



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(Coram: Ojwang, J.)
CRIMINAL APPEAL NO. 359 OF 2006

O K J.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. Muketi dated 30th June, 2006 in Criminal Case No. 10018 of 2004 at the Kibera Law Courts)

JUDGMENT

O K J, the appellant herein, was charged in a first count, with the offence of defilement of an imbecile contrary to s.146 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on 4th December, 2004 at Waruku within the Nairobi Area, had unlawful carnal knowledge of **G W**, a girl who is an imbecile.

In the alternative, the appellant was charged with indecent assault on a female, contrary to s.144(1) of the Penal Code. The particulars in this regard were that the appellant, on 4th December, 2004 at Waruku in the Nairobi Area, unlawfully and indecently assaulted **G W** by touching her private parts, namely her vagina.

In a second count, the appellant was charged with commission of an unnatural offence contrary to s.162(1) of the Penal Code, the particulars being that he, on 4th December, 2004 at Waruku in the Nairobi Area, had carnal knowledge of **G W** against the order of nature.

PW1, **G N** testified that she is a housewife and the mother of the complainant, **G W**, and lives at Kangemi, in Nairobi. The complainant, who was 13 years old at the material time, had been born retarded, and PW1 was responsible for her care. As PW1's family retired to bed on 4th December, 2004 they felt apprehensive, as the complainant who had been out, had not returned to the house. PW1 thought the complainant would have been at her grandmother's house, a short distance away; and so she went towards the foot-gate, intending to go and bring the complainant to the house. At this moment, PW1 saw the main gate being opened, and somebody walked in. When PW1 inquired of the entrant, on identity, he "said it's me, **Ogieng**". What did this man want in the compound at 10.00 pm.? He answered that "he had brought **W**". This man told PW1 that **W** had been 'at their place, and their father had called him to escort her". The man then left, and PW 1 took charge of her daughter, **W**.

It was PW's assumption that **W** had already taken supper, in the house where she had been. So PW1 proceed to mind other aspects of her daughter's care: PW1 administered normal medication, and asked **W** to put on her sweater.

From PW1 testimony, she had apprehensions of the man described on record as "**Ogieng**" who had brought **W** into the compound at 10.00 pm. PW 1 says:

"When the accused (who appears to be the said **Ogieng**) left, I was not happy. I took **W** and went to her grandmother's place. I told her to talk to **W** so that she does not go (to **Ogieng**'s place?)

The grandmother talked to her..... I looked at **W**; she had brown pieces (of mattress) on the head. I took her to the uncle's room and checked. She did not have a pant. (Her pink pant was missing)..... I told her to lie down. She had a discharge. I came out crying We went to the accused. I was with my mother-in-law, brother-in-law, and the father of (**W**) When asked, (the accused) denied. We went to the police station, and we were advised to go to Nairobi Women's (Hospital). She was examined. I was not given the treatment sheet"

On the following day PW1 and her mother-in-law gained access to the appellant's house, and, on the bed, they found **W**'s pant. To the sight of this item, PW1 thus reacted:

"It was this one. I went out crying. The mother-in-law took the pant and put it in a (paper bag). I did not look at it. We took it to the police station. We were told to wait for the doctor's documents and then record a statement".

And who is the accused? In PW1's words:

"The accused is my husband's cousin. He is **G** (**W**'s) uncle".

And, of the complainant herself, PW1 testified:

"My child (**G W**) is not okay. She is not normal. Her mental capacity is low. She is retarded. She goes to [Particulars Withheld] Special (School)... She has been like that from the age of two months. The child did not talk to me. We spoke to the child. She could not say anything". Responding to questions in cross-examination, pw1 testified that she had opened the door, on the material night, only to see the accused come in with the complainant – and the accused then said it was his father who had asked him to escort **G W**. The accused then walked right up to PW1's house, with the complainant following behind. PW 1 looked at the accused, at that moment, in proper lighting inside the house. The accused spoke to PW1 while in the house, and asked for Ksh 200.00, for a cigarette. The accused was well known to PW1, and he had visited PW1's house many times before.

PW1 did not, at this stage, ask if **G W** might have been assaulted while she was away from home, as there was no immediate signal of assault.

However, pw1 had felt concern for the safety of her daughter; and so she took her to her grandmother for a pep talk. Inquiries at the grandmother's house reveled that, contrary to what the accused had said, **G W** had not been to the accused 's fathers house; and this raised the likelihood that she had all along been in the accused's hands and may well have been sexually assaulted. The accused (appellant herein) denied that he had assaulted the complainant, while the complainant remained silent when asked the question.

PW1 on the material night noticed that the accused had mattress pieces, just as was the case with the complainant, on his head; and this, to PW1, confirmed that an act of defilement had taken place against the complainant.

A check on the complainant's body, at her uncle's house, showed her to be experiencing a vaginal discharge, and to be without her pants. PW1 testified that when she examined the body of the

complainant, she found her to have bruises, and she had sperms oozing from her private parts; and she had only been in the company of the appellant herein.

PW2, **M H**, is an aunt of the appellant herein, and grandmother to the complainant. She was at her house at 11.00pm on 4th December, 2004 when she had the voice of PW1 who was knocking on the door. PW2's son, I, opened the door, and PW1 and the complainant entered. PW1 asked PW2 to talk to the complainant, and to ask her what she had been up to. **G W** told PW2 she had come from the house of the appellant's father – but she said no more. Pw2 then called the accused's father on fixed telephone, on Number [.....], to find out if the complainant had been to his place; but the answer was in the negative. When PW2 delivered this response to PW1 who was in the sitting room, PW1 decided to put the complainant in one of the bedrooms in the house, and to inspect her body; and she came out crying and speechless. PW2 went into the “inspection room” and saw the complainant; the complainant was wet and had dirt in the form of semen, on her private parts. PW2's reaction was to call the appellant's mother's house; and the appellant's mother encouraged her to follow up on the complaint. PW2 thereupon, with her son I and PW1, went to look for the appellant in the house of the appellant's girl-friend. At that time of night, PW2 asked the appellant to dress up, which he did and then accompanied PW2's group to the Police station. Police officers placed the appellant under arrest, and asked that the complainant be taken to Nairobi Women's Hospital. PW2's team took **G W** to the said hospital, arriving there at 2.00 a.m. on the 5th December, 2004.

During the morning of 5th December, 2004 PW2 went to the house of the appellant's father, and asked to be allowed to inspect the appellant's house. The appellant's mother agreed, opened the appellant's door, and led PW2's group into the house. Beneath the mattress, on the bed, the complainant's mother who was part of the inspection team, saw the complainant's part. It was put in a paper bag supplied by the appellant's mother; and PW2 carried the bag, which the inspection team delivered to Muthangawi Police Station.

PW2 testified that the complainant, who was well known to her, was retarded and lacked memory. In the night of 4th – 5th December, 2004 PW2 had observed the complainant's appearance: “her hair was ruffled and she had pieces of mattress.” PW2 also realized later, when her team got to the Police Station, that “the accused's head had pieces of mattress’, similar to the mattress-pieces on the complainant's head. PW2 recalled that the mattress she had seen in the appellant's house, was not covered with cloth-material on the top part and on the bottom part.

On cross-examination, PW2 testified that she, in her position as grandmother of the complainant, had been requested to stop the complainant from going to the house of the appellant's father. On the material night PW1 had brought the complainant to PW2's house, and, in proper interior lighting, PW2 was able to observe the complainant closely: “Her face was punched. She was hungry” when, at that moment, PW2 called the appellant herein and asked certain questions, he denied that the complainant had been to his house. Although, at that time, PW2 did not suspect defilement of the complainant to have taken place, she apprehended that something was wrong. When the complainant then said she had been at the appellant's father's house, PW2 called only to be told the complainant hadn't been there. This raised suspicions, and hence the bodily examination which was then conducted on the complainant; and PW1 who first saw the complainant's nakedness, came out of the room screaming. Thereupon, PW2 had also been interested to see the complainant's private parts; and what did she see? “The child had dirt and was wet and had no pant. I did not touch it. I knew it was sperm.”

PW3, Police Force No.78337 **Police Constable Jane Ng'anga** testified that she was attached to Muthangari Police Station, and had been assigned responsibility for investigating the circumstances leading to the charge against the appellant's herein. The complainant when summoned to the Police Station and came with her mother, could not recall anything, and could not explain what exactly had happened to her at the hands of the appellant herein. PW3 took the complainant as well as the appellant to the Police doctor, for examination and for a medical report to be made. She in the shape of a skirt and a pant which were identified as belonging to the complainant, to the Government Chemist for analysis. Acting on Court orders, PW3 had also taken the complainant to the psychiatrist, and she received the psychiatrist's report which she now produced in Court.

On cross-examination by learned counsel **Mr. Orina**, PW3 said the Police doctor had taken both blood samples and saliva samples from the appellant herein, and she had taken the same to the Government chemist, on 10th December, 2004 for analysis.

PW3 testified that the complainant was wearing no underpant when she came to the Police station, on the material night. It was PW3's testimony that both the appellant herein, and the complainant had pieces from a brown mattress sticking on them, when they came to the Police Station on the material night.

PW3 testified that the complainant, when she came to the Police station, on the material night, appeared to be an imbecile; she had been unable to express herself, when interviewed by PW3. The complainant had been unable to pronounce ordinary words, when interviewed. Whenever she was asked what had happened, the complainant's words would be "**Ojee Juma**", and she would then burst out crying.

The psychiatrist's report which PW3 produced as exhibit No.4 (dated 25th November, 2005) thus reads:

"An assessment done today on **G** and supported by the history (given) the Parents, the School Report and EEG findings confirms that she suffers from severe mental retardation/epilepsy. As such, although she is 13 years old, due to the severe brain damage, she is not expected to recall the sequence of events on the material day."

PW4, **Dr. Zephania Kamau** testified that he works at the Police Surgery, and had on 15th December, 2004 examined the complainant who alleged to have been defiled. He found the complainant to have no physical injuries; her external vaginal was normal; but she had no hymen. The complainant already, when PW4 saw her, been seen at the Nairobi Women's Hospital. She had old hymen tears, with evidence of recent bruising. PW4 produced the P3 medical form which he had prepared; and this showed that a high vaginal swab taken and tested, had shown no spermatozoa. PW4 also examined the appellant herein, who was suspected to have defiled the complainant; he found the appellant's sexual organ normal, and without injuries. PW4 conducted his examination some 11 days since the date of alleged defilement.

The defendant gave sworn evidence in which he stated that on the material date, at about 9.00 p.m. he had been asleep in his room, which is set in a one-acre compound wherein also live some 20 neighbours. He says he rose from his bed and walked out to another house, some 100 meters away, for the purpose of staying the night with his girl-friend. As he was getting out of the compound to find his way into the next compound where the said girl-friend lived, he **met** the complainant; he spoke to her; asked her where she had come from. The complainant replied that she had come from the house of the appellant's father; and just as the appellant was opening the gate-latch for the complainant, the complainant's mother came out; the appellant said nothing to the complaint's mother, but went to his girl-friend's house and slept. It was the appellant's testimony that he had been woken up by whipping, by one of the complaint's uncles, at 11.00 p.m.

The appellant testified that those who arrested him on the material night were his relatives, and they had differences arising out of a land dispute, so the claim made against him was one in the nature of revenge.

In the judgment, the trial Court found the appellant herein guilty of defiling an imbecile contrary to s.146 of the Penal Code, convicted him, and sentenced him to a ten-year term of imprisonment.

It is contended, in the petition of appeal, that the trial Court erred in law and in fact, by convicting the appellant on uncorroborated circumstantial evidence; that the search conducted in the appellant's house was done in his absence, and in the absence of Police officers; that the trial Court erred in fact, by holding that pieces of old mattress were found on the appellant's hair, whereas this account was not corroborated by independent testimony; that conviction had been arrived at on the basis of mere allegation; that the trial Court erred in its interpretation of the law regarding recent bruises and fresh bruises; that the medical report produced had not confirmed defilement to have taken place against the complainant; that the trial Court overlooked the appellant's revenge hypothesis.

Learned counsel **Mr. Kimani** submitted that since no laboratory analysis report from the Government

Chemist was received by the Court, there was no forensic-evidence which showed the appellant to have committed an act of defilement against the complainant; and even though there was testimony that the complainant had first been examined at Nairobi Women's Hospital, no report was received from that hospital regarding even the alleged fact that an act of defilement had taken place; and since PW4 testified that he placed reliance on the findings not produced, from Nairobi Women's Hospital, his medical evidence significantly contained hearsay material.

Mr. Kimani submitted that the trial Court, in convicting the appellant, had relied on evidence that itself lacked corroboration: that appellant's mother had retrieved the complainant's pant from the appellant's house; that the appellant had been seen escorting the complainant; those pieces of old mattress had been seen on the appellant's hair. It was contended that no proper procedure had been adopted in the recovery of the said pant, and the results of laboratory tests on the same were unknown.

Learned counsel doubted the veracity of PW1 and PW2's testimony that they had perceived sperm material on the complainant's private parts when they examined her on the material evening; for only two-three hours later the complainant was taken to Nairobi Women's Hospital; but no report came from that hospital confirming the claim.

Learned counsel submitted that, whereas the trial Court had laid much weight on the testimony that old-mattress pieces were found on the appellant's hair, and that his was evidence of sex between the complainant and the appellant having taken place on the suspected mattress in the appellant's room, such pieces of mattress were not produced in Court.

Mr. Kimani urged that if the appellant had committed the offence charged, against, the complainant, then, most likely, the appellant would not have been found escorting the complainant at 10.00 p.m. in the night.

Mr. Kimani urged that the medical evidence relied on by the prosecution lacked corroboration. Such corroboration was required, as had been stated in the Court of Appeal decision in **Bernard Kebiba v. Republic**, Criminal Appeal No.104 of 2000 (Kisumu):

(i) As the doctor was not called to give evidence, the findings....remained unexplained. We observe that, in cases of this kind, involving evidence of (a) medical or technical nature, there is always a desirability to call the doctor or the expert concerned to give evidence in the trial and to explain whatever needs to be explained. Although this is not mandatory....., the need for it is more than obvious for the assistance of the Court....."

(ii) "There is (a) requirement for corroboration in all sexual cases.....The Court must look for corroboration from the evidence led and recorded.....where the Court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of (the) doubt must be given to the accused and acquittal must result."

Learned State Counsel **Ms. Gakobo**, however, contested the appeal, and supported both conviction and sentence as pronounced by the trial Court. She urged that there had been sufficient circumstantial evidence providing a proper basis for the conviction.

Ms. Gakobo urged it to be of no materiality that no exhibit had been produced showing the results of the medical examination which the complainant underwent soon after the alleged incident of defilement, as the Nairobi Women's Hospital: for the reason that PW4 in preparing the PW3 form which he produced, had taken into account the treatment notes from the said hospital.

On this point, I would prefer **Mr. Kimani's** contention, that the report from Nairobi Women's Hospital, made so soon after the alleged defilement-incident, ought to have been produced. For, what did PW4 find in that report? Did it show that spermatozoa had been found on the complainant? If not, then the testimonies of PW1 and PW2 regarding spermatozoa, would have been proved false. Moreover, PW4 did not tell the Court that the report he said he was relying on, from Nairobi Women's Hospital, bore any mention of spermatozoa. Consequently, this Court cannot conclude that on the material evening, there

was any evidence of semen or spermatozoa befalling the complainant's private parts – and this must go to negative the claim of a defilement having taken place on that evening.

Although **Ms. Gakobo** attached much significance to the lady's pant said to have been found in the appellant's house, there is no Forensic evidence tests said to have been done on the same. The significance attached by learned counsel to mattress pieces said to have been found on the appellant's head, similarly, would appear to lack foundation, since those mattress pieces were not produced, and it was not shown that they came from any particular mattress.

It is common cause that the complainant was mentally retarded, and precisely on this account, her evidence was not taken and relied on by the Court. But at the same time, the complainant had uttered the words that on the material night, she had been at the house of the appellant's father – and this utterance appears to have been a Primary lead occasioning the suspicious haboured against the appellant. I hold that the use of such an information-lead is problematic and unreliable, since the complainant said nothing else to put into context her utterance which was being construed against the appellant herein. At the very least, there are lots of doubts, as to what exactly befell the complainant. These, as a matter of law, must be resolved in favour of the accused.

I have a duty, therefore, to allow the appellant's appeal; to acquit him; and to order his immediate release from custody, unless he is otherwise lawfully held.

Orders accordingly

DATED and DELIVERED at Nairobi this 30th day of January, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Appellant: Mr. Kimani

For the State: Ms. Gakobo