REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 138 OF 2016

WESLEY KEMEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from judgment of the Chief Magistrate Hon. W. Kagendo

delivered on 10th of August, 2016 in Molo Chief Magistrate's Court 302 of 2015.)

JUDGMENT

1. The Appellant, Wesley Kemei, was arraigned before the Molo Chief Magistrate's Court charged with a single count of defilement contrary to section 8(1) as ready together with section 8(4) of the Sexual Offences Act. The allegations contained in the charge sheet were that the Appellant defiled MC a child aged 13 years on 22/11/2014 by unlawfully and intentionally causing his penis to penetrate the vagina of MC at Kapkatet Shopping Centre in [particulars withheld] District, Nakuru County.

2. The Appellant also faced an alternative count of committing an indecent act with the same MC by intentionally causing his penis to rub MC's vagina on the same date and place.

3. The Appellant pleaded not guilty to the charges and the case went to full hearing. The Prosecution called five witnesses. At the conclusion of the Prosecution case, the Learned Trial Magistrate put the Appellant on his defence. He gave an unsworn statement and called one witness.

4. The Learned Trial Magistrate, after due consideration of the case, was persuaded that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellant. The Learned Trial Magistrate then sentenced the Appellant to imprisonment for twenty years.

5. The Appellant is aggrieved by the conviction and sentence. He listed five grounds of appeal and submitted Written Submissions in the support of the grounds. At the hearing of the appeal, he wholly relied on the Written Submissions. The grounds of appeal were as follows:

> 1. That the learned trial magistrate erred in law and fact in convicting the Appellant on the evidence of PW3 the complainant who was a 13 years old minor and yet failed to conduct a voire dire examination before correcting her evidence which was on irregular practice.
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> 2. That the learned trial magistrate erred in law and fact in convicting the Appellant yet the prosecution failed to satisfy the burden at proof required in a defilement case ie penetration
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> 3. That the learned trial magistrate erred in law and fact in convicting the Appellant yet crucial and vital witnesses were not availed for the establishment of the truth and subsequent administration of justice
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> 4. That the learned trial magistrate erred in law and fact in conviction the Appellant on conflicting and contradicting evidence that was inconsistent and that lacked probative values
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> 5. That the learned trial magistrate erred in law and fact in convicting the appellant yet failed to evaluate the evidence as a whole and hence there was no concurrent finding of fact as the prosecution case was treated in isolation of the defence case and that the prosecution failed to discharge the alibi defence.

6. The State opposed the Appeal. Mr. Motende, Prosecution Counsel, orally argued in opposition to the Appeal. He argued that the age of the victim was never in question. On penetration, Mr. Motende argued that the Complainant gave account of how Appellant took her to his house and had sexual encounter with her; that the evidence was believed and truthful which the trial magistrate considered and relied on. Mr. Motende submitted that the evidence of penetration was corroborated by evidence of PW4 who testified that the hymen was broken and they found some seminal fluid during examination.

7. On the issue of identification, Mr. Motende submitted that it was the evidence of the Complainant that she knew the Appellant and that the Complainant was removed from Appellant's house by a group of about 15. Appellant ran away when he heard the group coming, the Appellant ran away with only vest on. Thus, Mr. Motende submitted, there was no wrong identification.

8. Finally, Mr. Motende argued that the alibi defence was dislodged by the prosecution witness. He submitted that the issue of grudge with the complainant does not explain how seminal fluids were found on the complainant and why the Appellant ran away.

9. As the first appellate Court, my duty is to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** **(1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

10. Evidence adduced at the trial showed that MC was sent to the shop on 22/11/2014 by her mother, ER. E testified as PW1. It was in the evening at around 6:00pm. She says that although the shop was quite near – a bare 100 metres from home – MC never returned home. E went looking for her at the shop but did not find her. She slept worried that night and embarked on a search for her daughter the following morning. In the search process, she met a E who told her to look no further as E knew that her daughter was at the Appellant's house. By then, it was late at night on 23/11/2014.

11. E testified that upon consultation with her husband, they determined that it was risky to confront the Appellant in his own compound that late in the night. They resolved, instead, to do so the following morning. So it was that 5:00am found them laying in wait with a group of other villagers by the Appellant's house. They has alerted the village elder as well.

12. E further testified that when a group of the elders who they had gone with – and which included her husband – knocked on the Appellant's house at 5:00am, the Appellant suspected that an arrest was imminent. The Appellant, reportedly, unlocked the door and zoomed past the astounded elders dressed only in a vest. When the elders went into the house, they found MC sleeping in the Appellant's bed dressed in a T-shirt and petticoat.

13. E told the Court that she took MC to the hospital for examination and reported the matter to the Police. That was at Kiptagich Police Post. There, they found PC Trazy Njoki. She gave them a P3 Form which they took to Kiptagich Health Centre. PC Njoki became the Investigating Officer in the Case. She testified as PW5 about the investigations she conducted and how the Appellant was later – on 02/02/2015 brought to the Police Post by members of the Public and Nyumba Kumi elders. She re-arrested the Appellant and recommended charging him with the offence of defilement.

14. MC testified as PW3. Her testimony was that as she was heading to the shop after her mother sent her, she met the Appellant who claimed that he had been looking for her. MC had seen the Appellant around the neighbourhood but did not know his name. The Appellant reportedly told her that they would go to his house that night. MC said she resisted but the Appellant dragged her there threatening to kill her if she screamed. So she obliged. So, they went to the Appellant's compound and into one of the houses. MC testified that the Appellant had a knife. He made her lie on the bed and lifted the Jeans skirt she had on. He then removed her biker underpants. The Appellant, then, unfastened his belt; unzipped his trousers and proceeded to have sex with her.

15. MC's testimony, then, veered to the moment when the door was knocked and the elders went into the Appellant's house. She confirmed that they found her in the Appellant's bed.

16. JKR was one of the elders who was at the scene when the Appellant's door was knocked and he came out running. He testified as PW2.

17. At Kaptagich Health Centre, MC was examined by Willy Maritich, a nurse. He found normal genitalia which were not bruised or injured. He also found that they hymen had been previously broken. Of consequence, he found some seminal fluid in the girl's vagina. He concluded that there was penetration.

18. Put on his defence, the Appellant told the Court that the case against him was fabricated. His theory was that his detractors wanted his children to suffer when he is sentenced to go to prison. His told the Court that on 22/11/2014, he spent his whole day working in the shamba with his wife. At 1:00pm, his wife went home to prepare lunch and he was left still working. He went home at 3:00pm, ate his lunch then rested until 6:00pm. At 6:00pm he went to milk his cows then ate supper and slept. He never left home that evening, he told the Court.

19. The Appellant's wife, Sharon Chepkoech Kemai, backed up his story. She testified that she was with her husband in the shamba the whole day until she left early to go make lunch. Her husband, she testified, came home at 3:00pm, ate lunch and then rested until 6:00pm when he went to milk the cows. They then ate supper and slept.

20. In short, the Learned Trial Magistrate disbelieved the Defence narrative and believed the overriding Prosecution narrative that the Appellant had defiled MC. In material part, the Learned Trial Magistrate stated as follows:

> It must be pointed out that even the Complainant's evidence was delayed and she had gone missing as some point. She was a reluctant witness. There could be a chance that she went with the Accused Person willfully and is not keen on having the case prosecuted…..The Accused Person did not mention any grudge with the parents of PW3 that could have made them implicate him falsely. 15 people saw him dash out of his house while [he] had only a vest on the day PW3 was rescued. PW3 testified that they had penetrative se and the Court believed her.

21. One of the issues that came up at the trial was whether the P3 Form was admissible evidence since it was filled and produced by a nurse – and not a doctor or a Clinical Officer. In the Court below as here, the Appellant has forcefully argued that the P3 Form was inadmissible because it was filled and produced by a Nursing Officer and not a doctor or a Clinical Officer. Only these two categories of professionals, the Appellant insists, are "medical practitioners" for purposes of section 77 of the Evidence Act. For this legal proposition, the Appellant cited Machakos High Court Criminal Appeal No. 59 of 2013; Machakos High Court Criminal Appeal No. 156 of 2012; and Machakos High Court Criminal Appeal No. 106 of 2013. The holding in these three cases appears to be that the Nurses Act (Chapter 257 of the Laws of Kenya) does not empower a nurse to act as a "medical practitioner". As such, he argues, PW4, the Nursing Officer who filled and produced the P3 Form in this case was not competent to do so.

22. The Learned Trial Magistrate considered this argument and dismissed it. In doing so, the Learned Trial Magistrate relied on two cases recently decided by the Nakuru High Court: Nakuru Criminal Appeal No. 168 of 2013: Kenneth Kipngetich Soi v R and Nakuru Criminal Appeal No. 139 of 2012: David Kipkoech Yegon v R. In the latter case, the Court decided that section 77 of the Evidence Act permitted Clinical Officers "as medical practitioners" to fill and produce P3 Forms in Court. In the former case, the Court extended the same reasoning to Nurses.

23. On my part, my response to the argument is to be found in section 48 of the Evidence Act. In truth, when a medical personnel appear in Court to produce a P3 Form, they are doing so as experts to help the Court reach a just determination on an issue. Section 48 of the Evidence Act provides as follows:

> 1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
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> 2. Such persons are called experts.

24. In the present case, PW4, Mr. William Maritich, introduced himself as, and established his credentials as a Nurse. The credentials were accepted by both the Defence (who was represented by Counsel) and the Court. His evidence was taken as that of an expert. To this extent, whether Mr. Maritich qualifies as a "Medical Practitioner" as that term is defined in Kenya or not, his opinion about what happened to MC which he formed upon his physical examination of MC and informed by his learning in the sciences and experience, was admissible as that of an expert. The P3 Form, to this extent, is admissible as a document that is not any different than a report prepared by any other expert to help the Court reach a just conclusion on the matter at hand. I, therefore, find no error at all in accepting this evidence.

25. In any event, as the Learned Trial Magistrate correctly pointed out, defilement is not proved through medical evidence; it is proved through evidence. Hence, even in the absence of medical evidence, any other cogent and credible evidence would be sufficient to establish the fact of penetration beyond reasonable doubt. That was the holding of the Court of Appeal in ***Kassim Ali v R (Mombasa Court of Appeal Crim. Case No. 84 of 2005; [2006] eKLR)*** where the Court said:

> So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

26. The Appellant raised two other legal arguments about the conduct of the trial and the Prosecution Case. The first one was that the trial was a nullity because the Court took the evidence of PW3 – MC – without conducting a *voir* dire first. The Appellant cited a number of Court of Appeal decisions which have held that it vitiates a criminal trial if a witness of tender years is allowed to be sworn and for their evidence to be taken if the Court has not satisfied itself first that the witness understands the nature and meaning of taking an oath. This is by dint of section 19 of the Oaths and Statutory Declarations Act.

27. The Oaths and Statutory Declarations Act does not define who a child of tender years is. The courts have held that a child of tender years for purposes of the Oaths and Statutory Act is one the age of under fourteen years (See ***Kibageny Arap Kolil v R*** (***1959) EA 82*** ***Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014***).

28. In the present case, MC was born on 26/08/2000. She testified on 09/07/2015. She was fourteen years and ten months when she testified. She was a child; but not one of tender years. There was, therefore, no requirement to conduct a *voir dire* first.

29. The Appellant also argues that the Prosecution failed to call some crucial witness and that under the authority in ***Bukenya & Others v Uganda [1972] E.A. 549*** we should presume that the witnesses would have given evidence adverse to the Prosecution. The witnesses the Appellant complains were not called were: E – who was mentioned in the testimony of PW1 and the other elders who went to ambush the Appellant at his house.

30. It is true that the prosecution has a duty to call all witnesses that are necessary to establish the truth even though their evidence may be inconsistent as was stated by the former East Africa Court of Appeal in the ***Bukenya Case.*** Where a material witness is not called, the Court may infer that the evidence of that witness would have been adverse to the Prosecution. However, this inference is only drawn where the prosecution evidence is weak and inadequate to support a conviction. It must first be established that the witness who was not called was material and essential; there is no duty to call a superfluity of witnesses to prove a particular point. See: ***John Waweru Njoka v R Court of Appeal at Nyeri Criminal Appeal 115 of 2001*** ***(2005) KLR 175*** and ***Bare Mohamed v R High Court At Garissa Criminal Appeal No. 106 of 2014).***

31. In the present case, I am not persuaded that E was a "material and essential" witness in any sense of the word. All she did was to tell PW1 that the Complainant was in the Appellant's house. PW1 believed that information and acted on it. Hence, E testimony was not material or essential at all. As for the fifteen or so odd elders who accompanied PW1 and her husband to the Appellant's house early that morning to confront his, the testimony of one was as good as the rest. There was no necessity to call all of them to testify to the same facts.

32. The Appellant also argues that there were a number of inconsistencies in the Prosecution case which should have been resolved in his favour. He flagged out the following discrepancies which he says are major:

> a. That PW1 claimed at first that MC had gone to church on 22/11/2014 and did not return then a short while later she claimed that she had sent MC to the shop that evening at 6:00pm;
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> b. That MC testified that the defilement happened on 26/11/2014 while PW1 and the Charge Sheet say it was on 22/11/2014.
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> c. That MC claimed she had never had sex before while the Nurse (PW4) testified that he found an old broken hymen upon examination.

33. As noted by the Uganda Court of Appeal in ***Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6*** it is not very contradiction that warrants rejection of evidence – see ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** ***Criminal Appeal NO. 5 OF 2013*****.** As the court put it:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

34. Having looked at the trial Court record in its entirety and in context, I have come to the conclusion that the inconsistencies in question here are not material at all; they can be ignored as they have no bearing on the veracity of the material evidence tending to demonstrate the guilt of the Appellant. The so-called contradictions can be explained by passage of time, lapse of memory, or, in the case of PW3's testimony about her broken hymen, factors other than incredulity of the witness. Regarding the question whether the Complainant was having sex for the first time or not, two possible explanations might exist for the old broken hymen: one is that hymen's can be broken by activities other than sexual intercourse; two is that MC could have been stigmatized not to admit that she had been earlier defiled. In either cases, the crucial point is that the Court believed, with good reason, that she had been defiled on the material night; and that the evidence of PW4 corroborated that testimony.

35. Lastly, the Appellant complains that the Learned Trial Magistrate made no finding of facts regarding his defence especially considering that the Prosecution did not utilize section 309 of the Criminal Procedure Code to call further evidence to reply to the alibi defence the Appellant had established in his defence.

36. As reproduced above, the Learned Trial Magistrate did consider the defence tendered and rejected it as implausible. She, conversely, found the Prosecution narrative believable. Indeed, the Learned Trial Magistrate was categorical that she believed the Complainant and her mother (PW1). I have no reason to diverge from this finding of fact made by the Learned Trial Magistrate who saw and heard the witnesses. She disbelieved both the Appellant and his witness as not telling the truth. There is no indication at all that she erred in that assessment. The credibility of the Prosecution witness completely dislodged the alibi defence. There was no need to call any extra witnesses to disprove the alibi defence.

37. The upshot is that the appeal against conviction is wholly unmeritorious and it is hereby dismissed.

38. As for sentence, the Appellant was imprisoned for twenty years. This is the minimu sentence allowed by the law upon conviction for an offence contrary to section 8(1) as ready together with section 8(3) of the Sexual Offences Act. Therefore, no appeal against sentence is possible here.

39. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

> **a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.**
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> **b. The sentence imposed by the Trial Court of imprisonment for twenty years is affirmed**.

40. Orders accordingly

Dated at Nakuru this 8th day of November, 2019

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JOEL NGUGI

JUDGE

Delivered at Nakuru this 11th day of November, 2019

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J. N. NGUGI

JUDGE