REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 175 OF 2016

(CORAM: HON. R.E. ABURILI - J)

GOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against sentence delivered on 1/12/2016 at Ukwala Law Courts vide Criminal Case S.O. No. 142 of 2016, before Hon. C.N. Wanyama, RM)

JUDGMENT

1. The Appellant **GOO** was charged with the offence of defilement contrary to **Section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006** and an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the said Act. The particulars of the offence are that on 2nd April 2016 at Ugunja District in Siaya County, he intentionally caused his penis to penetrate the vagina of a child aged 14 years or that in the alternative, he intentionally touched her vagina with his penis.

2. The appellant pleaded not guilty to the charge and the prosecution called four witness to prove its case. At the close of the prosecution case, the appellant was placed on his defence. He gave sworn testimony and called no witness.

3. In determining this first appeal, this court is alive to the principles laid down in the case of **Okeno Vs. Republic [1972] E.A 32** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (**see Pandya Vs. Republic [1957] E.A. 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.

4. Revisiting the evidence before the trial court, PW1 MAO (full name withheld) testified that she was at her home on 2.4.2016 when her father and grandmother went out and left her with her siblings. That her uncle arrived while drunk and sent the younger child for cooking fat. That the appellant then pulled her into the house and defiled her. The complainant further stated that her mother found out and questioned the uncle who began quarrelling her. PW1 was taken to Sigomere Police Station then Sigomere Health Centre where she was treated.

5. In cross examination, the complainant stated that that was the first time the appellant had defiled her and that he was drunk. In re-examination, she stated that her mother ran for refuge at her grandmother's house because G wanted to beat her.

6. **PW6 Patrick Okuku**, the Assistant Chief of West Asango testified and recalled that on 4.4.2016 at about 9.00 am, JA informed him that her husband GO had defiled their daughter. That she found him defiling the girl on their matrimonial bed, and that the appellant chased her away when she knocked on the door but opened it and the child ran out. That she accompanied the child to Sigomere Police Station and recorded her statement. In cross-examination, he stated that that was the first complaint he had received concerning the appellant.

7. **No. 855339 Police Constable Kenneth Ndombi** testified that he was at the report office on 4.4.2016 when the Assistant Chief, Mr. Patrick Okuku – PW2 and one J, the appellant's wife reported that the appellant G had defiled the child. He recorded the witnesses' statements and the child was escorted to the hospital on 5.4.2016 by PC Regina. He stated that on 6.4.2016 he issued the complainant with the P3 form which was filled at Sigomere Health Centre. He later went with Sergeant Hamisi and arrested the appellant. PW3 found that the child was born on 5.6.2002 and was a student at [Particulars Withheld] Primary School. In cross examination, he stated that the appellant tried to ran away at the time of arrest which was 3 days after the incident.

8. Atenya Joel, a Clinician at Sigomere Health Centre testified that he examined MAO the complainant herein on 5.4.2016 as an outpatient No. 4967/16. He found blood on her genitalia with no abrasion and hymen was not intact. She was given antibiotics and pain killers. He stated that the complainant was menstruating but that that may also have been a sign of trauma. According to PW4, the history given by the complainant was that she was defiled on 2.4.2016 and reported late to the facility after 4 days. That she had bathed and was menstruating.

He stated that it was difficult to tell whether she was defiled or not. He stated that the appellant was also examined at the facility on 6.4.2016 by his colleague.

9. The appellant gave sworn testimony stating that he was GOO. That he went to work at Buhuru and did not find the wife and her sister at home. That he asked his mother who did not know where they were. That on the following day his wife returned and he quarreled her and she left with her sister. He was later arrested at the trading centre. The prosecution did not cross examine the appellant.

10. The trial court after considering the prosecution and defence case found the appellant guilty of the offence and sentenced him to serve twenty years imprisonment.

APPEAL

11. Being dissatisfied with the judgment, conviction and sentence imposed on him by the trial court, the appellant filed this appeal setting out the following grounds of appeal:

> ***(1) That the trial court erred in law by basing my conviction on a medical examination report which did not link me with the alleged offence.***
>
> ***(2) The trial court failed to consider that crucial witnesses were not availed to support the prosecution case.***
>
> ***(3) That the prosecution case was marred with inconsistencies hence unsafe to base a conviction upon.***
>
> (4) ***That the trial court failed to observe the provisions of Section 19 of Oaths and Statutory Declaration Act.***

12. In support of the appeal, the appellant filed written submissions which he also highlighted orally. The appellant submitted under the following headings:

1. Credibility of the Witness

13. Under this head, it was submitted that as the evidence was clear that the victim was a child as per the definition in the Sexual Offences Act, the trial court should have conducted a voire dire examination in a bid to ascertain the intelligence of the witness and whether she knew the meaning of an oath. Reliance was placed on **John Otieno Oloo v Republic Cr. Appeal No. 350 of 2008** where the Court of Appeal stated:

> ***"the trial court before swearing a child of tender years should our if caution from an opinion on a voire dire examinations whether the child understands the nature of an oath or note. Failure to do so could occasion a miscarriage of justice had that been the only witness on the issue that were before court."***

14. In the instant case, it was submitted that PW1 was the only witness and whose credibility should have been ascertained. Further reliance was placed on the decision by the Court of Appeal in **Gabriel v R. (1960) EACA 159,** where it was held:

> ***"it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood."***

15. The appellant therefore submitted that the child in the instant case was not truthful and that neither did she know the meaning of an oath since she misdirected the court that she was the appellant's daughter while she was on oath.

2. Medical Examination Report

16. Here, the appellant submitted that the key ingredient in the case of defilement is penetration. He cited **Section 8(1) of the Sexual Offences Act** which defines the offence as "***a person who commits an act which causes penetration with a child is guilty of an offence termed defilement"*** and submitted that the essence of carrying out a medical examination on a victim is to establish penetration, which the law defines: ***"penetration means the partial or complete insertion of the genital organs of a person into the genital organ is of another person."***

17. The appellant submitted that this ingredient of penetration was not medically proved and that the doctor (PW4) categorically stated that ***"it is difficult to tell whether she was defiled or not. The hymen may been broken during intercourse."*** (see pg 13 line 17-18). It was therefore the appellant's submission that that piece of evidence totally failed to establish the allegation of penetration and that the word ***"may"*** in PW4's statements creates an inference that the breakage of hymen could have not specifically been attributed to an intercourse.

18. The appellant submitted that the brokerage of hymen can always occur as a result of various reasons including the nature of games played by the girl. He submitted that moreover, the doctor's remark on the condition of the said hymen could have been ***"freshly torn or broken"*** failed to prove penetration which rendered the charge of defilement unsound and unsafe to base a conviction in a matter of the seriousness of this magnitude.

3. Lack of Essential witness

19. According to the appellant, there was a very strong allegation that PW1's mother, one J, was the person who rescued the complainant from the alleged house in which she was locked and that she also reported the matter to the authorities. (see page 4 line 22 and page 6 line 18-20. The appellant relied on PW3's statement in chief at (line 7 - 10) and submitted that the action of the said mother of the alleged victim to disappear and or fail to avail herself for testimony before the court was not consistent with that of a mother whose child was truly defiled or sexually assaulted. It was therefore the appellant's submission that the only inference that can be drawn from that act is that she had framed up the appellant in a bid to settle her hidden personal scores.

20. It was further contended that the prosecution either did not tell the court why the complainant's mother could not be arrested in the effect of the warrant of arrest issued by court and compelled to testify given the gravity of the evidence that she purported to have had.

4. Inconsistencies

21. On inconsistencies, the appellant submitted that the offence allegedly occurred on 02.04.2016, while the report to the police was made on 04.04.2016, 2 days later. It was contended that the prosecution failed to justify the delay in reporting the matter immediately yet there was an allegation that the assailant was well known and that no evidence was tendered to show that the appellant was at large.

22. The appellant therefore submitted that the unjustified delay in reporting a matter of this seriousness and which was allegedly committed in the alleged circumstances rendered the whole allegation an afterthought and a frame up.

23. In further submission, the appellant contended that the allegation of PW1 that she was locked in the house between 2.00 pm and 5.00 pm and yet the other children who were allegedly present and who were allegedly aware of an abnormal happening could not even tell the neighbours during that very long period of time.

24. Further inconsistency was said to be in the alleged date of first visitation to the hospital which was stated by PW4 as 05.04.2016, 3 days after the alleged incident. (see PW4 statement, second paragraph line 22). In the appellant's view, this piece of evidence was not supported by any treatment notes that were relied upon to fill the P3 form. He referred to the last page of the P3 form (additional remarks of the doctor), where the doctor remarked that the victim first visited the medical facility 4 days after the alleged offence, which should have been 06.04.2016 and which date should have been reflected on the treatment notes.

5. Defence

25. The appellant also submitted that the trial court failed to consider that the appellant's defence raised material evidence as far as there existed a grudge between him and PW1's alleged mother, who was his wife and who misreported to the authority that the alleged victim, who was her younger sister, was their daughter to add more weight on the seriousness of her framed up case. It was his humble submission that the domestic misunderstanding between the appellant and his wife, who was PW1's elder sister, was the cause of his implication in the framed up case.

26. In his oral submissions, the appellant reiterated that he had disagreed with his wife that is why they couched the child to frame the case against him. In addition, he stated that there were people in the home who did not see him defile the child and that he could not have locked her indoors from 2.00 pm and 5.00 pm.

27. In opposing the appeal, the prosecution counsel Mr. Okachi submitted that the complainant knew the appellant as her uncle and that the evidence was unshaken against the appellant.

DETERMINATION

28. I have carefully considered this appeal, reassessed the evidence before the trial court and the submissions by both the appellant and the Respondent's counsel. In my humble view, the issues for determination are:

(1) Whether the complainant was a minor;

(2) Whether there was proof that the appellant caused his penis to penetrate the victim's vagina;

(3) Whether the prosecution proved its case against the appellant beyond reasonable doubt.

29. On the first issue, the Prosecution produced a document a baptismal card for the complainant showing that she was born on 5.6.2002 and baptized on 1.7.2002 at the Salvation Spirit of Israel East Africa Church. As such, on the date that she is alleged to have sexually molested on 2.4.2006, she was aged 13 years and 11 months. ***Section 2 of the Children's Act*** defines a child ***as a "child" means any human being under the age of eighteen years."*** There is evidence that she was a child as defined by the ***Children's Act***. The only question is whether her age falls within the provision of ***Section 8(3) of the Sexual Offences Act*** which provides for punishment where the child's age is between 12 years and 15 years.

30. On the second issue of whether there was penetration and proof thereof, ***Section 2 of the Sexual Offences Act*** defines "penetration" to mean '***the partial or complete insertion of the genitalia organs of a person into the genital organs of another person***.' The appellant complains that there was no evidence of penetration in view of the evidence by the clinical officer that it was not clear whether the complainant was defiled as she was also in her menses.

31. I have examined the evidence of the clinical officer who examined the complainant and filled her P3 form. He indeed stated that ***it is difficult to tell whether the complainant was defiled or not, although the hymen was not intact.*** He was not sure whether the missing

hymen was occasioned by alleged penetration. It is therefore not true as stated by the trial court that the clinical officer in filling the P3 form was clear that there was penetration, when the same Clinical Officer said that it was not clear whether the child was defiled.

32. This court is aware that penetration need not be complete as per the provisions of section 2 of the Act. In addition, Section 124 of the Sexual Offences Act provides:

> ***"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 appellant, if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."***

33. However, from the medical examination, as shown by the P3 Form and clinical notes produced in court as exhibits, although there was evidence that the hymen was not intact, there were no bruising or lacerations on both *labias*. According to the clinician, the complainant had blood on her genitalia which could also be a sign of trauma. He however confirmed that the child was in her menses.

34. Evidence of the complainant alone can convict an offender in sexual offences cases. However, in this case, the court is unable to find evidence of penetration whether partial or complete. If as the complainant testified, this was the first time she was being defiled and that she was defiled from 2.00 pm to 5.00 pm, obviously she could have sustained some injuries including breaking of the hymen and bruises on her genitals, even if she was in her menses.

35. The evidence by PW2 Patrick Okuku who received the complainant and her alleged mother was that the victim's mother reported to him that she found the appellant in the process of defiling the complainant on their matrimonial bed.

36. However, as correctly established by the trial court, this evidence is hearsay and inadmissible. The mother to the child JA recorded her statement with the police but she did not attend court to testify on what she had seen and heard of the complainant, even after a warrant of arrest was issued. The police claimed that she could not be traced. The question is why did the person who called herself as mother of the victim, whereas the victim called the appellant as uncle, fail to attend court to testify, being an eye witness to the defilement case? In my view failure to present the eye witness to testify is not fatal to the prosecution's case especially where there is other credible evidence proving the guilt of the appellant. However, in the instant case, the evidence of the complainant is shaky. She claimed that she was defiled from 2.00 pm to 5.00 pm when her mother came and she told her of what the appellant had done to her.

37. A child aged about 14 years is not of tender years and therefore being defiled by an adult from 2.00 pm to 5.00 pm which is three hours could not have failed to get bruises in her vagina even if she was in her menses. The Clinical Officer was clear in examination in chief that it was not clear whether the complainant was defiled. He was presumptive that the menses could have come as a result of trauma.

38. There is no explanation why the person who claims to be the mother of the victim and who allegedly found the victim being defiled and even accompanied her to the village elder to report the incident and took the child to hospital for medical examination could disappear during the trial and fail to be traced by the Police. If she had been threatened by the appellant which the prosecution did not allege, the police would have sought for her protection by the court through the Witness Protection Agency.

39. On the whole, I find that albeit the failure to conduct a voire dire examination on the complainant per se was not fatal to the prosecution's case, I am not satisfied that the trial magistrate was right in his finding that the victim's evidence was watertight. Only the alleged mother to the child could have shed light on why the victim child was taken to hospital, late, noting as the Clinician stated that the delay was likely to interfere with the investigations and findings of defilement.

40. The appellant submits that he had a grudge with his wife and that she coached the complainant child to give evidence against him. He also claims that PW1 was not truthful because she testified that she was his child yet she was his wife's younger sister. However, the prosecution did not put any question to the appellant and neither was the complainant re-examined to clarify whether the complainant was the appellant's child or uncle or in low by blood or whether she was a sister to the appellant's wife hence an in low to him.

41. Furthermore, the Baptismal Card for the complainant produced in evidence as Exhibit 1 show that the victim's father is PO. Her mother's name is not indicated. The prosecution did not clarify whether the appellant GOO is alias POO.

42. For the above reasons, this court entertains sufficient doubt as to whether the complainant was telling the truth that she was defiled by the appellant and that doubt must all times go to the benefit of the accused person.

43. I find that the Prosecution did not establish a watertight case against the appellant. The conviction of the appellant is found to be unsafe. It is hereby quashed and prison sentence meted out on him set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

44. Accordingly, the appeal herein against conviction and sentence is allowed.

Dated, signed and delivered at Siaya this 16th day of September 2019.

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi SPPC for the State

CA: Brenda and Modestar