



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 208 of 2008 & 209 of 2008 (Consoliated)

HASSAN NDIINGURI WAINAINA.....1ST APPELLANT

PAUL ASAMBO MAGUNDU.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellants, Hassan Ndinguri Wainaina and Paul Asambo Magundu were charged with the offence of **defilement** contrary to **section 8(1) (3)** of the **Sexual Offences Act, 2006**. They were also charged with an **alternative charge of indecent act with a child** contrary to **section 6(9)** of the **Sexual Offences Act, 2006**. The particulars of the offence in respect of **Hassan Ndinguri Wainana** (*the 1st appellant*) state that on the diverse dates between 15th June 2006 and 28th March 2007 in Nakuru District within Rift Valley Province willing fully and unlawfully had sexual intercourse with SW who is a girl under the age of fifteen years.

The particulars of the alternative charge state that **Hassan Ndinguri Wainana** (*the 1st appellant*) on the diverse dates between 15th June 2006 and 28th March 2007 at Shauri Yako Estate in Nakuru District within Rift Valley Province unlawfully and intentionally did an indecent act with a child namely SW who is a girl under the age of 18 years by getting into contact with her private parts namely genital organs.

The particulars of offence in respect of the **Paul Asambo Magundu** (*the 2nd appellant*) state that on the diverse dates between 19th March 2007 and 21st March 2007 in Nakuru District within Rift Valley Province willing fully and unlawfully had sexual intercourse with SW who is a girl under the age of fifteen years. The particulars of the alternative charge state that on the diverse dates between 19th March 2007 and 21st March 2007 in Nakuru District within Rift Valley Province unlawfully and intentionally did an indecent act with a child namely SW who is a child under the age of 18 years by getting into contact with her private parts namely genital organs.

The appellants pleaded not guilty, after trial before the Senior Resident Magistrate at Nakuru, they were both found guilty, upon their conviction, they were sentenced to serve 15 years imprisonment. Being dissatisfied with the conviction and sentence both the appellants appealed. The two appeals were consolidated and heard together. In the petition of appeal the grounds of appeal in respect of the two appeals are similar. The appellants challenged the judgment by the learned trial magistrate for failure to consider that there was a grudge between the complainant's Guardian who used to live with the first appellant and they separated. That grudge was the cause of the complaint. The learned trial magistrate also failed to make a finding that PW2, who was the guardian of the complainant was not a credible

witness.

The judgment was also faulted for failure to make a finding that the appellants were subjected to medical tests and they were found to be HIV and STD negative while the complainant was found to be HIV positive. Thus the learned trial magistrate erred both in law and in fact for shifting the burden of proof upon the appellants. It was also submitted that the appellants were detained in the Police Custody longer than provided for in the law which was a breach of their Constitutional rights to a fair trial. Finally there were glaring contradictions in the prosecutions evidence and there was no eye witness to the alleged offences.

This appeal was opposed by the State. The learned State Counsel Mr. Mugambi submitted that the evidence on record is consistent with the findings and the judgment of the court. The issue of grudge between PW2 and the 1st appellant was raised during the cross-examination and it was clear the sexual relationship between the 1st appellant and PW2 ended many years ago. This cross-examination was not taken further and did not bring out reasons why there was likely to be a grudge between the 1st appellant and PW2. The appellant also gave a sworn statement defence and from his evidence there was no allegation of grudge. The evidence of PW2 was credible and there was no contradiction that affected the weight of her evidence.

Under the provisions of **Section 124** of the **Evidence Act** the court needs to be satisfied that the minor is telling the truth. The evidence of the complainant was consistent. She knew the 1st appellant as uncle Sweka although she did not know the name of the 2nd appellant, she led the Police to his house where he used to take her, and she pointed him out and he was arrested. The fact of defilement was also confirmed by the medical report which confirmed there was penetration of the complainant's vagina. He therefore urged the court to uphold the decision of the trial court.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellants.

The trial court conducted a *voire dire* examination of **SW (PW6)** a young girl aged 10 years. After the court was satisfied that PW6 was intelligent enough to understand the meaning of speaking the truth, she was affirmed. PW6 testified that the 1st appellant used to pick her from school and take her to his house where he would sexually assault her (*do to her tabia mbaya.*) She also testified that the 2nd appellant used to do the same, pick her after school, carry her to his bicycle to his house and sexually assault her. PW6 testified that she knew the 1st appellant who used to visit her aunt's house and would sometimes spend the night there and they used to call him uncle S. However she did not know the name of the 2nd appellant.

PW6 used to live with **RO (PW2)** from the time when she was about one year old. PW2 testified that she had gone to PW6's school for a meeting in March 2007; one of PW6's classmate told her that PW6 was flushing a lot of money. PW2 reported to the school teacher Mrs Thuo who testified as PW4 to investigate how PW6 happened to have money. PW2 was later called to school and was informed by PW4 that she had interrogated PW6 who confided in her that somebody by the name 'mzee S' used to pick her from school on his bicycle and take her to his house where he would feed her with bread and tea and give her some money. Thereafter he would order her to remove her clothes and sexually assault her. She also confided with PW4 that another young man would also pick her up on his bicycle and repeat the same things to her. PW2 took the complainant to the hospital where she was examined and found to be HIV (positive). She later reported the matter to the police who arrested both appellants.

During cross-examination PW2 admitted that she knew the 1st appellant well. They had a sexual relationship between 1998 and 1999. Within that time the 1st appellant also used to sleep in PW2's

house. Similarly PW2 would sleep in his house. Thereafter the relationship ended because the 1st appellant was moving around with other women.

RBB (PW3) the headmaster of [Particulars Withheld] Primary School testified how PW4 reported to him that PW6 was having problems. The headmaster called PW2 who was the child's guardian and she was taken to the hospital. **GGT (PW4)** testified that she was a teacher at [Particulars Withheld] Nakuru Primary School at the material time when PW2 requested her to have a chat with PW6 basically to investigate why she was in possession of a lot of money. PW4 approached the complainant and after assuring her, the complainant confided with her that somebody by the name Uncle S used to live with them. He would collect her outside the school gate and carry her on his bicycle to his house and sexually assault her. After that he would give her Ksh 10/= that is when PW4 decided to report this to the Headmaster who sent for the complainant's guardian.

This matter was investigated by **PC Ruth Chacha (PW7)**. She testified that on 30th March 2007, PW2 who is the guardian of the complainant booked a report that the complainant had been defiled and infected with a disease. PW7 recorded the statements of the child who said she knew the persons who defiled her and led the police to the appellants' houses where they were arrested and booked at the police station.

The medical reports were produced by Dr. Kamau on behalf of Dr. J. M. Oloo, who was not available to give evidence. However Dr Kamau was familiar with the hand writing as they had worked together for some years. The complainant had alleged that she was defiled on several occasions between the 15th June 2006, to 28th March 2007. The complainant was examined, the vagina was found to be tender and the hymen was ruptured. She was found to be HIV (positive). The 1st and 2nd appellants were also examined and their HIV test was negative.

Counsel for the appellants made submissions of no case to answer. Upon consideration of the evidence the trial court placed the appellants on their defence. The 1st appellant testified that he knew the complainant who was living with PW2 with whom he had a sexual relationship. 1st appellant testified that he knew the complainant as baby S. He also knew the mother of the complainant who passed away and the complainant was living with PW2 who is her aunt. Although he had an intimate relationship with PW2, he denied that the complainant had ever visited his house or that he carried her on his bicycle. When he was arrested by the Police he was taken to hospital and upon testing he was found to be HIV (negative). The complainant was found to be HIV (Positive). He denied that he knew the 2nd appellant, during cross examination he admitted that he was also known as S and that the complainant knows him well as uncle S.

JE DW3 also testified that he knew the 1st appellant as a neighbour since 1993. He knew that PW2 and the 1st appellant were lovers because he used to see PW2 visit the 1st appellant. One time, he separated the two when they were fighting and PW2 threatened the appellant. He claimed that if the 1st appellant brought the complainant to the house neighbours would see.

The 2nd appellant also gave a sworn statement of defence and denied the charge. He was also taken to the hospital and upon examination he was found to be HIV (negative). He claimed that he did not know the complainant. He also relied on the evidence of Edward Gichaka Kinyanjui DW4 who was his landlord. In her judgment the learned trial Magistrate considered the defence alongside the evidence by the prosecution's witnesses and found that the prosecution had proved their case beyond reasonable doubt. The learned trial Magistrate found that the subject was defiled. She was aged 10 years old. She knew the people who defiled her especially the 1st appellant who she referred to as Uncle S. Although she did not know the name of the 2nd appellant, she led the Police to his house and he was arrested. The trial Court was satisfied that the complainant's evidence was cogent.

The court also considered the allegation that there was a grudge between PW2 and the 1st appellant. However the trial court was satisfied that the issue of grudge was just an afterthought which only arose

during cross-examination and was not followed up. The 1st appellant had no obligation to give any defence, however the trial court also reasoned that if the grudge was such an issue, it would have emerged from the 1st appellant's defence. The court also considered the medical evidence that the appellants were found HIV negative but took judicial notice that first results are not conclusive. Both appellants were convicted. The judgment was read by another Magistrate, Hon E. Tanui who sentenced the appellants to 15 years imprisonment under the Sexual Offences Act.

This appeal now challenges the entire judgment of the trial court. The appellants were charged under the Sexual Offences Act. Although the appellants were charged with the alternative charge of indecent acts of a child contrary to **section 6(9) of the Sexual Offences Act**, the judgment is silent on whether there was a finding on this particular charge. The appellants were convicted on the main charge of defilement.

The evidence before the trial court was pieced up from the evidence of the complainant when she confided with her teacher, PW4, upon request by PW2, to find out where the complainant got money from. It was PW4 who interrogated the complainant and she confided in her. The complainant was then taken to the hospital; upon examination she was found to have been a victim of sexual assault, medical results showed that she was HIV positive. The complainant named the people who had been defiling her. The 1st appellant was well known to her. However the 2nd appellant was not known to her by name, she led the police to his house where he allegedly used to take her and he was arrested.

As regards the proper identity of the 2nd appellant, I find that no identification parade was conducted to confirm that the complainant's knowledge of her defiler was free from mistake. The evidence by the Investigating and Arresting Officer is also scanty on the details of how they were able to identify the 2nd appellant. For these reasons I find the evidence regarding the 2nd appellant unsafe to sustain a conviction. Proper care should have been taken to ensure that there was no mistaken identity. The appeal by the 2nd appellant is hereby allowed.

Counsel for the appellants also submitted that the appellants Constitutional Rights to a fair trial were breached by the prosecution when they were detained in police remand for eleven days against the letter and spirit of the provisions of Constitution. There is a long line of decisions by the Court of Appeal that give directives in this regard. Principally, each case should be considered on its own merit as circumstances differ from case to case. Secondly, the issue of delay should be raised early during the trial, so that the Investigating Officer is given a chance to offer an explanation.

Raising the issue at this late stage, denies the court an opportunity to establish why there was a delay or whether there was delay in the first place. The victim of the offence also has rights and the expectation by the society is that the rule of law must always be observed. The appellants have not specified how they were prejudiced whether they were denied right to counsel, or police bond. I hold the view that at this stage it is difficult for this court to make a finding on whether or not the Constitutional Rights of the appellants were abused by the police, if they were the appellants would still find a remedy by seeking compensation by way of damages against the police.

As regards the 1st appellant, the complainant testified that she knew him as Uncle S. It is also not disputed that the 1st appellant knew the complainant. The issue for determination is whether there was a grudge between PW2 the complainant's aunt that led to the 1st appellant being framed up in a charge. Going by the evidence before the trial court, this allegation is rather far fetched. The relationship between PW2 and the 1st appellant is said to have ended several years ago. There was no evidence apart from DW3 who said that at one time he separated a fight between PW2 and the 1st appellant after which PW2 threatened the 1st appellant by telling him he will see. This is a scanty statement found in DW3's evidence. I am also alive to the fact that the 1st appellant was under no obligation to offer a defence but just as the trial court, if an issue such grudge was the 1st appellant's defence; it did not come up in his defence.

I agree with the learned trial magistrate that there was no evidence to proof there was a grudge.

Moreover the complainant confided to her teacher about this defilement. It is the teachers who summoned PW2. PW2 merely suspected something was wrong with the complainant because she was having money with her. It also defeats commonsense that one would use a child of tender age to frame up charges of this nature and plan it in such a way as to involve the teachers. Allegations of sexual offences bring fear and stigma to the victim. It is therefore illogical that one would use a child to make a score.

Regarding the evidence before the trial court the medical report showed that the complainant was a victim of sexual assault. She was also HIV positive. The trial court heard the testimonies especially by the complainant. Under **Section 124 of the Evidence Act (Cap 80)**, it is provided that:-

“provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

The trial court that saw the complainant testify was satisfied that she was speaking the truth. Although counsel for the appellant submitted that there were some inconsistencies in the testimony of PW2 and PW6 I do not think that these inconsistencies were material as to affect the credibility and the weight of the evidence. The complainant identified her attacker to the teachers and also to the Investigating Officer. The defilement was for a considerable period of time. The medical report showed that the complainant was HIV positive. The medical report itself is sketchy and so is the medical examination of the appellants. What is so clear from the testimony especially by the complainant is that the 1st appellant did “*tabia mbaya to her*”. This explains why the 1st appellant was charged with the alternative charge of indecent act whereby he would touch the complainant’s private parts and ask her to suck his penis. Considering that the medical report as sketchy as it is showed the 1st appellant was HIV negative and the complainant was HIV positive, this creates doubt as to whether there was penetration.

Although the trial magistrate was right to take judicial notice that the first HIV test does not render conclusive results. In this case there is room for doubt on whether the 1st appellant committed the offence in the first count; the evidence proves the alternative charge of indecent acts with a child. I accordingly set aside the sentence imposed on the first count and substitute it with the conviction of the alternative count of indecent acts contrary to section 6 of the Sexual Offences Act.

The sentence of 15 years is substituted with a sentence of five years. In the upshot the appeal by the 2nd appellant is allowed. The conviction and sentence is quashed and set aside respectively. The 2nd appellant is to be set at liberty forthwith. The 1st appellant is convicted of the alternative charge and the sentence of fifteen (15) years is substituted with the sentence of five (5) years.

Judgment read and signed on 19th day of March 2009

M. KOOME

JUDGE