



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO.147 OF 2015

BETWEEN

ERICK KIPCHIRCHIR TAMU alias FAUSTINE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. C. M. Wattimah, RM dated 30th October 2015 at the Magistrates Court at Kapsabet in Criminal Case No. 268 of 2015)

JUDGMENT

1. The appellant, **ERICK KIPCHIRCHIR TAMU alias FAUSTINE**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* ("the Act"). The particulars of the offence were that on 27th January 2015 at [particulars withheld] Village within Nandi County, he intentionally caused his penis to penetrate the vagina of CO, a child aged 9 years.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. In his grounds of appeal, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt. He contended that the conviction was based on uncorroborated evidence and the burden of proof was erroneously shifted to him. He complained that the complainant was not availed to testify and that the medical evidence did not point to him as perpetrator. Counsel for the respondent submitted that the prosecution proved its case beyond reasonable doubt.
3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.
4. The child's mother, PW 1, testified that on 27th January 2015 at about 6.00pm, the child, (CO) had come from school so she sent her collect milk. She took time to come back. She later learnt that CO had been defiled and the appellant had been arrested. She knew the appellant as a neighbour. She took CO to hospital and observed she had bruises on the neck like she had been strangled and there was a discharge on her private parts. She testified that CO was aged 9 years old and produced the clinic card.
5. PW 2 testified that PW 1 and the appellant were her neighbours. She recalled that on 27th January 2015, she saw the appellant going with CO to his home. She proceeded with her chores whereupon she heard screams coming from the appellant's house. She inquired from her son who was screaming and he told her it was CO. She decided to go to the appellant's house where she saw the appellant running away being followed by CO. When she asked the appellant what he was doing with CO, he told her he wanted to give her maize. She testified that CO went to where her father was and the appellant was arrested.
6. PW 3 recalled that on 27th January 2015 in the evening, she saw the appellant with CO, who was crying, coming out of the appellant's house. The appellant told her that CO's father had given him Kshs. 100/- to give CO beans but she refused and started crying. As the child cried and left, the appellant took a panga and followed her.
7. The clinical officer, PW 5, testified that he examined the child on 27th January 2015 and on 29th January 2015 when he filled the P3 medical form. He recalled that when he examined CO, she was in fair condition and on examination of her genitalia, it had redness, the hymen was freshly torn and no discharge was noted at the time. The laboratory examination of the samples taken from the High Vaginal Swab showed that there were numerous puss cells which was clear evidence that the child had an STI. He examined the appellant on 2nd February 2012 and he had a healing wound caused by a blunt object on his chin as a result of being beaten by members of the public.

8. The investigating officer, PW 6, told the court that PW 1 and CO came to lodge the complaint of defilement on 27th January 2015 at the police station. On the following day, AP officers brought the accused to the police station. She investigated the matter and caused the appellant to be charged. She produced the clinic notes and immunization card which showed that the child was born on 15th June 2005. She also told the court that at the scene she received a red biker, white pants and rubbers shoes which belonged to CO which she produced as evidence.

9. In his unsworn statement, the appellant denied the charge. He told the court that on the material day, he was working on the farm when he was called by some women. When he went to the home of one of the women, he was assaulted and taken to the AP Post. He stated that when he was arrested the police demanded Kshs. 20,000/- from him so that he could be released.

10. Since the issue in this appeal is whether the prosecution proved its case beyond reasonable doubt, under **section 8(1)** of the **Act**, the prosecution must prove that an accused did an act of penetration with a child. “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

11. In this case the child CO did not testify. When the matter came up for hearing, it was PW 1 who testified. Following an application of the prosecutor, the court directed that the CO’s testimony be taken through an intermediary. I however looked at the proceedings and from its tenor, it is PW 1 who was sworn and who proceeded to testify. She was also cross-examined by the appellant. It is not apparent from the record that PW 1 communicated questions to LA and LA responded. The trial magistrate, in my view, misunderstood the role of an intermediary which is to act as a channel of communication between the witness and the court.

12. The role and place of an intermediary was explained by the Court of Appeal in **M. M. v Republic NRB Criminal Appeal No.41 of 2013 [2014] eKLR** as follows:

Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to section 2 of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.

Section 31(1) provides inter alia that: -

A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

We have seen that in Article 50(7) of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness’ emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary’s evidence.

If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

a) convey the general purport of any question to the relevant witness.

b) inform the court at any time that the witness is fatigued or stressed; and

c) request the court for a recess. (Emphasis supplied)

The word through is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

13. This error in treating PW 1’s testimony as that of an intermediary was not fatal to the prosecution case. Although the child did not testify, it is established that this is not necessary particularly where the child is vulnerable and there exists sufficient independent evidence, as I have outlined above, as proof of the fact of penetration. In **M. M. v Republic (Supra)**, the Court of Appeal observed that, “Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice.” Thus failure of the child to testify is not fatal to the prosecution case and the court may look at any other independent and admissible evidence. In such instances, the general principle concerning proof of the case by circumstantial evidence must be applied. The principle governing circumstantial evidence was distilled in the seminal case of **Rex v Kipkering Arap Koskei and Another [1949] 16 EACA 135**, where the East Africa Court of Appeal stated that, “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt.” It is with this principle in mind that I turn to consider the evidence.

14. On the issue of penetration, I have no doubt that the prosecution proved the fact of penetration. PW 1 gave clear and concise evidence on how CO was subjected to penetration. Her testimony was corroborated by PW 4 who met her immediately after the ordeal and whom she told at the first opportunity. He saw her in a state of distress. Likewise, PW 2 saw her in a state of distress and when she looked at her private parts, she was bleeding. The clinical officer, PW 3, who examined CO on the same morning confirmed penetration after examining the

vagina and noting the bruises on the vagina and the puss and epithelial cells.

15. The next issue is whether the appellant committed that act of penetration. Two witnesses, PW 2 and PW 3 saw the appellant with CO on that evening. PW 1 confirmed that she had left home to collect milk at about 6.00pm. She was not in any state of distress. PW 2 saw the appellant going to his house with CO and when she proceeded with her chores, she heard CO screaming, came out of her house and saw the appellant with CO. PW 3 also testified that she saw the appellant coming out of the house with CO, who was crying. All the witnesses were neighbour with CO and the appellant and knew them all and the incident took place in the evening before it was dark therefore foreclosing the possibility of mistaken identity. Further, PW 3 confirmed that she talked to the appellant who told her that CO had been sent by her father to collect beans.

16. The totality of this evidence is that it is only the appellant who could have committed the act of penetration between the time PW 1 sent CO to the time she was seen by PW 1 going to his house and when she screamed and also when CO and the appellant were seen together after the felonious act was done. In his defence, the appellant dwelt on his arrest and said nothing of the fact that he was seen with CO by two witnesses in his house in circumstances that raised suspicion that he is the only one who would have injured the CO in her vagina. This evidence points to the appellant exclusively as the person who caused an act of penetration to CO. The evidence is further buttressed by the fact that PW 6 found CO's items of clothing in his house.

17. The age of CO was proved by production of the Child Health Card which showed that she was born on 15th June 2005 meaning that she was 9 years at the time the offence was committed. Since she was below the age of 11 years, the mandatory minimum sentence of life imprisonment under **section 8(2)** of the **Act** was applicable.

18. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED AT KISII BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 3RD day of JUNE 2019.

H. A. OMONDI

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.