



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CRIMINAL APPEAL NO. 127 OF 2017.**

**PETER LUSALA MATEKWA.....APPELLANT**

**VERUS.**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Conviction and Sentence in Original KIMILILI SPM CR. NO. 82/2015 delivered on 17<sup>th</sup> November, 2017 by D.O. Onyango, SPM).*

**JUDGMENT.**

The appellant Peter Lusala Matekwa was charged with the offence of defilement Contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. Particulars of offence being between 3<sup>rd</sup> and 7<sup>th</sup> days of December, 2015 in Lukuyani District within Kakamega County, intentionally caused his Penis to penetrate the vagina of Z S S, a child aged 13 years.

The evidence before trial court was that 3.12.2015 the complainant Z S S, who is 14 years old and a student at [Particulars Withheld] Secondary School in Form 1 was invited to the home of the appellant. She went to Nagila market where she met him and they went to appellant's home at Matunda. She slept but did not have Sexual intercourse. The next day the appellant went to his 2<sup>nd</sup> hand clothes selling business and came back in the evening. They slept and he inserted his penis in her vagina and had protected sex using a condom. She was with him and on the 4<sup>th</sup> day joined him at his clothes selling business when the complainant's brother came with police officers and arrested both of them and took them to Brigadier Police Station. The next day she was taken to hospital where she was examined.

Pw3 A N S the mother of the complainant testified that the complainant was her daughter and on 29.11.2015 the complainant from members of public disappeared from home. On 3.12.2015 she reported her disappearance to Brigadier Police on 7.12.2015 she received information that the complainant had been seen at Moi's Bridge in company of a young man selling clothes. She went with her son to Moi's Bridge where she found the complainant and the appellant. They arrested them and took them to the Police station. Pw4 PC. Murandi received the appellant and complainant and referred complainant to Naitiri Hospital for examination. Pw2 Michael Okumamuti a Clinical officer attached to Naitiri Hospital examined the complainant and found her labia minora had inflammation. She was on her menses.

The appellant in his sworn defence testified as to his arrest on allegation of keeping a girl which he denied. Upon considering the above evidence the trial magistrate found the appellant guilty of the main charge, convicted him and sentenced him to serve 20 years imprisonment.

The appellant filed this appeal on the grounds that the court relied on hearsay evidence, that key witness was not called and that the sentence was excessive in the circumstances. The appellant filed written submissions. He submitted that the charge sheet indicated that complainant to be Z S S and the evidence adduced is that of Z H S; and therefore there was an error in the charge sheet, which was therefore defective.

Mr. Akello for state opposed the appeal. He submitted that the case was properly investigated. There was evidence that age of the complainant was 13 years; and birth certificate was produced; he further submitted that appellant was arrested with the complainant on the variation on the names in the charge sheet and the Birth certificate, the mother confirmed the names refer to the complainant. Finally he submits that the charge was not defective.

This is a first appeal. The duty of the first appellate court is to re-evaluate the evidence and arrive at its own conclusion giving allowance to the fact that Court did not hear and see the witness testifying.

The appellant in his submissions submitted extensively on the discrepancy in the names of the complainant in the charge sheet, the birth certificate and the name of the person who testified as the complainant. In the charge sheet the complainant is named as Z S S. The Birth certificate produced by Pw3 the mother of the complainant Exh. 4 shows that the Certificate of Birth is for Z S N. The complainant who testified on 24.8.2016 gave her name as Z H S. Mr. Akello for the state submitted that Pw3 the mother of the accused clarified the same and in any case there was no prejudicial to the appellant.

I have perused the documents, it is true that the names in the charge sheet of the complainant is shown as Z S S; in the birth certificate as Z S N and in the evidence as Z H S. There is clearly discrepancy on the names of the complainant in the 3 instances of concern to this Court is whether the Birth certificate produced which bears the name Z S N belongs to the complainant. While as Mr. Akello submits, that all the names used; Z S S, according to the charge sheet; Z S N according to the Birth Certificate. Z H S the person who gave evidence as the complainant and Z S according to Pw3 A N S the mother of the complainant, may refer to the same person, these discrepancy was not explained and may point to an inconsistency in the evidence of the prosecution.

Mr. Akello submitted that there was evidence of penetration. He placed great reliance on the evidence of Pw2 Michael Okumamuti the Clinical officer who produced a P3 Form which was evidence of defilement. The evidence of the clinical officer is as follows;

I examined her on the 8/12/2015. She had changed clothes. She was in the company of her mother. When I examined her genitiation the labia minora had inflammation. The hymen was missing. There was blood indicating that she was on menses. We conducted HIV test which was negative. Syphilis and pregnancy tests were negative. There were epithelial cells in the blood. I did not prescribe PEP because it had been over 72 hours after the incident occurred but the parents prevailed on us and she was eventually given the drugs. I signed the P3 Form and treatment notes.

Court: Treatment notes is PExh. 1.

P3 Form: Is PExh. 2.

Cross-Examined by Accused:

I am a Clinical Officer who treated Z and filled her P3 Form. I have been a Clinical Officer for 9 years. I did not examine you.

The P3 Form referred to as

***a) Describe in detail the physical state of any injuries to genitalia with especial reference to labia majora, labia minora, vagina and cervix and conclusion***

- NEG

- No injury to labia majora

- Hyperalumic labia minora

- Hymen partent.

b) Note presence of discharge, blood or venereal infection, from genitalia or on body externally.

- Blood stained has a piece of clothes used as a pad (Has menses)

The medical examination evidence in sexual offence is important, not only in to prove penetration but also to provide other materials for prosecution in Sexual offences including the age. Central to the examination of the complainant is the conclusion from the examination and observation made. In Sexual offences the Medical Practitioner must give an opinion from the result of examination whether there was penetration or not. In this case both in the evidence in court and in the P3 Form, the Clinical officer did not arrive at the conclusion from his examination. If he did; he did not state so in his evidence in court or record the same in the P3 produced Exh. 2.

It is not disputed that the only evidence of the offence of defilement is that of the victim who is a child. Section 124 on evidence of Children provides;

Section 124 Evidence Act;

*124 Corroboration required in Criminal Cases*

*Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with the section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

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

The provision to the above Section allows the court to convict without corroboration the evidence of a victim where the accused is charged with a sexual offence if **for reasons to be recorded in the proceeding the court is satisfied that the victim is telling the truth**. The proviso makes it clear that trial court must record the reasons in the proceedings where it is satisfied that the victim is telling he truth. The trial court therefore in its Judgment must indicate the reasons. The reason may be that the witness understands, the sexuality and Sexual organs, understands the act of penetration, reported the incident to parent or guardian at earliest opportunity, or if threatened by the accused to say so,

her evidence was consistent and credible; or that even upon cross – examination, she demonstrated credibility, both in her answers and personality. All these must be evidenced from the proceedings and as Judgment of this trial Court.

The reason for recording these reasons is not only to show that the trial court addressed its mind to the issue but also for the appellate court to ascertain whether the reasons were enough to bring the evidence of the complainant within the proviso to Section 124. Where no such reasons are given, the appellate court may make a finding that the Trial Court did not address its mind to that issue.

In the present appeal the trial magistrate in his Judgment stated; the most crucial evidence from Pw1. **I have warned myself of the danger of relying on the uncorroborated evidence of a minor. Pw1 gave a detailed account as to how she met the accused on the 3.12.2015 and stayed with him for about 4 days visiting various markets where the accused placed his trade of selling clothes. She was emphatic that during the 3 nights she was with the accused they had protected sex on the 2<sup>nd</sup> night. I watched the minor testify and have no reason to doubt her credibility regarding her evidences that the accused inserted his penis into her vagina.**

From the proceedings no reasons have been recorded which the trial magistrate considered to arrive at the conclusion that the witness was credible.

Considering this evidence in the trial court and upon consideration of this appeal I find that there were gaps in this prosecution evidence which will make the appellants conviction for an offence of defilement unsafe. I therefore allow the appeal, set aside the conviction and sentence of 20 years imprisonment imposed. I order the appellant be set at liberty unless otherwise lawfully detained.

**Dated and Delivered at Bungoma this 13<sup>th</sup> day of November, 2018.**

**S.N. RIECHI**

**JUDGE.**