REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Criminal Appeal 98 of 2009

APPOLLOH NDERITU……..…...……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.1604/2008

by Hon. H. M. Nyaberi, Resident Magistrate, Nyahururu)

JUDGEMENT

The appellant was tried and found guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. On conviction, he was sentenced to twenty (20) years imprisonment. Being aggrieved he filed the instant appeal.

From the onset, I would like to point out that the appellant who does not have the services of an advocate filed what is only headed "GROUNDS OF APPEAL" which is in the form of a narration.

Appeals to this court are made, by dint of Section 350 of the Criminal Procedure Code, in the form of a petition. There is no exception to this rule even when the appellant, as in this appeal, is in person. The appeal having been admitted, these irregularities not withstanding, I am

nonetheless bound to consider it, particularly in view of the gravity of the matter. It is my duty first to re-evaluate the evidence presented before the trial court so as to arrive at my own independent conclusion.

I need to point out here that the appellant faced also an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. It was the prosecution case that the appellant and his wife, P.W.1, Lokolonyei Margaret Lodukai (Margaret) had in the morning of 16th July, 2008 gone to their shamba returning home at about 10a.m. The couple had three children, the complainant aged at the time 5½ years and a younger one aged 2 years. The details of the third child are not available from the proceedings. The couple having returned home, Margaret left for the posho mill at a nearby trading centre. Upon returning from the trading centre the complainant informed Margaret that the appellant had put his private parts in her anus and that she had noticed traces of blood in her stool. Margaret examined the complainant and noted that her anal region was torn with visible blood stains.

The appellant denied the accusation that he was responsible for the complainant's state and suggested that she be taken to the hospital. The complainant was taken to a local hospital the following day by Margaret. They were referred to Nyahururu District Hospital where the complainant was examined and

treated. The P.3 was produced on behalf of the examining doctor by Dr. Charles Nganga under Section 77 of the Evidence Act. According to the findings as noted in the P3 form, the complainant was bleeding from the vagina and she had also suffered laceration in the anal region. No spermatozoa were seen but red blood cells were noted.

Finally, I come to the evidence of the complainant which was not given under oath on account of her tender age. The trial magistrate conducted a *voire dire* examination as required by the law but failed to specifically answer the question such examination is required to elicit. The learned magistrate found that:

"*the court observes that the child is too tender. I direct that she give* (sic) *unsworn evidence.*"

The two pronged purpose for conducting a *voire dire* examination is for the court to satisfy itself that the child understands the nature of the oath in which event her evidence may be received under oath. If the court is not so satisfied, her unsworn evidence may be received if in the opinion of the court she is possessed of sufficient intelligence and understands the duty of speaking the truth. With the exception legislated in the proviso to Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him. See Section 19 of the Oaths and Statutory Declarations Act – Cap 20. Proviso to Section 124 aforesaid, as amended by Act No.5 of 2003 reads:

"*Provided that where in a criminal case involving a sexual offence, the only evidence is that of 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.*"

I will return to these matters shortly. The appellant in his defence stated that he had been framed up by Margaret who wanted to return to her parents.

In the so called grounds of appeal, the appellant challenges the decision of the learned trial magistrate on the grounds that:

a) there were no independent witnesses

b) there was no evidence of the investigating officer

c) the examining doctor was not called to testify

d) the appellant was not examined to link him with the offence

e) no exhibits were produced and

f) the appellant's defence was not considered.

As is usually the case with the offence of defilement, the victim was a child of tender years being only 5 ½ years at the time of the offence. I have set out what the court looks out for in conducting a *voire dire* examination. In this case the learned trial magistrate made no specific finding on the intelligence of the complainant but directed that her unsworn evidence be received. By dint of the proviso to Section 124, the learned trial magistrate was not bound to look for corroborative evidence before convicting so long as he was satisfied that the complainant was telling the truth and the reasons for so believing the child are recorded. The learned trial magistrate believed the evidence of the complainant and recorded thus:

"*There is no evidence that prior to the incidence the accused had quarreled and/or they were not living peacefully. The averment by the accused that the charges have been framed against him is untrue. The evidence by the complainant (P.W.2) is well corroborated by P.W.1 and by the clinical examination and findings by doctor Iraya as presented by P.W.5. The evidence is overwhelming……..*"

What was the evidence of the complainant? She stated:

"He removed my piker (sic). He did a bad thing on my private parts. I felt pain and cried……..He cleansed me with a cloth…….. I saw blood mixed with feaces when I went for long call."

The offence of defilement is defined in Section 8(1) of the Sexual Offences Act, No.3 of 2006 as follows:

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

Penetration on the other hand means:

"……*the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

Finally on this issue, genital organs are defined to include:

"…..*the whole or part of male or female genital organs and for purposes of this Act includes the anus."*

I find from her testimony that although she was only 5½ years, the complainant was clear in her testimony and gave a consistent account of events. She reported to Margaret what the appellant had done to her.

Margaret confirmed that she had been molested. Both the clinical officer, P.W.3 and Dr. Charles Nganga were of the opinion that the complainant had been defiled, and that there was penetration. What I have so far stated answers ground 1.

On ground two I find no merit on the claim that failure to call the investigating officer was fatal. It is not in every case that it is imperative to call the investigating officer. The calling of the investigating officer would not have added any value either to the prosecution or defence case.

The third ground is about failure to subject the appellant to medical examination. No doubt if that was done it would have only strengthened the already strong prosecution case.

Fourth ground. I have already indicated that the prosecution laid the basis for failing to call Dr. Iraya and the court pursuant to the provisions of Section 77 of the Evidence Act allowed the medical evidence to be presented by another doctor.

Once more, I find no merit on the 5th ground. It is not clear what exhibit the appellant is alluded to. If it is the biker, the same was not subjected to forensic examination and therefore would have served no useful purpose in the light of the overwhelming evidence.

Dealing with the appellant's defence the learned trial magistrate stated as follows:

"*The averment by the accused that the charges have been framed against him is untrue"*

He also found that the appellant and Margaret had worked together in their shamba that morning. That there was no evidence that they had quarreled or that they were not living peacefully. That was adequate consideration of the appellant's defence.

I find no merit in the appeal and the same also not having been brought in accordance with the law must fail and is dismissed accordingly.

DATED, SIGNED and DELIVERED at NAKURU this 16th day of October, 2009.

W. OUKO

JUDGE