REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINALAPPEAL 128 OF 2005

M.W.N ==========APPELLANT

V E R S U S

REPUBLIC ==========RESPONDENT

(Being an appeal from the original conviction and sentence of M.C. CHEPSEBA –PM in Criminal Case No. 4810/2004 delivered on 15th November, 2005 at Kitale)

J U D G M E N T

The appellant, M.W.N, was convicted for the offence of attempted defilement contrary to section 145 (2) of the Penal Code. He was then sentenced to 30 years imprisonment with hard labour.

The complainant, **E.N**, was the daughter to Anne Chemutai Koech, of Sabwani ADC Farm. Her mother (PW3) testified that the complainant (PW1) was born in August 2002. Therefore, it follows that as at the date of the alleged offence, on 14/7/2004, the complainant was just about 2 years old.

Before the learned trial magistrate took the evidence of PW1, she formed the opinion that PW1 was about 4 – 5 years old. Therefore, the trial court conducted a voire dire examination, with a view to ascertaining if PW1 understood the meaning of an oath. Having conducted that exercise, the trial court came to the conclusion that the complainant was too young to understand the meaning of an oath. Consequently, the court directed that the complainant would proceed to give unsworn evidence.

The appellant now submits that because the complainant's evidence was unsworn, it was not possible for the court to gauge the truth or accuracy thereof.

In any event, the appellant believes that the complainant should have informed the court that she did not cry, when the "***bad manners***" were done to her, because she appeared to appreciate that whatever had been done to her was wrong.

The appellant submitted that the evidence of PW1 would have been credible if she had said that she was seduced by being given the one shilling coin before she was allegedly defiled. However, in this case, PW1 said that she was given the coin after the incident.

It was also submitted by the appellant that the evidence of the Clinical Officer did not support the charge of attempted defilement or of indecent assault.

The appellant pointed out that whilst the P3 form indicated that the complainant was suspected to have been defiled, the clinical officer who examined her found no injuries which supported the charge.

Bearing in mind the fact that PW1 was examined by the medical officer within four (4) hours of the

incident, the appellant submits that the results of such medical examination should have been consistent with what the child's mother saw when she examined the child. However, the appellant pointed out that the evidence of the mother was not consistent with that of the clinical officer.

His contention is that it was most unlikely for the Clinical Officer to have failed to see any injuries to the complainant's private parts, only four hours after the complainant's mother saw the swollen vulva of the complainant.

As the mother saw PW1 with a swollen vulva and a watery discharge from her private parts, yet the Clinical Officer saw nothing of that kind, the appellant urges this court to find that the complainant's mother was not a reliable witness.

I am not sure why the appellant has chosen the mother as the unreliable witness, instead of the Clinical Officer. I say so because if there were two witnesses whose testimonies on one issue, were at variance, one would normally say that their evidence was inconsistent.

If one wished to have the evidence of one or the other of those witnesses taken as reflective of the correct factual position, he would need to lay a clear background for his contention.

The mere fact that the evidence of two witnesses may be at variance is not reason enough to invite the court to find that one or the other witness was the one telling the truth.

Another issue pertains to the nature of the charges preferred against the appellant vis-à-vis the offence for which he was convicted. The appellant says that the charge sheet indicated that the complainant was under the age of sixteen years. Yet the evidence adduced in court showed that the complainant was only about 2 years old.

As far as the appellant was concerned the charge sheet was defective because of stating that the complainant was under the age of 16 whereas she was only two years old.

I must confess that I was totally unable to appreciate the point which the appellant was trying to make in that regard, because a child who is 2 years old is definitely under the age of 16.

In my understanding, the charge sheet needed to specify that the complainant was a girl under the age of 16 years of age because that is an ingredient of the offence, as prescribed under section 145 (2) of the Penal Code. Accordingly, I find no defect in the charge sheet. I also find no variance between the charge sheet and the evidence regarding the complainant's age.

PW1, E.N, testified that on the material day, her mother (PW3) had sent her to get shoes from Manuel, the appellant. PW1 went to the appellant's home, where she found him sleeping. According to PW1, the appellant did "***bad manners"*** to her, whilst lying on his bed.

The court records show that PW1 pointed at her vaginal area, when explaining the part of her body to which the appellant did the said "***bad manners"***

PW1 also explained that before doing the bad manners, the appellant removed his pant. On the other hand, PW1 had not been wearing a pant.

The appellant is said to have pushed back the dress which PW1 was wearing, before placing her on his bed. He then lay on PW1, causing her stomach to pain. PW1 then said that she: -

> " ***was feeling excited at my vagina."***

PW2, L.L, was a Clinical Officer at Kitale District Hospital. He examined a young girl, aged about 3 years. The girl's father gave a history of defilement.

PW2 found no evidence of spermatozoa or of defilement. He concluded that there might have been a likelihood of attempted defilement. However, PW2 qualified that finding by saying that in order for the court to say that there had been an attempted defilement, there was need for other evidence, which the court could rely on.

In cross-examination, the Clinical Officer categorically stated that there was no evidence of rape or defilement.

PW3, A.N.K, was the mother to PW1. She said that PW1 was born in August 2002.

On 14/7/2004 PW3 sent PW1 to the appellant's house, which was on the same plot where PW3 was living. PW1 was to collect a shoe from the appellant.

When PW1 came back home, she told the mother that the appellant had defiled her, after offering her lunch. When PW2 checked the complainant's private parts, she found the same to be swollen, as well as the vulva.

PW3 reported to the Village Elder, who then accompanied her to the appellant's house. However, the appellant had locked himself in the house, and was restless.

Later, the appellant was arrested by a Kenya Police Reservist, and was escorted to the Endebess Police Station where he was locked up.

According to PW3, the person who accompanied PW1 to the Kitale District Hospital for the examination of the complainant, was PW1's father.

In cross-examination, PW3 said that PW1 was not crying when she got home, after covering the distance of 200 metres, from the appellant's house.

PW4, M.B, was a security officer at Sabwani ADC Farm. On 14/7/2004 he remembers being called by the Village Elder, who told him that **E.W** had defiled a young girl. The Village Elder enlisted PW4's help in arresting the culprit.

PW4 went with Benedict Juma to the appellant's house, where they arrested him. PW1 and PW3 were present, and they accompanied PW4 to Endebess Police Station.

According to PW4, the injuries to PW1 were not too serious, even though the appellant had attempted to defile the complainant.

After the prosecution closed its case, and the appellant was put on his defence, he said that he was arrested on 14/7/2004, by a Kenya Police Reservist, who took him to Endebess Police Station. He continued to deny the charge.

Having re-evaluated the evidence on record, I note that PW1 said that she was not wearing a pantie. She also said that the appellant removed his own pant and then he lay on top of her, on the bed. She felt pain in her stomach and some excitement in her vagina.

Her mother insisted that PW1 had swollen private parts and vulva. She also said that she saw a watery discharge. However, there were no blood stains or any tears in the complainant's private parts.

Even when it was pointed out to the mother that the Clinical Officer had not seen any injuries to the complainant's private parts, she insisted that she had seen the swelling.

Does that mean that PW3 was an unreliable witness? I would not necessarily say so.

But, because her testimony was not corroborated by the evidence of the Clinical Officer, and also

because the complainant did not specify the manner in which the appellant did the said "***bad manners",*** I hold that there is doubt as to what exactly transpired between PW1 and the complainant.

No doubt the appellant removed his pant. That is indicative of his intention to use his male sexual organ. However, PW1 did not state that the appellant used his said organ to do "***bad manners***" to her.

Whilst it is possible that PW3 saw some swellings in PW1's private parts, and some watery discharge, PW1 did not say that the appellant had discharged any sort of liquid onto her body. Then, also, PW2 who examined PW1 on the same day, found no signs at all suggestive of rape at the vaginal region and entrance. Perhaps, the swellings or watery discharge were no longer in place, by the time PW2 examined the complainant. We cannot be sure.

And as PW1 did not talk of any discharge or pain in her private parts, it is equally possible that PW1 had neither a watery discharge nor swellings in her private parts. Again, I cannot be sure of that.

In the circumstances, I hold that there is doubt about what PW2 saw. And any such doubt must, by law, be determined in favour of the appellant.

Had I come to a different conclusion on that issue, it would not have mattered at all, that by the time PW1 was being examined by the Clinical Officer, the history given by her father was of defilement, yet later, the appellant was charged with attempted defilement. Having obtained the P3 form from the Clinical Officer, which indicated that there was no evidence of rape, the state could not have charged the appellant with defilement.

As PW2 said in his evidence: -

" ***there might have been a likelihood of attempted defilement, if there is other evidence court can rely on."***

Having re-evaluated the evidence on record, I find myself unable to agree with the findings by the learned trial magistrate, to the effect that PW1's evidence was corroborated by PW2 and PW3. To my mind, the evidence of PW2 and PW3 were inconsistent, whilst the evidence of PW1 was not clear as to actions of the appellant. Or to put the issue differently, PW1's evidence did not and could not be sufficient to prove the offence of attempted defilement, even if the same was true. In order to prove the offence, the complainant should have, at least, indicated that the appellant did use his male sexual organ in such a manner as was intended or calculated to link up with the complainant's female sexual organ.

In the result, although it would appear that the appellant was up to some mischief directed at the innocent young girl, I reluctantly come to the conclusion that it would be unsafe to uphold the conviction, on the strength of the evidence on record. Accordingly, the appeal is allowed. I quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Kitale, this 4th day of December, 2007.

FRED A. OCHIENG

JUDGE