

GODFREY WASWA:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

(From the original conviction in ELD.CM.CRC.NO.5386/2005 by

SRM Mr. Shiundu in ELDORET)

JUDGEMENT

GODFREY WASWA was charged before the Chief Magistrate's court at Eldoret in criminal case No. 5386 of 2005 with the offence of attempted defilement contrary to section 9(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on the 1st day of August 2005 in Lugari District within western province he attempted to have carnal knowledge of a named girl aged under the age of fourteen years. The Appellant also faced an alternative charge of indecent assault of a girl contrary to section 164 of the Penal code and the facts are that on the 1st day of August 2005 in Lugari District within Western Province he unlawfully and indecently assaulted a named girl under the age of 14 years by removing her under pants. He pleaded not guilty but at the end of the prosecution case and his defence he was found guilty and convicted and sentenced to serve a term of ten years imprisonment. He was dissatisfied and filed an appeal to this court raising the grounds that the learned trial magistrate erred in law and in fact when he convicted and sentenced the Appellant against the weight of evidence and on evidence that lacked corroboration and evidence that had glaring contradictions. That there was no independent evidence of an expert, that is to say, a doctor and the standard of proof of beyond reasonable doubt was not achieved in the case are the further grounds of appeal. The appellant adds that the trial Magistrate erred in law and fact in not impeaching the demeanor of the witnesses due to their contradictions and that there was an error in convicting in the absence of a P3 form and in the absence of independent evidence.

At the hearing learned counsel for the Appellant Mr. Obwatinya submitted that contradictions in the evidence of prosecution witnesses 2 and 4 in the appearance of the girl could not have led to a conviction. He added that the complainant contradicted herself in examination in chief when she said that she knew the Appellant yet in cross-examination she said she did not know him.

He found further contradictions in the evidence of PW1 and PW7 the former of whom said the Appellant put his thing into hers and the latter saying that he found the Appellant defiling the complainant yet the charge is that of attempted defilement. Counsel further submitted that there were no eye witnesses and so the standard of the Best Evidence Rule was not met. He submitted that the evidence of the complainant was couched evidence and added that there are many doubts as to whether the offence was committed and hence the standard of proof beyond reasonable doubt was not obtained. There was submission that as no P3 form was produced in evidence then no case was proved. Counsel faulted the amendment of the charge on count 1 from the Penal Code to the Sexual Offences Act stating that the Appellant was charged and convicted of an offence that did not exist at the time it was alleged to have occurred and that the ingredients of the offence and the facts were different. He prayed that the appeal do succeed.

Learned Counsel for the Republic Mr. Omutelema opposed the appeal on the grounds that the offence was proven as the child's account of what happened was believed by the trial court and there were no material contradictions. Counsel added that a P3 form was not necessary as the same would add no value in a charge of attempted defilement and submitted that although the amendment of the charge was irregular the offence committed existed in both the Penal Code and the Sexual Offences Act and this court should proceed to convict even in the alternative charge.

I have very carefully evaluated the evidence adduced at trial. On the issue raised that there were contradictions in the evidence of prosecution witnesses and hence such evidence could not support a conviction I find as follows. As to the appearance of the complainant PW2 and PW4 stated that the girl looked okay and they did not explain what they meant by okay. Other witnesses said that the complainant was crying and shaken and so also did PW4. Virtually all the witnesses said that the complainant was crying when she was explaining what had befallen her. Indeed PW4 who was the first person the complainant met when she left the Appellant's house said that the girl came out crying. All the witnesses gave evidence that the complainant's dress (uniform) was dirty and some were more specific by saying that it was the back of the dress that was dirty. The issue of the appearance of the complainant therefore resolves itself from the evidence adduced. And in my assessment nothing turns on the apparent contradiction that the girl looked okay and that she was crying. That sort of contradiction taken in the totality of the entire evidence fades in importance and does not go to prove or disprove any other material evidence. No where did PW7 say that he found the accused defiling the complainant.

The point was taken that the complainant could not identify the accused in court. I do not know where that came from as the same is not in evidence. The complainant stated candidly that she knew the appellant as she had seen him on several occasions at the market and she knew him as a radio repairer. PW4 in his evidence said that he saw the complainant come out of the house of the accused crying. PW1 gave evidence as to how she explained to PW4 what had happened to her and PW4 went and brought the Appellant out of his house. The sequence of events was not broken and there cannot be any doubt as to the identification of the appellant. As regards the issue of couching and whether or not the evidence met the required standard of proof I find that PW1 gave unshaken account of what happened. She repeated in cross examination what she said in examination in chief. She stated how the Appellant called her into his house and took her to the third room of his house removed her underpants, unzipped his trouser, pinned her to the wall and "took out his thing and put in my thing". She continued to say that the Appellant wanted to put his thing in mine and I screamed. I was not hurt. The further evidence was that when the complainant screamed the Appellant gave her ten (10) shillings and let her go. This evidence was not shaken on cross examination. What is being called couching does not amount to couching. I do not understand couching to mean repeating what the complainant had recorded before the police in her statement. In her words she said "I was told by Daudi (PW4) to say what happened, how it was. Robert also told me to say what I had written in my statement". That is not couching and I also hold. Counsel proceeded on the basis that there was no corroboration and hence the conviction was wrongful. He said that the failure by the prosecution to produce the P3 form was fatal. No it was not fatal and that is my finding. I do not know of what value evidence a P3 form would be in a case of attempted defilement. The complainant said that when the Appellant wanted to put his thing into hers she screamed and that she was not hurt. The value of a P3 form in those circumstances is irrelevant in my considered view. In any event corroboration in this kind of offence is not required. Section 124 of the Evidence Act Cap 80 of the Laws of Kenya and more particularly the provision thereto reads:-

"Provided that where in a Criminal Case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The trial magistrate did not discredit the evidence of the complainant and hence accordingly convicted the Appellant, rightfully in my view. Additionally, requiring corroboration from women and girls in sexual offences has been held to be discriminated. See **Mukungis –vrs- Republic Criminal Appeal No. 227/2002.**

The offence the Appellant was charged with existed both in the Penal Code and also in the Sexual Offences Act and therefore there was no need to substitute the charge. The same could have properly proceeded under the Penal Code. However no injustice was occasioned by the substitution and such irregularity is the type curable under s. 382 of the Criminal Procedure Code and I order it so cured. In the totality of the above this appeal is without merit and the same is dismissed.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF OCTOBER 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. Obwtinya for the Appellant

Mr. Omutelema for the Respondent

C/C - Paul.