



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 9 OF 2010**

*(From original conviction and sentence in Criminal Case No.1518 of 2009 of the Senior Principal Magistrate's Court at Naivasha – N. N. NJAGI, PM)*

**PATRICK HAMISI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Patrick Hamisi was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge are that on 29/4/2009 in Naivasha District, intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of F.A.M, a child aged 9 years.

In the second charge, he was charged with the offence of deliberate transmission of a sexually transmitted infection or any other life threatening sexually transmitted disease, contrary to **Section 26(1)(c)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge are aforementioned date and place, intentionally, knowingly and willfully infected F.A.M with sexually transmitted disease namely, Gonorrhoea.

The appellant denied committing the offences and the case proceeded to hearing before Hon. Njagi (PM), who convicted the appellant on both counts and sentenced him to 15 years imprisonment on each count and ordered that they run consecutively. The appellant is aggrieved by both conviction and sentence and preferred this appeal. The appeal is based on the following grounds found in the memorandum of appeal and further grounds found in the appellant's submissions:-

- 1. That the conviction was based on inconsistent medical evidence;**
- 2. That there was no independent evidence to connect the appellant with the said offences;**
- 3. That in the first report to police, no description was given of the offender;**
- 4. That the prosecution evidence was contradictory and raised doubts which should have been resolved in favour of the appellant;**
- 5. That his rights under Article 49(1) C(II) of the Constitution were violated in that he was not given copies of the witnesses' statements;**
- 6. That the proceedings proceeded in a language he did not understand;**

**7. That the trial magistrate erred in failing to consider that all essential witnesses were not called;**

**8. That the appellant's defence was not considered.**

As a first appellate court, this court is required to re-evaluate, and analyse the evidence and arrive at its own findings, while bearing in mind that this court did not have the opportunity to see and weigh the demeanor of the witnesses. The brief facts of this case are that the complainant, F.A.M, a child aged about 9 years was playing outside their house when the appellant who was her neighbour called her. She knew him as a neighbour. She entered in the appellant's house after he asked her to help him wash utensils. After washing one cup she wanted to go out but the appellant got hold of her hand, dragged her to the bed, removed his trouser and her underpants, penetrated her genitalia by using his genitals; she felt pain and he threatened to beat her if she told anybody. She left his house but never told her parents or sister for fear that she would be beaten. She went back to school and on 5/15/09, she informed her class teacher, B, because she had got wounds on her vagina. The teacher checked her, referred her to the matron and the head teacher directed that she be taken to hospital. She was treated. Her mother was called to school and went the next day.

PW2, J.A.M, the mother of PW1, and a teacher at the School, confirmed that the complainant is one of her children. She recalled that on 27/5/2009, the Head teacher called her and informed her that the complainant was unwell. She visited the school on the next day, and was informed that the child had a sexually transmitted disease and had been taken to hospital. She took PW1 to hospital for further laboratory tests. She obtained a P3 form, took her to Gilgil Police Station. She said that PW1 mentioned Patrick as the one who defiled her and PW2 found him at his house and he was arrested. The complainant was examined by Grace Ngurani (PW3), a Clinical Officer at Bahati District Hospital. PW1 had a history of defilement. She observed that PW1 had rashes like eruptions on the labia, hymen was torn, had a whitish discharge. Urinalysis was done and pus cells were seen, blood cells in uniform. HIV test was negative and PW1 was treated for sexually transmitted infection. She opined that the degree of injury as grievous harm.

B.G.G (PW4), a teacher at the Boarding Primary, recalled that on 27/5/09, while at school, she went to Class 4 when PW1 told her that she had pains on her thighs and after she took PW1 outside PW1 further informed PW4 that she had pains in her vagina. The Matron took PW1 to hospital and the doctor found that she had been defiled. PW1 informed PW4 that she had been defiled by a neighbour during the August holidays. Thereafter PW4 called the girl's parents.

L.W (PW5), the matron at the Primary School recalled that a teacher referred PW1 to her on the morning of 27/5/09. She checked PW1 and found pimples on her private parts, PW1 was later referred to the District Hospital, Nakuru on 28/5/09. PW1 informed PW5 that a neighbour defiled her.

PC Evans Kimaiyo Kimunge (PW6) arrested the appellant on 28/5/09 after he was pointed out by PW2.

When asked to enter his defence the appellant in his unsworn defence denied knowing anything about the offence and that the charges were a frame up.

The state opposed that appeal for reasons that PW1 knew the appellant well as a neighbour; the incident was in broad daylight; that the matron examined PW1 and later the Clinical Officer confirmed that PW1 had been defiled; that the appellant never raised the issue of being framed when the prosecution witnesses testified.

On the question of whether or not the appellant was properly identified, PW1 testified that the appellant is known as Patrick and was their neighbour. The appellant never challenged PW1's testimony that he was a neighbour and that she knew him well. Infact he never challenged that fact when PW1's mother, PW2 testified. In his defence, he admitted that he had been staying in Gilgil where PW1 resided too. The identification of the appellant by PW1 was not in issue. There was therefore no need to give the appellant's description to the police upon the first report.

The complainant conceded that she never informed anybody about her ordeal, either her sister who was at home or her parents because of fear of the appellant who had threatened to beat her. It was not until she became sick while in school that she disclosed it to her teacher. As per the P3 form, PW1 was found to have pimples like eruptions on her labia, hymen was broken and membranes were torn, she had a vaginal discharge, pus discharge and she was treated for sexually transmitted infection (STI). Although PW1 had not disclosed what had happened till about a month later on 27/5/09, this court is satisfied that it is as a result of the threats and fear of the appellant that the complainant took so long to report. There is, overwhelming evidence that she was defiled and the court is satisfied that though the incident was discovered a month later, the appellant is the one whom the complainant identified as the person who abused her.

The appellant claims that not all relevant witnesses who should have been called were not called by the prosecution. It was his submission that his brother with whom he lived and PW1's father should have been called as witnesses but he did not point to any valuable evidence they would have added to the case. **Section 143** of the **Evidence Act** provides that there is no fixed number of witnesses required to prove a fact. It reads as follows:-

**“S.143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”**

The appellant has not pointed to any law that requires a certain number of witnesses to be called to prove the prosecution case. Further to the above, the requirement of corroboration of the evidence of young witnesses in sexual offences was done away with, with the amendment to the law. It is enough that the court believes the evidence of the witnesses who are called and gives reason for it. See **Section 124** of the **Evidence Act**.

The appellant also complains that the proceedings before the trial court were in a language he did not understand. On a perusal of the court file, on 2/6/09, when the plea was read to the appellant, it is indicated that it was read to him in the Kiswahili language and he denied the offence. PW1 testified in the Kiswahili language and so did PW3, PW5 while PW4 and PW6 testified in English. It is not indicated what language PW2 used. The appellant cross examined all the witnesses and gave an unsworn defence. At no stage did he complain that he did not understand the language or that he could not follow the proceedings. This court is convinced that the proceedings were conducted in a language that the appellant understood and the allegation that he did not understand is an afterthought.

As to whether the appellant's defence was considered, the appellant's defence comprised four sentences. He denied any knowledge of the offence and concluded that it was all a lie. It was a bare denial. It did not at all displace the evidence adduced by the prosecution witnesses. The trial court did consider that the defence was a mere denial and believed the evidence of the prosecution to be corroborated and credible.

The appellant contends that the prosecution evidence was full of contradictions and inconsistencies. He submitted that whereas PW1 talked of having informed PW4 of what happened to her on 5/5/2009, PW4 talked of 27/5/09. It is true that PW1 talked of having informed her teacher (PW4) about her ordeal on 5/5/2009, but PW1 talked of 27/5/09. The matron (PW5) who checked PW1 also talked of 27/5/09. Similarly PW2, PW1's mother recalled that the Headteacher of the School where the complainant went to school asked her to go to the school on 27/5/09 and she went to the school on 28/5/09, after the incident was discovered. I find that PW1 must have informed PW4 of her ordeal on 27/5/2009. This court notes that PW1 was a child of 9 years. Her birth certificate was produced in evidence. It indicates that she was born on 22/7/1999. By the time she testified she was about 10 years. She was a child of tender age who may not have appreciated dates. The evidence of PW2, PW4 and PW5 is consistent as to when PW1 informed PW4 of her ordeal and the discrepancy in the date does not go to vitiate the prosecution evidence. The contradiction is not material and would not prejudice the defence case in anyway.

The appellant also submitted that his rights under **Article 49(1) (c)** of the **Constitution** were infringed in

that he was not given witnesses statements and was not therefore able to prepare his defence. **Article 49** provides for rights of arrested persons. Right to evidence of prosecution is under **Article 50(2)(f)** of the **Constitution**. At no stage, during the trial, did the appellant allege that he was denied the witness statements which are ordinarily issued to accused persons at the time of plea. The appellant never complained to the court or prosecution, he only cross examined the witnesses and entered a defence. This allegation is an afterthought and this court finds that it is not true and it is hereby dismissed as such. In any event such allegations of infringement of fundamental rights should be raised at the earliest time possible.

The complainant was found to have been infected with a sexually transmitted infection and was treated for it. The court was not told why the appellant was not taken for medical examination to ascertain whether he too was infected. Despite that omission the court finds that the offence was committed during the daytime; it was committed by a person well known to the complainant. There was no reason for the complainant, a child of tender age to frame the appellant. The appellant never disclosed why he could have been framed. I find that even if there was no other independent evidence to corroborate that of PW1, she testified on affirmation, her evidence was tested in cross examination, the trial court believed her and I am satisfied that the trial court arrived at the correct finding, that it is the appellant who committed this heinous offence on a small girl, who was his neighbour.

It is interesting that the police never took the appellant for medical examination to ascertain whether or not he had a sexually transmitted infection. That was necessary to prove the second charge of whether or not the appellant intentionally, knowingly and willfully infected the complainant with a venereal disease. Failure to take the appellant for medical examination left a gap in the prosecution case. Despite the fact that the complainant identified the appellant as the person who defiled her, it does not automatically follow that the second charge was proved. I find that the prosecution did not make any effort to prove the second charge and I would accordingly find that it was not proved beyond any reasonable doubt. The conviction on the second charge is not safe and is hereby quashed and the sentence set aside.

Having re-evaluated and analysed the evidence on record, I come to the same conclusion as the trial court that the appellant defiled the complainant and I hereby confirm the conviction on Count 1.

The first charge indicates that the appellant was charged under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. **Section 8(1)** creates the offence of defilement. The other subsections create the sentences to be meted out upon conviction based on different ages. The complainant was about 10 years at the time of the incident. The provision that relates to her age is **Section 8(2)** but not **8(3)**. It was an error for the trial court to proceed to sentence under **Section 8(3)** of the **Sexual Offences Act**. **Section 8(2)** reads as follows:-

**“(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

**Subsection (3)** provides that a person convicted for defilement of a child between the age of 12 and 15 years is liable to be sentenced to not less than twenty years. The trial court had the complainant’s birth certificate which shows she was below 11 years and the appellant should have been sentenced pursuant to **Section 8(2)**. Even under **Section 8(3)**, the sentence allowed is 20 years and above. The sentence of 15 years imprisonment was therefore made in error and it is hereby quashed and set aside. Instead the appellant will be sentenced to serve life imprisonment under **Section 8(2)** of the **Sexual Offences Act**. It is so ordered.

**DATED and DELIVERED this 16<sup>th</sup> day of December, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Appellant – present

Mr. Omari vfor the State.  
Kennedy – Court Clerk.