REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 10 of 2008

KEVIN AROKA MONGAYA.....APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of defilement of a girl contrary to **section 8 (1)** as read with **section 8 (2)** of the Sexual Offences Act. He also faced the alternative charge of indecent act with a child contrary to **section 11 (1)** of the Sexual Offences Act.

After a full trial, the appellant was convicted for the lesser offence of attempted defilement of a child contrary to **section 9 (1)** as read with **section 9 (2)** of the Sexual Offences Act.

Following his conviction, the appellant was sentenced to ten (10) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant lodged an appeal to this court. In his memorandum of appeal, he raised five issues, which can be summarized as follows;

(i) There was insufficient evidence to found conviction.

(ii) The evidence of the minor was not corroborated, nor was it tested, so as to remove any doubts.

(iii) There was a failure to identify the appellant on an Identification Parade.

(iv)The trial court erred by placing reliance on the dock identification.

(v) The defence was neglected.

When the appeal came up for hearing, the appellant simply told the court that he was relying on the memorandum of appeal. He reiterated that he was never involved in the defilement or attempted defilement of the complainant.

In answer to the appeal, the learned state counsel conceded the same. In his considered view, the evidence of the complainant was not corroborated. He also noted that there was only dock identification by the complainant and also by PW 2.

The state also expressed the view that the evidence adduced by the prosecution was inconsistent. As an example of the said lack of consistency, the state pointed out that PW1 did not mention the use of a pen-knife to threaten her, yet PW5 told the court that PW1 had told her about a pen-knife.

Finally, the state submitted that if any offence was proved, it was one of defilement. However, the trial court rejected the findings of the medical doctor who examined the complainant.

In re-evaluating the evidence on record, I note that the incident which gave rise to the charges against the appellant occurred at about 1.00 pm on 25th July, 2006. The complainant, **V A**, was then 10 years old. She was a pupil in standard 3, at the Bondeni Primary school, Kakamega.

She was going back home, from school, and she was in the company of PW2.

It was the evidence of the complainant that the appellant tried to engage her and PW2. First, he asked them if they knew one Allan. But they answered in the negative.

Next, he asked PW1 and PW2 if they lived in the same house, and according to PW1 they answered in the negative.

Then the appellant offered to send them to buy mandazi, but the two children, again, said no. Finally, the appellant asked PW1 to escort him to Madam Rose. When PW1 yielded, PW2 walked on ahead, towards Kefinco estate, where they lived.

PW1 was led into a maize plantation, where the appellant forced here to lie down, removed her underwear and then;

"***removed his urinal organ and pushed into my vagina, in the hole, and I felt pain there….***"

According to PW1, the appellant had covered her mouth. She nonetheless attempted to scream, when she felt the pain. At that point, someone ran through the maize causing the appellant to get-off from PW1 and run away.

PW1 put her underwear back on, and walked home. As her grandmother was not at home at that hour, PW1 told her neighbour, H, what had happened. H immediately escorted PW1 to the Kakamega General Hospital where PW1's grandmother was working.

PW1 was examined and then treated at the hospital. She was then escorted to the police station, where PW1 told the police that she could Identity her assailant.

A couple of days later, on 1st August, 2006, PW1 saw the appellant, as she was with her grandmother, near the stage Café. PW1 pointed out to the appellant, upon identifying him as the person who had defiled her. It is then that the appellant was arrested.

PW2, **PO**, was 7 years old. He was a classmate to PW1, and he testified that on the material day, he and PW1 were going back home, from school.

According to PW2, when the appellant asked them if they lived in the same house, they answered in the affirmative.

He also said that both he and PW1 declined to be sent to Madam Rose. They also declined to be sent for Mandazi. But later, when the appellant called after PW1, the complainant obliged. At that point in time, PW2 went on ahead.

He next met PW1 at about 2.00 pm, at the home of PW1. She told him that the appellant led her into a maize plantation, where he raped her .During the ordeal, the appellant is said to have threatened to stab PW1 with a knife, if she screamed.

Later, after the appellant had been arrested, PW2 was called to an identification parade. However, PW 2 failed to pick the appellant at the said parade. His explanation for that failure was that the appellant was in a group of dirty people, who were similar in their looks. Also, the parade was said to have been conducted in a darkish corner.

During the trial, PW2 said that he did positively identify the appellant in the dock. He did so because the appellant was alone and was clean.

PW3, **JOSEPHINE WADANGA**, testified that she was a nurse at the kakamega General Hospital.

She was at her place of work on 25th July, 2006, when H O brought her daughter, VA, to the hospital. The time was about 1.00 pm.

According to PW3, V was her daughter. When H told PW3 that PW1 had been defiled, PW3 had her examined at the Casualty Department. And after PW1 had been given treatment, PW3 escorted her to the Kakamega Police station, where they reported the incident.

Later, on 1st August, 2006 PW3 was walking along with PW1 after the latter had recorded her statement at the police station. As they continued on their way, PW1 pointed out the appellant, as the person who had defiled her. The appellant had just passed by PW3 and PW1.

When PW 1 pointed out the appellant, as her assailant, the appellant rushed into the K.I.E compound. But PW3 engaged the help of PW4, to arrest the appellant.

During cross-examination, PW3 said that PW1 identified the appellant after he had bypassed them.

PW4, **JARED IDAKHA MASHETI**, was a "**Bodaboda**" cyclist. He is also a member of the Community policing initiative. He testified that PW3 sought his help, in arresting the appellant. PW4 said that when he grabbed the appellant, the latter tried to resist, but PW4 told him that he was required by the police. PW4 then frog matched him to where PW1 was.

According to PW4, when the appellant saw PW1, exclaimed;

"***Do you mean I have raped this girl?"***

During cross-examination, PW4 said that the appellant asked him why he was being arrested. PW4 said that the police would explain the reasons to him.

PW5, **HNO**, was the daughter to PW1 and PW3. According to her, PW1 was the daughter of PW3.

It was PW5's evidence that PW1 went to PW'1 house at about 1.30pm, on 25th July, 2006. As PW1 was crying, PW5 inquired from her what the problem was. PW1 said that she had been defiled in a maize plantation. PW1 also had told PW5 that the assailant had threatened her with a pen-knife.

PW5 said that the assailant gave to PW1, Ksh.5/=, in an attempt to buy her silence. PW1 showed PW5 the money.

PW5 then escorted PW1 to the Kakamega General hospital, and handed her over to PW3.

During cross-examination, PW5 said that PW1 was walking with difficulty when she went to PW5's house. PW5 further explained that as PW1 was walking with difficulty, it took them some two hours to get to the Kakamega Provincial General Hospital. PW5 said that the walk to hospital lasted between 2.00 pm and 4.00 pm.

PW6. **AKWABI JAPHETH MALOBA**, was a clinical officer at the Kakamega Provincial General

hospital. He testified that when PW1 went to him for medical attention, PW1 said that she had been assaulted both physically and sexually, by a person who was known to her. PW1 had sustained injuries to her chest, lower limbs and genitalia.

The dress which PW1 had had at the time of the assault was muddy, and her panty had blood spots.

On examination, PW6 found that the thorax and abdomen of PW1 were tender. The lower limbs of PW1 had reduced movement of the hip, resulting in a limping gait.

The genitalia was swollen externally, and PW1 had bruises. Her urine specimen showed pus cells and seminal fluid and some spermatozoa.

After carrying out the examination on PW1, the clinical officer formed the opinion that she had been defiled. In his view, there had been complete penetration.

Later, in cross-examination, PW6 said that the complainant was walking on her own. He explained that the defilement did not make it impossible for the victim to walk. It only forced her to walk with difficulty.

PW7, **PC CHARLES MWANGI** ,was a police officer attached to the Kakamega police station.

He testified that on 25th July 2006, PW1 reported that she had been defiled by someone who she could identify. PW7 recorded the statements of PW1 and also of the other witnesses. He also issued a P3 form to PW1, which was eventually returned to him after it had been filled in by PW6.

PW 7 also kept the dress and panty of PW1 as exhibits. He recalled that the panty had blood stains on it.

On 1st August 2006, the appellant was taken to the police station, under arrest. The arrest had been effected by members of the public after PW1 had identified the appellant as her assailant.

PW7 did organize for an identification parade, but PW2 failed to pick out the appellant as the person who had defiled the complainant.

Later, when the appellant was placed on his defence, he said that he had gone to B village, Ikolomani location on 21st July 2006. He went there to attend the funeral of his late mother. And after the burial, the appellant remained at B up to 28th July 2006.

In effect, the defence was an alibi. The appellant was saying that he was not at the scene of crime, as he was in a totally different place.

After re-evaluating the evidence on record, the first thing that struck me is that whilst the complainant called PW3 her grandmother, the latter referred to PW1 as her daughter.

Meanwhile, their neighbour, PW5 referred to PW3 as being both a grandmother and a mother to the complainant, PW1.

Secondly, PW1 did not specify what features of the appellant were so distinctive that enabled her to identify him, when she saw him on 1st August 2006. That issue is significant because PW3 said that the complainant identified the appellant.

> *"**after he bypassed us."***

That presupposes that as at the stage when PW1 identified the appellant, he had his back to both pw1 and PW3. In those circumstances, there would have been need for a specific feature or features on the

appellant, through which, he could be positively identified. Those features, if any, were not specified.

In any event, if the appellant had any such specific identifiable feature, that would imply that PW2 should not have had any difficulty in identifying him. Yet PW2 failed to pick out the appellant at an identification parade.

On the other hand, if the appellant had no distinguishable feature, which would explain PW2's inability to identify him at the parade, this court must come to the conclusion that the alleged identification by PW1 was not fullproof.

As regards the identification of the appellant in court, I need only reiterate that dock identification alone is almost of no value. It cannot undo the fact that PW2 had failed to identify the appellant at the Identification parade.

For those reasons, I find that it would be unsafe to sustain the appellant's conviction.

However, had I found that the appellant was positively identified, I would have said that he ought to have been convicted for the offence of defilement. I would not have seen any justification in reducing the offence to one of attempted defilement. I say so because the medical officer categorically stated that there had been complete penetration.

The learned trial magistrate expressed the view that there cannot be full or complete penetration without the hymen of the girl being torn.

By expressing those views, the learned trial magistrate was not hinging her conclusions on the factual evidence. In my considered view, the learned trial magistrate was either drawing upon her personal experience or from her general understanding of a female body. In so saying, I mean absolutely no disrespect to the learned magistrate. But, it must be appreciated that there is always a legitimate danger of allowing our opinions to be influenced by matters which, although they may be factually accurate, did not feature during the trial of the case which we are determining. We must always strive to make a conscious effort to limit our decisions to only such issues as are canvassed in the case, or to matters about which we are entitled to take judicial notice.

One other issues that I need to address relates to the finding that the evidence adduced by the prosecution witnesses was consistent and corroborative. By and large, that finding is accurate. However, there is one glaring piece of evidence which stands out like a sore thumb.

Both PW1 and PW2 say that the incident took place at about 1.00 p.m. PW5 said that PW1 reached her house at about 1.30 p.m. And PW3 testified that PW1 was taken to hospital at about 1.00 p.m.

Although the little discrepancy in the timing can be excused, the one issue that is out of context is the fact that PW5 reached the hospital at 4.00 p.m. She said that it took about two hours, between 2.00 p.m. and 4.00 p.m. to walk to the hospital, because PW1 was walking with great difficulty.

Assuming that PW5 was right, then it would mean that PW3 could not have received PW1 at the hospital at about 1.00 p.m.

In a nutshell, that aspect of the prosecution evidence was neither consistent nor corroborative.

Meanwhile, once the learned trial magistrate made a finding that a portion of the medical evidence produced by the medical officer was "**unreliable**", that begs the question as to how the court thereafter went about choosing and picking the reliable portions of the evidence contained in the same P3 form.

It is debatable whether the failure by a complainant to mention to the trial court, some aspects of her injuries, which she did tell the doctor about, renders the evidence of the doctor unreliable. Or, to put the issue in a different perspective, how can a court of law establish whether it is the complainant who failed

to disclose all her injuries to the court, or whether it is the medical officer who provided more information than that which he verified from the examination which he carried out on the complainant.

My considered view, is that it is not necessary in such situations, to apportion blame, unless there is a basis, grounded on the material before the court. It is normally sufficient to simply specify the discrepancy between the complainant and the medical officer's evidence.

In conclusion, I find that it would be unsafe to sustain the conviction herein. It is therefore quashed. I also set aside the sentence.

Finally, it is ordered that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 30th day of April, 2009.

FRED A. OCHIENG

J U D G E