



PAUL KAMAU MUNENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Paul Kamau Munene, was charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. The particulars of the charge were that on the 5th of December 2002 at [*particulars withheld*] Estate in Nyandarua District, the appellant had unlawful carnal knowledge of C W K, a girl under the age of fourteen (14) years. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged. He was sentenced to serve seven years imprisonment. The appellant was aggrieved by the conviction and sentence by the trial court and has appealed to this court.

In his memorandum of appeal the appellant has raised a total of nine grounds of appeal which may be summarised as thus; He was aggrieved that he had been convicted on the uncorroborated evidence of the complainant who was a child of young and tender years. He was further aggrieved that the trial court had failed to consider his alibi defence before arriving at the said decision convicting him. He faulted the trial magistrate for convicting him based on the evidence that was full glaring contradictions. The appellant was further aggrieved that the trial court failed to consider the fact that the complainant's mother could have been motivated by malice in making the report to the police due to the marital problems that existed between the appellant and the complainant's mother. The appellant faulted the trial magistrate for finding that he had had sexual intercourse with the complainant and consequently infected her with a sexually transmitted disease while in actual fact he had been examined and found to be free of any sexually transmitted disease. Finally he was aggrieved that he had been sentence to serve a custodial sentence that was oppressive and contrary to what the appellant termed as local criminal jurisprudence.

At the hearing of the appeal, Mr Ndegwa made persuasive submissions urging this court to allow the appeal filed by the appellant. He argued all the grounds of appeal in support of the appellant's appeal. Mr Gumo, the Assistant Deputy Public Prosecutor opposed the appeal. He urged the court to uphold the conviction of the appellant and the sentence imposed upon him by the trial magistrate. I will consider the submissions made after briefly setting out the facts of this case.

PW4 E N K testified that the appellant was her husband. They were married in the year 2001. At the time of her marriage, she already had a daughter from a previous relationship. She was a second wife. At the material time her daughter was aged about nine years and was living together with PW4 and the appellant. On the 5th of December 2002, PW4 testified that she travelled to Meru from her matrimonial home at a place called [*particulars withheld*], near Ol Kalou, Nyandarua District. Her husband (the appellant) gave her permission to go to Meru to see her sister. PW4 testified that she went to Meru with her youngest child who was two years of age at the time. She left the complainant with the appellant with instructions to the complainant that she was to go home and assist with the household chores. PW4 testified that she was away from the 5th of December 2002 to the 9th of December 2002. She returned back to her matrimonial home.

On the 11th of December 2002 at about 9.00 am while she was removing bed sheets from the bed where she had slept with the appellant, she found a piece of cloth which had blood stains. She became

suspicious. She inquired from her daughter the complainant what had transpired in her absence. The complainant told PW4 that she had been defiled by the appellant. PW4 inspected the private parts of the complainant. She saw that her vagina had wounds on the sides and on the lower part. A yellow discharge which was smelling was emanating from the vagina. PW4 picked the piece of cloth and took the complainant to the police where she made a report. The report was made to PW2 Chief Inspector of Police Mary Njenga, the Officer Commanding Station Ol Kalou Police Station. She ordered PW3 Police Constable (W) Teresia Wanyiri and another police officer to accompany PW4 and the complainant to the hospital. The complainant was examined by PW1 Dr Mwendwa Nyalita, the Medical Officer at Ol Kalou District Hospital. He established that the complainant had been sexually assaulted and infected with gonorrhoea, a sexually transmitted disease. His physical examination of the complainant's vagina established that there was a foulsmelling yellowish discharge. The vagina had reddened and was inflamed after the injury that the complainant had sustained. There was a left lateral tear of the hymen.

The laboratory test of the vaginal swab revealed that the complainant had been infected with gonorrhoea. He duly filed the P3 form and produced it as prosecution's exhibit No. 1. In her testimony PW4 testified that she was also found to have been infected with gonorrhoea and had to undergo treatment at the same time with the complainant.

PW5 C W (the complainant) testified that she was ten years old. She gave sworn testimony after the trial magistrate had established that she was sufficiently intelligent to give such sworn testimony. PW5 testified that on the 5th of December 2002 she escorted her mother (PW4) who was travelling to Meru. She escorted her to Ol Kalou bus stage. She then returned home. As she was mopping the house, the appellant returned home and went to the bedroom. He called the complainant to go to where he was at the bedroom. PW5 found the appellant sitted on the bed. The appellant called the complainant to go to where he was sitted on the bed. The complainant refused. The appellant held her by hand and forcefully took her to the bed and removed her pants. He then removed his clothes. He then forcefully had sexual intercourse with the complainant. The complainant stated that she had wanted to cry but the appellant warned her to keep quiet or else he was going to kill her. PW5 testified that the appellant had sexual intercourse with her for about ten minutes after which he picked a piece of cloth and wiped his penis with it. The penis was bloody.

The complainant was bleeding from her vagina. The appellant told her to go take a bath and not tell anyone. After the sexual assault, the appellant told the complainant to go to the house of her step mother. When her mother came back, the complainant was afraid to tell her what had transpired. It is only after her mother had discovered the bloody cloth that PW5 was compelled to tell her mother.

PW3 testified that after the complainant had been examined by the doctor, she was instructed by PW2 to arrest the appellant. She arrested the appellant from his office at the Rurii's Chief's Camp where the appellant worked as a Chief. The appellant was later charged with the offence for which he was convicted.

When the appellant was put on his defence, he denied that he had defiled the complainant. He gave detailed evidence of his movements on the particular day. He denied that he was in the house at the time the complainant said she was defiled. He testified at the time he was alleged to be in the house, he was at his office working. He called two witnesses, DW2 Joel Waweru Mwaura alias Maneno and DW3, Mary Njeri Nduati who testified that they were with the appellant at his office on the material day. DW3 testified that she had gone to the offices of the appellant to request him to resolve a domestic dispute involving her daughter and her son-in-law. DW4 Margaret Wairimu Kungu testified that she saw the complainant on the material day at about 10.30 a.m. alighting from a Nissan Matatu at a bus stage at Rurii Centre. The complainant asked DW4 if she had seen the appellant. DW4 replied in the negative. She advised the complainant to go and see if the appellant was at his office. DW4 testified that she did not see the appellant alighting from the Nissan which the complainant had travelled in. The appellant testified that the case had been brought against him by PW4 (his wife) because of the marital problems that existed between them. He suspected PW4 to be involved in extra-marital affairs. He testified that PW4 had a grudge against him because of the marital problems that existed between them. He however testified that when PW4 came back from Meru, he had sexual intercourse with her for a period of two nights before

PW4 went away to her parents' home. PW4 also took the complainant with her. The appellant denied that he had defiled the complainant whom he considered as his own daughter.

This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita –versus- Republic C.A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal held that: (at page 5)

“In *Okeno v R* [1972]E.A. 32 at page 36 the predecessor of this Court stated:- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –v- R* [1957]EA. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (*Shantilal M. Ruwala –v- R* [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424.”

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in *Gabriel Njoroge v. Republic* [1988-85]1 KAR 1134, at page 1136 this Court said:-

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see *Pandya v. R.* [1957] E.A 336, *Ruwala v. R* [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law.”

In the instant appeal, the issue for determination by this court is whether the prosecution established beyond reasonable doubt that it was the appellant who defiled the complainant. This court is mandated to consider whether the trial court properly and legally analysed the evidence that was placed before it before arriving at the decision to convict the appellant in this case.

According to the complainant, she was sexually assaulted by the appellant. The complainant testified that the appellant found her mopping the house. He went to the bedroom. He called the complainant to go to the bedroom. The complainant saw him sitted on the bed. The appellant told the complainant to go to where he was sitted on the bed. She refused. The appellant held her hand and took her to the bed, he forcefully removed her pants. He then had sexual intercourse with her. The complainant gave a graphic description of the sexual assault that she was subjected to. She said that she felt pain when the appellant had sexual intercourse with her. She wanted to scream. The appellant warned her that if she screamed he would kill her. After the sexual assault, the appellant picked a cloth and wiped his penis. The penis of the appellant was bloody. The complainant was bleeding from her vagina. The appellant ordered her to go and take a bath. He then warned her that if she told anybody what had transpired he would kill her. The complainant was compelled to tell her mother after her mother (PW4) had discovered the bloody cloth under their marital bed. The cloth was produced by the prosecution as Exhibit No. 2.

The complainant was taken to hospital. PW1 Dr Mwendwa Nyalita upon examining the complainant established that indeed she had been sexually assaulted. Her hymen was broken. The complainant had been subjected to penetrative sex. Her vagina was bruised, she had injuries;- further proof of sexual intercourse. She had been infected with gonorrhoea. PW1 treated the complainant for the sexually transmitted disease. PW1 filled the P3 form. The P3 form was produced as prosecution’s exhibit No. 1. PW4 testified that she was also infected with gonorrhoea. She was treated at the same time with the complainant. The appellant denied that he sexually assaulted the complainant. It was his testimony that he

was elsewhere when the said defilement was alleged to have taken place. It was his evidence that he was at his office when the alleged defilement is said to have taken place. He called two witnesses (DW2 and DW3) who testified that they were with the appellant at the time he was alleged to have been with the complainant at his house. He also testified that the charge against him was instigated by PW4 due to the marital problems that they facing. The appellant testified that he suspected PW4 of having extra-marital affairs and had indicated his displeasure to PW4. According to him, the criminal case had been brought against him by PW4 to get back at him.

I have carefully re-evaluated the evidence adduced by the prosecution and the defence offered by the appellant. I have also considered the submissions which were made by Mr Ndegwa on behalf of the appellant and Mr Gumo the Assistant Deputy Public Prosecutor. The only direct evidence linking the appellant to the offence is that of the complainant (PW5). She is a child of tender years. According to Section 124 of the Evidence Act (before it was amended by Act No. 5 of 2003, Criminal Law (Amendment) Act) the evidence of the complainant required corroboration. The detailed and graphic evidence of the complainant notwithstanding, unless the said evidence was corroborated, the appellant's appeal would have to succeed. After evaluating the evidence, I do find that the evidence of the complainant, though a child of tender years was cogent, consistent and obviously truthful. For a child of her age, she described the sexual act in detail that the only conclusion this court could reach was that the appellant actually defiled the complainant. In her testimony, the complainant testified that; (page 21 of the proceedings)

“The accused (appellant) held me by the hands and pulled me to the bed. He placed me on the bed and then removed my underpants. The accused removed all his clothes and he remained naked. I saw his penis and it was erect. The accused (appellant) lied (sic) on top of me and he inserted his penis into my vagina (my thing for urinating) I felt pain and started crying, the accused (appellant) told me that if I cry (sic) he was going to beat me and kill me. While he was in he was moving up and down. The penis was out and in. He remained in for about ten minutes. He then removed his thing penis and sat on the bed. Blood was coming out and the accused (appellant) picked a piece of cloth which was on the bed and wiped his penis. The penis had blood. I was also bleeding. The accused told me to take water and bath. When I went to the shower, I saw blood from my vagina.”

The testimony of the complainant cannot be said to have been contrived. Her evidence was corroborated by that of PW4. She testified that she found the piece of cloth which had blood under the mattress when she was changing the sheets on their marital bed. It is the same bed that the complainant testified that she was sexually assaulted by the appellant. The bloody cloth was produced in evidence as prosecution exhibit No. 2.

The appellant has testified that the evidence of defilement as adduced against him was fabricated. I have evaluated the evidence adduced and reached the conclusion that the events as narrated by the complainant actually took place. The piece of cloth with blood in it was found by PW4 who became suspicious. Her evidence on the discovery of the cloth and that of the complainant corroborated each other. It corroborated the evidence of the complainant that she had been sexually assaulted by the appellant and after sexual intercourse, the appellant wiped his penis, which had blood, with the piece of cloth. If indeed this evidence was fabricated, no evidence has been adduced by the defence how the piece of bloody cloth came to be found under the bed. Further corroboration is provided by the evidence of PW1, the doctor who examined the complainant and established that the complainant had been sexually assaulted. She had been subjected to penetrative sex. Her hymen was broken. She had injuries on her vagina. She had been infected with a sexually transmitted disease – gonorrhoea to be specific. Her mother was also found to have been infected with gonorrhoea. She was treated at the same time with the complainant.

I do find that the appellant defiled the complainant. The fact that he infected both PW4 (who is his wife) and the complainant is sufficient corroboration that he was the one who defiled the complainant.

Although at the time of his arrest he was found not to be infected with gonorrhoea, evidence was adduced by PW4 that he had been taking some capsules (medicine) when she came back to her matrimonial home from Meru. At the time of his examination he was already healed from the disease. In *James Wanjohi Kariuki –versus- Republic C. A. Criminal Appeal No. 104 of 2003 (Nyeri)* (unreported) the Court of

Appeal in dealing with similar evidence of defilement like in the instant case, stated at page 4:

“By convicting the appellant on uncorroborated evidence of a child of tender years, the two courts below went ahead of the law. In any case had the prosecution been minded to bring corroborative evidence, they could have done so. The mother of the complainant said the appellant’s wife went to her and asked her (mother) if the complainant had told her what had happened. As Mr Gacheche wa Miano for the appellant pointed out, rightly in our view, the wife of the appellant was a competent and compellable witness under Section 127(3) of the Evidence Act. The prosecution chose not to call her and offered no explanation for her failure.”

I do hold that the evidence of PW4 as relates to where she found the cloth and further her evidence of the infection that she got from the appellant that was similar to the infection that the complainant had been infected is corroborative of the evidence of the complainant. The circumstances of the defilement and the evidence of PW4 corroborated the evidence of the complainant. I do hold that the prosecution established beyond any reasonable doubt that it was the appellant who defiled the complainant. His appeal on conviction therefore lacks merit. The same is dismissed.

On sentence, the appellant was sentenced to serve seven years imprisonment with hard labour. I have carefully considered the circumstances of this case and find that the said sentence meted on the appellant by the trial magistrate, in view of the serious nature of the offence and particularly the physical and the psychological injuries that the complainant sustained, was lenient. The appellant betrayed the trust of the society which placed the complainant in his custody as a parent. As a leader in society (being a chief) he ought to have known that what he was doing was wrong. He made attempts to circumvent the course of justice by trying to frustrate the investigation of the case using his office. He deserves a more serious punishment. I have taken the unusual step of invoking my powers as provided by Section 354(3)(ii) of the Criminal Procedure Code and enhance the sentence to be served by the appellant. I therefore set aside the sentence of the trial magistrate and substitute it with the sentence of this court.

The appellant is sentenced to serve the maximum term fourteen years imprisonment with hard labour. If the appellant had committed the offence after the amendment of the penal code in 2003, I would have sentenced him to a more harsher custodial sentence. The sentence shall take effect from the 11th of February 2004 when the appellant was convicted by the lower court.

It is so ordered.

DATED at NAKURU this 25th day of May 2005.

L. KIMARU

JUDGE