have been adverse to the prosecution evidence.

This being the first appellate court, I had the duty to re-evaluate the evidence on record afresh and draw my own conclusion and findings. I find that the prosecution proved its case against the appellant beyond any doubt and the conviction is safe and is hereby confirmed.

Sentence:

The appellant was sentenced to serve life imprisonment. He was treated as a first offender. Section 8(2) of the Sexual Offence Act provides that a person who defiles a child aged 11 years and less shall upon conviction, be sentenced to life imprisonment. The sentence is mandatory and the court will not interfere with it. The appeal is dismissed.

Right of appeal 14 days.

DATED and DELIVERED this 19th day of October, 2011.

**R.P.V. WENDOH
JUDGE**

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PRESENT:

Mr. Tengekyon for the appellant.

Mr. Nyakundi for the State.
Kennedy – Court Clerk.