



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 193 of 193 of 2005**

**ALEX JOMO ANGOLOLE ..... APPELLANT**

**- AND -**

**REPUBLIC .....RESPONDENT**

***(An appeal from the judgment of Senior Resident Magistrate Mrs. Muchira dated 28<sup>th</sup> January, 2005 in Criminal Case No. 1032 of 2004 at Kibera Law Courts)***

**JUDGEMENT**

The appellant was charged with defilement of a girl contrary to s. 145 (1) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, between 19<sup>th</sup> January, 2004 and 4<sup>th</sup> February, 2004 at H[...] Primary School in Parklands, Nairobi, unlawfully had carnal knowledge of **LO**, a girl under the age of 16 years.

In the alternative the appellant was charged, and with reference to the same dates and the same *locus in quo*, that he unlawfully and indecently assaulted **LO** by touching her private parts.

The complainant (PW5) who is a Std. 1 Primary School pupil, at H[...] Primary School, was taken through a *voir dire* examination by the learned Magistrate, before being allowed to give unsworn evidence. She said the appellant had followed her into the toilet, then he closed the door and lifted her dress; she went on to say:

*“... he removed his thing for urinating, he opened his trousers. He put it inside my thing for urinating after he removed my panty. I screamed, but he held my neck. I cried when his thing entered me. I felt pain, I cried. He released me, I went away. I put on my panty. I left him in the toilet. I went to school. I told the teacher ....”*

Later on, PW5 reported the matter to her mother, who took her to hospital. PW5 later identified the appellant to the Police, who arrested him. She testified that she used to see the appellant at her school, and that the appellant was a worker at the school.

**Dr. Z. K. Kamau** (PW6) of the Nairobi Area Police Surgery examined PW5 with complaints of defilement, on 9<sup>th</sup> February, 2004; he found her external genitals normal, and there were no injuries to the vulva or vagina; the labia were normal, and the hymen was intact; and PW5 had no discharge in her private parts. PW6, however, saw medical notes from Suswa Clinic, where PW5 had been taken following the alleged incident; and these notes showed that PW5 had had a vaginal discharge, as well as bruises to the labia.

**Florence Wanjiru Maina** (PW8), a nurse at Suswa Clinic, had examined PW5 on 24<sup>th</sup> January, 2004 and had prepared a report on 4<sup>th</sup> February, 2004. PW8 found that PW5 was a young girl of seven years of age. PW5 had come with her to PW8; and PW8 had then learnt that PW5 felt pain and cried when she was passing urine. When PW8 examined PW5 she “immediately noticed [PW5] had a smelly yellowish-white discharge”; and an examination of the vagina and of the labia majora and labia minora showed bruising; and PW8 also found that the hymen was torn. PW8 advised that PW5 be taken to a more specialized hospital, but PW5’s mother said she had no money. PW8 gave medication to PW5. PW8’s

opinion was that the injuries to PW5 were from a sexual assault. On cross-examination, PW8 said she was not a Government Chemist, but a health worker; and she said that from her work-experience, the discharge she found on PW5 proved the existence of an infection. PW8 said that the probable cause of the infection was sexual intercourse with a grown-up.

The appellant made an unsworn statement, to the effect that he was, on 5<sup>th</sup> February, 2004 at his work-place as a watchman, when his boss called him, and he was then arrested by Police officers, and taken to the Police Station. The appellant said he knew nothing of the charges that had been brought against him. He said his work “doesn’t involve mixing with children”, and he wondered how the school authorities would not know if he had defiled the complainant.

The learned Magistrate assessed the evidence, and held that it showed the complainant had been defiled: there was credible evidence that the appellant followed PW5 into the toilet, closed the door, and inserted his genitals into her private parts, and she cried out in pain; PW8, the nurse, formed the opinion that PW5 had been the victim of a sexual assault. The trial Court did not find the Police doctor’s report reliable ? for he said he had read the hospital report which carried specific findings ? yet he made no comment on the same, but instead recorded things that appeared to stand in contradiction. The trial Court, as judge of the demeanour of witnesses, passed PW8 as a truthful witness. The court noted too that it is only PW8 who had had an early opportunity to see the complainant, when the complainant’s injuries were fresh.

The next question was whether the appellant herein it was, who committed the act of defilement upon PW5. In this regard the learned Magistrate took into account several elements in the testimonies as a whole, but paid focused attention to the evidence of the complainant:

**“PW5 had confessed to the investigating officer that [the] accused had done it. I find [that] PW5 had, or could only have, one reason to point out [the] accused. That is because at 7 years [of age], she was not confused [as to who] among the several workers in the school, had defiled her. She readily and consistently said it’s the accused person.”**

The learned Magistrate then focused on the defence offered: the appellant herein had said he did not understand how PW5 could be defiled without the knowledge of the people in the school. The trial Court took judicial notice “that this was a very traumatizing experience for PW5, and failure to understand its nature could make her reserved and unwilling to talk about it, hence the act was discovered several days after it happened”.

The learned Magistrate dismissed any possible claim of grudge and frame-up:

**“The accused did not give any reasons or motive why a [girl of such tender age] should [bear a grudge towards] him and fabricate these charges against him.”**

The trial Court then considered the question whether PW5 had mistakenly identified the appellant herein; and it was held that: **“Nothing in her demeanour suggested so;”**

**“... the prosecution has proved its case beyond reasonable doubt ...”**

She found the appellant guilty, and convicted him accordingly. After considering the appellant a first offender, and taking into account his statement in mitigation, the trial Court sentenced him to imprisonment for ten years.

In the grounds of appeal filed by M/s Orieyo & Co. Advocates, it is contended that: proof beyond all reasonable doubts was not achieved; the Court should not have doubted the testimony of the Police Surgeon (PW6); the evidence of the nurse (PW8) who examined the complainant should not have been accepted; the burden of proof had been shifted to the appellant herein; the Court should not have dismissed the appellant’s unsworn defence; the *voir dire* examination for child-witnesses was improperly conducted; there was no proof of the age of the complainant; the trial Court relied on hearsay evidence; the trial Court relied on evidence that was not worthy of belief; the sentence imposed was manifestly harsh and excessive; the mitigation statement was not taken into account.

The appellant, however, argued his appeal case in person, and contended that false evidence had been adduced against him, since the whole school would have known if he committed an act of defilement as charged. The appellant contended that the evidence of the Police Surgeon (PW6) was the truth, and “the complainant was a virgin, she was not defiled”.

Learned counsel **Mrs. Obuo**, for the respondent, contested the appeal, and urged that it be dismissed. She submitted that the evidence of PW8 was clear and specific, and related to an early stage in the history of the defilement-complaint. On

24<sup>th</sup> January, 2004 PW8 had found signals of defilement on the complainant: smelly, yellow-white discharge; bruises; torn hymen. The Police Surgeon (PW6) examined the complainant about two weeks later (on 9<sup>th</sup> February, 2004), and said he saw no physical injuries, and also that PW5's hymen was intact. Counsel urged that credence be placed on the evidence of PW8 who had examined the complainant when the injuries were fresh; and she urged that it was PW8's evidence that was consistent with nearly all the rest of the evidence adduced in the case by the prosecution.

**Mrs. Obuo** urged that the complainant had properly identified the appellant herein, a man she used to see working as a watchman at her school. Counsel urged that there was overwhelming evidence on record proving the prosecution case, beyond any reasonable doubt. This evidence, counsel urged, was consistent and corroborated; whereas the contentions made on appeal lacked merit.

I have considered all the evidence on which the case turns; and I find that all the prosecution witnesses spoke on the same lines, save for PW8, the Police Surgeon, whose evidence is at variance. There is no basis for this Court to hold that this one witness (PW8) is the one who is right, while other witnesses got their facts wrong. Indeed, this Court is not, as a *matter of law*, bound by the evidence of a person of the status of PW8, who is a surgeon. The surgeon's evidence must be properly structured and reasoned, and must bear a logical *linkage to the main case*, which, in this instance, is a case of alleged defilement. PW8 began from a report already compiled at Suswa clinic; and a professional duty rested on the surgeon to address the observations in the first report, and to show how a different assessment would now emerge. Unless that is done, the later report would be standing on no *foundation*, and, to the judicial mind such a report would then appear to be *irrational*, and not reflective of the overall reality conveyed by the evidence of the majority of the witnesses. I find, therefore, just as did the trial Magistrate, that an insufficient basis has been given for some aspects of PW8's report.

Taking the evidence as a whole, I come to the conclusion that the trial was properly conducted, and the evidence was rightly assessed as leading to the conclusion that there was proof beyond reasonable doubt, that the appellant had been guilty as charged. The appellant, in broad daylight, followed the complainant into the toilet, undressed her and sexually assaulted her, while intimidating her and muzzling her voice. There were definite *clinical manifestations* showing the complainant to have been defiled; and the culprit was none other than the appellant herein.

I dismiss the appeal; uphold the conviction; and affirm sentence as imposed by the trial Court.

**Orders accordingly.**

**DATED** and **DELIVERED** at Nairobi this 9<sup>th</sup> day of February, 2009.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Respondent: Mrs. Obuo**

**Appellant in person**