REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 168 OF 2009

(From original conviction and sentence in Criminal Case No. 702 of 2008 of the Resident Magistrate's Court

at Eldama Ravine - D. M. Machage {R.M.})

R.C.K...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

The Appellant was charged with the offence of defilement of a child of $2^1/_2$ years contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act, 2006 (No. 3 of 2006).

The Appellant was convicted and sentenced to life imprisonment. Aggrieved with both his conviction and sentence, the Appellant appealed to this court on four (4) grounds set out in the Amended Petition of Appeal submitted to the court on the date of hearing on (28/09/2010), namely -

(1) THAT the Appellant was prejudiced and wasn't accorded a fair and impartial trial as per the provisions Section 77(1) of the Constitution in that the trial magistrate failed to conduct a voir dire examination upon the complainant hence dispensing with her evidence denying me (the Appellant) an opportunity to cross-examine her.

(2) THAT the trial was a nullity as my Fundamental Constitutional, rights to freedom as enshrined by Section 72(3) of the Constitution was violated.

(3) THAT the learned trial magistrate made an error in both law and fact by acting upon the evidence of the complainant's mother (PW1) whereby her evidence was hearsay evidence.

(4) THAT the case for the prosecution was not proved beyond reasonable doubt.

Where this matter first came up for hearing, my brother Hon. Maraga J., ordered for the age assessment of the Appellant. The Appellant's age was assessed at above 19 years as of 30th June, 2010.

The Appellant had claimed that he was 16 years of 3rd June 2009. The offence was committed on 12th October, 2008. In accordance with the age assessment, if the Appellant was above 19 years of age as of 30th June 2010 calculating the age backwards, he was above 18 years of age as at 3rd June 2009 when he was convicted and sentenced to life imprisonment and was about 16-17 years of age when he committed the offence, and was therefore a minor. He could not, under the provisions of Section 190 and 191 of the Children Act, 2001, be imprisoned for life for an offence he committed while he was a minor.

Mr. Omwega learned State Counsel readily conceded to this point.

There are also procedural irregularities which went to the trial of the Appellant which I need to high light before drawing further conclusions in this matter.

Firstly, the learned trial magistrate failed to examine the little kid in terms of Section 19 of the Oaths and Statutory Declarations Act *(Cap. 15, Laws of Kenya)* to test the complainant's understanding *(if any),* of the concepts of right and wrong and ability to tell the truth and therefore be sworn, or whether she was possessed, at that early age of $2^{1}/_{2}$ years, some intelligence or understanding to be able to answer some simple questions and therefore be afforded the right to make an unsworn statement. The court thus denied itself, and this court, the benefit of the complainant's view of what happened, or what, in her own smattering words, the Appellant did to her.

This is important because it would form the basic evidence against the Appellant without the need for corroboration under the proviso to Section 124 of the Evidence Act *(Cap. 80, Laws of Kenya)*. The proviso to Section 124 of the Evidence Act provides that no corroboration is required for the evidence of a victim in a sexual offence.

Secondly, the trial court plunged into the evidence of PW1 *(the victim's mother)* without first declaring that the victim at the age of $2^{1}/_{2}$ years, was because of both her age, and trauma, a vulnerable witness, and therefore required the appointment of the mother as the intermediary in terms of Section 31 of the Sexual Offences Act, 2006.

In my view however, and notwithstanding that these procedural steps were not observed, PW1, the mother of the victim, would be, and was in the absence of any other witness, be the logical and natural source of first evidence as to the condition of the victim. PW1 was in my view a competent witness in her own right, and without being declared an intermediary under Section 31 of the Sexual Offences. However, not having been the victim, her own evidence being information and findings from her daughter her evidence would require corroboration from an independent witness.

The substance of the evidence of PW1 was that she realized something wrong with her the child on 12th October, 2008 and thought she had been defiled. Four days later on 16th October, 2008, PW1 realized that the child had pain in her private parts, and she told the mother that the Appellant had taken her, removed her trousers. For three days, Sunday, Monday and Tuesday the baby was not well prompting PW1 to take the child to Equator Health Centre, where she was treated, given drugs and discharged. Thereafter PW1 reported the matter to the Police at the Chief's Camp, and later to Timboroa Police Station.

In cross-examination, PW1 told the court that it was the victim, who informed her *(the mother)* that it is the Appellant who had defiled her. PWII - No. 2007110767, APC Charles Obiero testified that on receiving information that a child had been defiled by the Appellant he proceeded to where the Appellant was grazing cattle. The Appellant attempted to flee but PWII caught up with and arrested him.

Again in cross-examination by the Appellant, PWII testified that the child had said it was the Appellant who had defiled her.

The evidence of PWIII the Doctor who examined the child at Koibatek District Hospital, and filled the P3 Form on 21st October 2008 showed that the child's hymen had been broken, had bruised labia, and on the basis thereof concluded that ***"forceful intercourse had occurred."***

When put on his defence the Appellant gave an unsworn statement. He was 16 years of age, denied defiling the child or indecently assaulting her.

I have considered and re-evaluated the above evidence. I have already observed that the child was not given an opportunity in court even to say that the Appellant was her tormentor. In fact the court unfortunately dismissed her as a mere $2^1/_2$ years old, despite what PW1 said, ***"she was well nourished and able to talk."*** Where the evidence of a child of tender years is concerned, it is the requirement of Section 19 of the Oaths and Statutory Declarations Act, that the child be examined *(voir dire),* to establish whether it is competent to give evidence on oath, or an unsworn statement. That record ought to be made - courts should also observe the provisions of Section 31 of the Sexual Offences Act in respect of vulnerable witnesses, and appointment of intermediaries, even if their evidence is not conclusive, unless corroborated by an independent witness.

In this case, the evidence tends to show that the Appellant was the perpetrator of the act of defilement. Children of tender age 1-5 years, are guile less. It was left to the mother to find out why the child was complaining of stomach pains for four continuous days from 12th - 16th October 2008. When the child pointed to the Appellant, there would be no doubt her troubles were caused by the Appellant. Dr. Christopher Kemboi who testified on behalf of Dr. Marachi, and produced the P3 Form showed that the girl of tender age $2^1/_2$ years had been defiled.

I am consequently unable to fault the learned trial magistrate's finding the Appellant guilty of the offence of defilement under Section 8(1) of the Sexual Offences Act 2006 (No. 3 of 2006), and convicting him accordingly.

I am however unable to support the sentence of life imprisonment for the Appellant. He was a minor. The appropriate sentence for a minor is prescribed under Section 8(7) of the Sexual Offences Act. The said sub-section provides -

"8(1) - (6)

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92, Laws of Kenya).

Section 5 of the Borstal Institutions Act aforesaid provides inter alia that before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training at a borstal institution.

From the evidence and circumstances of this case, I am persuaded that the accused herein will benefit from a period of training in a borstal institution.

Being of the above mind, I set aside the sentence of life imprisonment imposed upon the Appellant, and in lieu therefore direct that the Appellant be admitted to Kamiti Youth Corrective Training Centre for a period of two years.

There shall be orders accordingly.

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

M. J. ANYARA EMUKULE

JUDGE