REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 23 of 2009

JAMES NYAKUNDI MACHUK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of defilement contrary to *section 8(1) and 8(3) of the Sexual Offences Act (no.3 of 2006)* whose particulars were that on the 14/1/2007 at about 3 p.m in Kisii District within Nyanza Province he defiled L.N a child aged 7 years. He was sentenced to serve 20 years in jail. He faced an alternative charge of indecent assault contrary to *section 11 (1) of the Sexual Offences Act* in regard to the same incident. He was aggrieved by the conviction and sentence and preferred this appeal.

The prosecution evidence on which the appellant was convicted was that the complainant L.N (PW4), aged 7 and in class 1, was left at home on 14/1/2007 at about 3 p.m by the mother S.K (Pw3) who had gone to the river. When the mother returned she found the girl on the bed crying. She reported that the appellant had done bad things to her. PW3 examined the girl's private parts and found she was bleeding. She took her to Kisii General Hospital for medical attention. PW4 testified on oath, after *Voire dire* examination, and stated that her mother left her at home with a baby and one V and went to fetch water. The appellant came and asked violet to go and get some bananas. When V was gone, the appellant took her to her father's bed and removed her clothes. Pointing to her genitalia, the girl told the court:

"He did bad things to me. He did stupid things to the ……I felt pain. Blood came out. When v came back he left. I was left in the house and I started to cry……..my mother came and took me to hospital. I was alone when my mother came. I told her what happened and what Nyakundi did to me."

PW5 P.C. Simon Mweu told court he received the incident report at about 4 p.m. and had the girl, who came to the station with the mother, to Hospital.

Medical evidence was produced by Criminal Officer JACKSON Murauni of Kisii District Hospital. He testified that he completed P3 (exhibit 1) for the girl 8 days after she was examined by another officer at the Hospital. He relied of the notes made by the officer to complete the P3. The notes showed the girl's genitalia was wet, red and tender when examined. It had moderate epithelia cell and non-motible spermatozoa. PW1 completed the P3 to say there was mild penetration and ejaculation into the girl's genitalia.

The appellant made unsworn defence to say he was attending a party at his brother's home when it was alleged he defiled the girl. He called his brother DW2 Pius Ombati who testified that on this day their nephew had a party and the appellant was overseeing the slaughter of animals. DW2 was not himself in the party to see what was going on. However, at one point the complainant screamed and they all ran there to find she had been defiled. The appellant also came there. He was being blamed for the incident.

Evidence was clear that the appellant and DW2 are step-brothers to the complainant's father whose home is about 200 meters from that of the appellant.

The appellant's complaint was that there was no medical evidence called and that he had not been properly identified to be the assailant. When he prosecuted the appeal, he stated he was medically examined but that the results did not support the prosecution contention that he was the one who had defiled the complainant. Mr. Mutai for the state submitted that there was sufficient evidence to show the appellant had defiled the child.

The incident complained of happened during the day, between 3 p.m and 4 p.m, and the appellant is the girl's uncle and therefore known to her. The issue of mistaken about the identity of the assailant does not arise. However, the girl's

testimony that she was defiled required corroboration, and the prosecution relied on the P3. Quite unfortunately, it was not PW1 who examined the girl and made the notes he relied on to complete the form. The prosecution did not lead evidence to show why the officer who examined her could not come to testify or to produce the notes. It was not indicated why he could not compete the P3. The appellant was not represented, and the treatment notes (exhibit 2) made by the officer who was not called, were produced in evidence without complying with *section 77 of the Evidence Act (Cap.80).* The PW3 was of no value as PW1 was not the one who examined the girl and could not, of his own, vouch for the results of the examination. The trial court fell in error when it found there was medical evidence to support the conviction.

The judgment shows that it was appreciated that the appellant relied on an alibi for his defence. However, the court went to state as follows:-

> *"Further when an accused gives an alibi, it is upon him to prove the same although of course the cultivate burden to prove an offence is generally on the prosecution.*
>
> *It was upon incumbent upon the accused to present evidence to support his alibi."*

That was misdirection. An accused who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer. The burden to prove the accused was at the scene at the material time and committed the offence alleged remains throughout on the prosecution.(See *Ssentale .V. Uganda [1968]Ea 365).*

The other issue that has caused this court anxiety is the way the trial court handled the complainant and her testimony. She was aged 7 and the court allowed her to give sworn testimony. Her testimony was preceded by her being examined by the court. At the end of that examination the court was supposed, as required by *section 19(1) of the Oaths andStatutory Declarations Act (Cap.15),* to make a finding whether the child was possessed of sufficient intelligence to justify the reception of her testimony, she understood the duty of speaking the truth as well as the nature of the Oath. (See *Njuguan.V. Republic [1988]KLR707).* The court did not make that finding. As to whether she understood the nature of oath, the record heard shows this is what the child said:

"Q. Are you a Christian?

A. Yes, I am a Catholic.

Q. Do you know about God?

A. Yes I do. He is up there.

Q.Do you know that God loves children?

A. Yes.

Q.Does God loves liar?

A. No he does not.

He loves people who speak the truth.

Q. What does he do to liars?

A. They are sinners. So he burns them."

This child was not asked if she knew about swearing or oath. She may be Catholic, but does she attend church on Sundays. Does she know about the Bible or its importance. Has she ever read the Bible? Once again, this child was only 7. Particular questions ought to have been put to her to test whether she understood the nature of the oath, rather than just questions about her general intelligence or whether she understood the importance of telling the truth.(See *Kibangeny Arap Kolil.V.[1959]EA 92).* I find the court did not comply with the requirements of *section 19(1*) above.

The result is that the appeal has to be allowed. The appellant did not have a satisfactory trial. The conviction is quashed and the sentence set aside. I consider that the appellant was jailed for 20 years in 2007 and therefore the substantial part of the sentence has not been served. He faced a serious offence in which the complainant was aged 7. If a court property conducts the trial, I find, a conviction might result. (See *Mathea & Another .v.Republic [1989]KLR 303).*

I direct that the appellant be retried for the offence by another competent court.

Dated, signed and delivered at Kisii this 27th day of January, 2010.

A.O.MUCHELULE

JUDGE