REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 249 OF 2009

(From original conviction and sentence in criminal case No. 930 of 2007 of the Principal Magistrate's Court at Nyahururu)

PAUL KAMAU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8(3) of the Sexual Offences Act 2006 (No. 3 of 2006) and on the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006 *(No. 3 of 2006).*

On the evidence the appellant was convicted of the offence of defilement contrary to Section 8(3) of the Sexual Offences Act and was sentenced to 20 years imprisonment. No finding on the alternative charge was made.

Aggrieved with both the conviction and sentence the appellant preferred an appeal to this court on 13 grounds namely -

(1) THAT the learned trial magistrate erred in both law and in fact by convicting the appellant against the weight of evidence on record.

(2) THAT the learned trial magistrate erred in both law and in fact by failing to appreciate that the main ingredient of the offence charged had not been proved to the required degree by the prosecution.

(3) THAT the learned trial magistrate erred in both law and in fact by failing to find that the evidence by the prosecution did not support the charge against the appellant.

(4) THAT the learned trial Magistrate erred in law and in fact in failing to find that the complainant's evidence was not corroborated in any material way by direct evidence of the other prosecution witnesses.

(5) THAT the learned trial Magistrate erred in law and in fact by failing to appreciate that the evidence on record pointed to the presence of another person who was never charged together with the accused person without any explanation.

(6) THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant was arrested before any investigations had been carried out and was only used as a scapegoat.

(7) THAT the learned trial magistrate erred in law and in fact by considering the evidence of the prosecution in total disregard to that of the defence.

(8) THAT the trial magistrate erred in both law and fact by finding a conviction against the Appellant when there were glaring contradictions in the evidence of the prosecution witnesses.

(9) THAT the conduct of the trial herein and the subsequent judgment and conviction of the appellant on the charges before court was oppressive and caused a serious miscarriage of justice.

(10) THAT the sentence of the Appellant to 20 years of imprisonment was unlawful as he was a minor during the purported commission of the alleged offence and he should have been sentenced under sections 190 and 191 of the Children's Act if at all.

(11) THAT the learned trial Magistrate erred in both law and fact by receiving the evidence of the complainant without making a specific finding that she was possessed of sufficient intelligence to justify the reception of such evidence. The same caused a serious miscarriage of justice.

(12) The learned trial magistrate erred in both law and fact by receiving the evidence of the complainant without fully complying with the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya.

(13) The learned trial Magistrate erred in both law and fact by failing to draft issues for determination by this Honourable court on finding that the Appellants rights under Section 72(3)(b) had been violated during the time of taking plea in the case.

And on the basis thereof prayed that the conviction and sentence be quashed and sentence be set aside.

Mr. Ndegwa Wahome Counsel who appeared for the appellant urged three of these grounds.

First counsel submitted that the prosecution did not comply with the requirement of Section 19 of the Oaths and Statutory Declarations Act, *(Cap 15, Laws of Kenya)*, and that the court could not have allowed PW1 *(the complainant)* to testify if it had not taken account of that provision, that PW1 was mentally retarded and a slow learner; that there was no examination of the witness. Mr. Wahome relied upon the case of **Ocharo Baigwa -vs- Republic** *(Criminal Appeal No. 92 of 2003 at Mombasa).* I will revert to

this case later.

The second ground argued by Mr. Wahome was that the charges against the appellant were defective in that it charged the appellant to have "jointly" defiled the complainant with another person not before the court. Counsel relied on the case of **Cosmus Kipyegon Kibor -vs- Republic** (Nakuru HCCA No. 72 of 2007) where the learned judge reiterated the decision of the court of appeal in **Paul Mwangi Murunga -vs- Republic** (Nakuru Criminal Appeal No. 35 of 2006) *"that it is a physical impossibility for two or more men to jointly rape one woman. etc."*

The third point was that the appellant's right to be brought to court within 24 hours under Section 72(3)(b) of the repealed Constitution was violated, and any subsequent proceedings thereafter, could not have been a fair trial.

I will dispose of this point right way and say, the issue is now a moot point. If the appellant's rights to a fair trial were violated it would be a subject of a separate inquiry under a separate suit for damages under Section 72(6) of the repealed Constitution. It is not a subject of inquiry in an appeal against conviction and sentence.

The fourth point argued by Mr. Wahome concerned the general merits of the appeal and these, I will consider along with the submissions of Mr., Nyakundi learned state counsel who did not support the conviction and sentence for the appellant by the lower court.

The fifth point which was not argued concerned the age of the Appellant, that he was a child. No evidence was led to show he was not over 18 years. Section 190 and 191 of the Children's Act, do not apply.

Mr. Nyakundi submitted that the appellant was not given opportunity to cross-examine the complainant to test the veracity of her testimony. Counsel relied on the old Court of Appeal for Eastern Africa decision of **Republic -vs- Konstanti Kirimunyo [1942] EACA 64** where the court held that failure to cross-examine a witness in a sexual offence case is prejudicial to the accused.

Secondly, Mr. Nyakundi argued, from the evidence, there was no penetration, as the doctor testified that it was an attempted act of defilement and assuming there was evidence of sexual offence, it would have been a charge under Section 9(2) of the Sexual Offence Act - attempted defilement and that this was not found.

Having set out the briefly the respective arguments by the appellant's counsel and the state counsel I now revert to the issues raised by counsel in this appeal.

Firstly Section 19 of the Oaths and Statutory Declarations Act requires that where the evidence of a child of tender years is received, the court shall ascertain by an oral or examination *(voir dire)* of whether the child understands the nature of an oath, or is possessed of sufficient intelligence to justify, the reception of the evidence, and that the child understands the duty of telling the truth.

In this case the learned trial court did ask the child (PW1) a few questions from which she established

that she (PW1) was a slow learner and decided to take an unsworn statement from her.

Under Section 211 of the Criminal Procedure Code, *(Cap 75, Laws of Kenya),* an accused who gives an unsworn statement is protected from cross-examination. The submission by state counsel that PW1 *(complainant)* was not subjected to cross-examination was quite off the goal.

However, on the evidence of PW1, Section 124 of the Evidence Act *(Cap 80, Laws of Kenya)* provides that no conviction could be based upon the uncorroborated evidence of alleged victim unless the charges is that of a sexual offence. Section 124 says-

"124. Notwithstanding the provision of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of an alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

PROVIDED that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

In this case the learned trial magistrate examined the prosecution evidence and in particular that of PW1 and PW3 her companion, who gave a detailed account of how the Appellant and his friend met PW1 *(the victim, and PW3 her friend),* near Kingdom Church, and the Appellant grabbed PW1 while his friend Kiragu, got hold of PW3. PW3 was lucky to wriggle herself and ran home and told PW4 the mother of PW3 who summoned her mother PW2. The evidence of PW1 and PW3 was corroborative, and there is no doubt that the Appellant and his companion Kiragu who ran away, were persons well known to both PW1 and PW3. They had even been in school together.

The evidence of identification was clear, and the trial magistrate did not misdirect herself at all.

The only question is whether the offence of defilement was established. For an offence of defilement to be established Section 8(1) of the Sexual Offences Act, says -

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

And Section 8(3) provides for punishment in these terms -

"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

The essential element in the offence of defilement is **"penetration".** The fact of penetration is established by evidence. That evidence is primarily from the victim, and is corroborated by medical evidence. Under the proviso to Section 124 of the Evidence Act, the court may still convict without the evidence of corroboration if the court is convinced for reasons to be recorded the victim is telling the truth.

In this case, it was the evidence of PW1 the victim, a girl of the age twelve years *(according to the evidence of PW2, her mother)* relating to the attack upon her by the Appellant is corroborated by the evidence of her companion and friend (PW3), L.W.W. The Appellant grabbed her while Kiragu grabbed PW3 but PW3 managed to wriggle out of the clutches of Kiragu. She could not corroborate what happened to PW1 in the hands of the Appellant. PW1 described what happened to her. The Appellant after grabbing her, took her to a deserted area near the Kingdom Church. The Appellant removed her clothes and lay on top of her after he removed his clothes.

The little girl was a person of slow understanding (retarded according to the trial magistrate, hard of hearing - deaf *(according to PW2, the mother)* and may not fully have appreciated what the Appellant did to her by lying on top of her after removing his clothes.

PW2, the mother suggested that she understood what her daughter told her was that the Appellant and Kiragu **"raped"** her daughter. PW1 testified that it was the Appellant who removed her clothes, and lay on top of her after removing his clothes' and ran away when people came. Kiragu does not appear to have touched her so that the charge of **"jointly"** committing an act which caused penetration is not borne out by the evidence.

PW5, a Clinical Officer who examined PW1 about three hours after the attack, found her biker was torn, and her pant was wet, had tender elbow joints on both hands, normal external genitalia, but had a whitish discharge from her genitalia, tenderness on the lower abdomen and also tenderness and swelling of the lower labia majora, and that high vaginal swab was taken and no organism was isolated and no spermatozoa were seen. PW5 therefore concluded that there was no penetration but *"there was an attempt to penetrate as a result PW1 sustained the injuries on her private parts."*

This evidence is conclusive of the fact that there was no penetration, an essential element in the offence of defilement under section 8(1) of the Sexual Offences Act. On that evidence therefore, the trial court erred in finding that there was penetration and could not therefore convict the Appellant of the offence of defilement. The conviction of the Appellant of the offence of defilement contrary to Section 8(3) of the Sexual Offences Act is therefore quashed and sentence set aside.

It was however the evidence of PW5 that there was an attempt to penetrate as a result of which PW1 sustained the injuries on her private parts. In addition, PW5 in cross-examination by the Appellant testified that-

"her biker was torn and her external genitalia were swollen. This was an attempt of defilement."

The offence and punishment for attempted defilement is governed by Sections 9(1) and (2) of the Sexual Offences Act. It provides as follows-

"9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

The unsworn statement of the victim PW1, and the evidence of PW5 the Clinical Officer clearly show that the acts of the Appellant upon the victim were acts of attempted defilement.

Under Section 186 of the Criminal Procedure Code, *(Cap. 75, Laws of Kenya)* when a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act he may be convicted of that offence although he was not charged with it.

In this case the Appellant was charged with the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The learned trial magistrate made no finding on this alternative charge. The lower court should have made a finding which I hereby do, that there was no evidence to support such a charge and acquitted him of that offence. The evidence here shows that the act of the Appellant was much more than the mere contact between any part of the body of a person with genital organs, breasts or buttocks of another, excluding the act of penetration.

The evidence of PW5 the Clinical Officers clearly points to an act of attempted defilement hence the injuries the victim suffered on her private parts.

For those reasons, I find the Appellant guilty of the offence of attempted defilement of a child contrary to Section 9(1) of the Sexual Offences Act, and sentence the Appellant to ten (10) years imprisonment as provided under Section 9(2) of the said Act. The said sentence shall run from the date of conviction and sentence from the lower court.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 26th day of November 2010

M. J. ANYARA EMUKULE

JUDGE