



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 290 OF 2014

GR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. A.TOWETT. delivered on the 4th December 2014 in Nakuru CM Criminal Case No. 2213 of 2012 in Republic v Geoffrey Rono)

JUDGMENT

1. The Appellant was charged with two counts of **defilement of a girl contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006** and alternative charge to each count of defilement.
2. Particulars to count one are that, on the the 24th and 25th day of July 2012 at [Particulars Withheld] Village in Kuresoi District within Nakuru County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **B C** a child aged 10 years in contravention of the said Act.
3. Particulars to count two are that on on the the 24th and 25th day of July 2012 at [Particulars Withheld] Village in kuresoi District within Nakuru County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **F C** a child aged 11 years in contravention of the said Act.
4. Alternative to each count is the **offence of committing indecent act contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on the the 24th and 25th day of July 2012 at [Particulars Withheld] Village in Kuresoi District within Nakuru county the Appellant intentionally and unlawfully touched the vagina of **B C** and **F C** both child aged 10 and 11 years respectively.
5. When the appellant was place on his defence, he denied having committed the offence and said the charges were fabricated against him. He was convicted of the main charge and sentenced to life imprisonment.
6. Being aggrieved by decision of the trial magistrate, the appellant filed this appeal on both conviction and sentence on the following grounds:-
 - i. That the trial magistrate erred in fact and in law by convicting the appellant on an offence that was not proved beyond reasonable doubt.
 - ii. That the trial magistrate erred in fact and law by failing to note that the evidence adduced lacked corroboration.
 - iii. That the trial magistrate erred in fact and law by failing to consider his defence of *alibi* and by holding that the prosecution evidence tendered could rebut the defence of *alibi* without production of the recovered exhibits.
7. The appellant relied on ground of appeal and written submissions filed.
8. In response, **Ms Nyakira** for the state submitted that the state opposes the appeal on ground that the evidence adduced in the lower court was sufficient. She submitted that there was evidence that two children had been defiled.
9. She further submitted that PW2 who is complainant in count testified that while her mother was away, the father woke her up at night to fetch water as it was raining heavily. She submitted that the girl testified that as she was going, the appellant who is her father pulled her, in the process he slapped her then pulled her to the bed, took a knife, placed on the bed then undressed her and had carnal knowledge of her.

10. Ms Nyakira submitted that PW2's evidence was corroborated by the evidence of PW4 a nursing officer who examined the two girls after the incident. She submitted that PW4 had laceration on her vagina and PW2 had laceration on the walls of her vagina.

11. She submitted that ages of the two girls were assessed and were found to be minors. She further submitted that the lower court considered the appellant's defence. She concluded that in the presence of overwhelming evidence against the appellant, the trial court found that the charges had been proved beyond reasonable doubt. She urged the court to find that the appellant was guilty.

ANALYSIS AND DETERMINATION

12. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *OKENO VS REPUBLIC [1972] EA 32* where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 Court's findings and conclusions; 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] EA 424.)”

13. In view of the above, I have perused and considered the trial court record. What I consider to be in issue is whether the charges against the appellant were proved beyond reasonable doubt and two whether the appellant's defence of *alibi* was considered.

14. On the first issue, PW1 testified that in the night of 24th July, 2012, she was sleeping with her elder sister when her father went to wake her up and took her to his bed where he removed her pant and had carnal knowledge of her. After that, he asked her to wipe herself and threatened her against telling anybody as it would be a curse. She said this was repeated the next day 25th July 2012.

15. In cross-examination by court, PW1 said that her sister later informed her that their father also defiled her.

16. PW2 who is the complainant in count 2 testified that she was in their home with her father, 2 brothers and PW1 when in the night her father asked her to go and fetch rain water, she said her father handed over a torch to her as she held the torch her father pulled her and when she cried he slapped her, placed her on bed, then undressed her and had carnal knowledge of her. After the act, he asked her to wipe herself and wipe his penis with a piece of cloth. The girl said she wiped herself and wiped him. PW2 said her father warned her about telling anyone about the incident, as she will be cursed. She said the next morning their father told them their mother had left his penis for us.

17. In cross-examination PW2 said they wore uniform, went to their Aunt B the next day, and informed her what their father did to them. B then called their mother.

18. PW3, mother to PW1 and PW2 testified that during the material time, she had gone to her home after quarrelling with her husband who is the father to the complainant's herein. She confirmed that her sister B called her to pick her daughters. She learnt from her sister that the husband/appellant had defiled their daughters PW1 and PW2.

19. She said that she checked PW1 and found blood on her underpants and on checking PW2 she had whitish discharge on her pants. She said she took her to Keringet hospital.

20. PW4 who examined PW1 and PW2 found that PW1 had broken hymen and laceration on her vaginal wall and approximate age of injury was one day. He said urine examination showed presence of sperms. He confirmed that the child was defiled.

21. He also examined PW2 and found that her hymen was torn and vaginal wall had lacerations; and vaginal swab showed sperms in the vagina. He estimated age on injury as one day. He confirmed that PW2 was defiled.

22. PW6 B T testified that she is a cousin to the complainant's mother. She said on 25th June 2012 she met her cousin's children PW1 and PW2. She said that the children told her they had been chased from school because of school fees. PW6 said upon asking them if they had informed their father they said yes and that their father had chased them from home. PW6 said she called the children's mother who went to her house the next day. She said when PW3 arrived she talked to her child as she left briefly and when she came back, she found PW3 crying, on PW6 asking her why she was crying, PW3 told her that her daughters had been defiled by their father. She confirmed that PW3 who is the complainants' mother had briefly separated with her husband the appellant herein.

23. PW5 the investigating officer produced age assessment report that showed PW2 was 13 years.

24. On ingredients of the offence, the medical evidence confirmed defilement, the complainant's age were confirmed and in respect to identification, the children knew the appellant, as he is their father.

25. I wish to start with the last ground of appeal, which is whether there was proper finding on appellant's defence of *alibi*. In his defence, the appellant said after quarrelling with PW3, she went to her home with children. He however, never availed evidence to prove that he never remained at their home with the children when his wife left their matrimonial home. On the other hand, PW5, the investigating officer testified that he enquired from neighbours and confirmed that appellant and PW3 had separated after disagreement and PW6 confirmed that the children had been left with the appellant. The appellant's defence of *alibi* was not therefore proved. That ground of appeal cannot

therefore stand.

26. The second issue that I wish to consider is credibility of the two complainants PW1 and PW2. There is no doubt that there was bad blood between appellant and his wife PW3 who is also the mother of PW1 and PW2.

27. PW1 and PW2 said the morning after the second incident of defilement they went to PW6 whom they say is their mother's sister though she confirmed she is a cousin. Cousin in or African culture is referred to as sister. I do not doubt the children on that. What I however have an issue with is why the two children said they went to PW6 and informed her their father had defiled them which prompted her to call PW3. PW3 gave the same version as the two children. PW6 on the other hand said the children informed her that they had been chased from school because of school fees and that they had informed their father who chased them from home. At the time PW6 left the children to talk to their mother, she had not known the children were defiled. She said she learnt of defilement when she came back and found PW3 crying. According to PW6, she learnt from PW3 that the two girls had been defiled.

28. In the presence of bad blood that existed at the time between appellant and PW3, inconsistency in evidence of the 2 girls and PW6 casts doubt on credibility of PW1, PW2 and PW3.

29. From the foregoing I find that in the presence of inconsistency in evidence adduced by PW1, PW2, PW3 on one side and PW6 on the side, it was unsafe to convict the appellant.

30. FINAL ORDERS

- 1. Appeal herein succeed on both conviction and sentence.**
- 2. Conviction and sentence against appellant on both main charges and the alternative charges are set aside.**
- 3. Appellant to be set free forthwith unless he is lawfully held.**

Judgment dated, signed and delivered at Nakuru this 4th day of December, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

Appellant in person

Nyakira for State