



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL APPEAL NO 177 OF 2017**

**LOKORI LOSIOKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[An appeal from the original conviction and sentence from the Principal Magistrate's Court at Kabarnet criminal case no 1155 of 2016 delivered on the 31<sup>st</sup> day of July, 2017 by Hon. N.M. Idagwa RM]***

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act and an alternate of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which were that the Appellant on the 9<sup>th</sup> day of December, 2016 within Baringo County intentionally caused his genital organs (penis) to penetrate genital organs (vagina) of LC a child aged 2 <sup>1</sup>/<sub>2</sub> years. The particulars of the alternative was that the appellant on the 9<sup>th</sup> day of December, 2016 within Baringo County intentionally caused his genital organs (penis) to come in contact with the genital organs (Vagina) of LC a child aged 2 <sup>1</sup>/<sub>2</sub> years.

2. The appellant was aggrieved with the conviction and sentence and has appealed to this court with the following amended grounds:

“That the honourable court erred in both laws and facts when it convicted me:

1. And failed to observe the identification of accused was improper.
2. a) the complainant was not brought to trial (was not identified)
- b) Important exhibits were not brought (clothes)
3. The language was unusual to the accused.
4. Without observing that there was no forensic evidence to link the accused
5. Failed to note that my arrest was improper
6. Failed to comply with Article 50 (2) (g), (h) of the Constitution.
7. Without complying with section 123 of the Criminal Procedure Code.
8. And contravened section 85 (1) (2) revised CPC 2009.
9. Without appreciating that the purported clinical officer was incomplete.
10. And sentenced me illegal, unlawful and unconstitutional sentence.
11. And was wrong to find that the complainant's anus was penetrated in which evidence is non-existing
12. Accused was absent during the judgment reading.

3. The appellant filed his written submissions submitted to court in support of his amended grounds of appeal and stated as follows:

1. Ground one – Identification of the accused was improper

The allegations that the accused at 4pm took the complainant is far-fetched, unfounded and was not confirmed by the children or the said Cheptoi. The minor did not identify me before court, the evidence of PW1 does meet the threshold of section 109, 110 and 111 of the Evidence Act.

2. Ground Two – The important exhibits including the complainant were not availed

The whole proceedings are a nullity; the person who was allegedly defiled was not called as a witness. The records are silent about the alleged minor. *J Nv. Republic* [1982-88] KLR, Appeal No 9 of 2000 *F O v. Uganda*.

3. Ground Three - Language used was inappropriate

During plea the substance of the charge and every element was stated to the accused in 'Pokot' which he understands.

4. Ground Four - No forensic Examination done to link the accused

Section 36 of the Sexual Offences Act enjoins that appropriate samples to be taken from both the accused and the complainant subject to scientific testing and marching the outcomes.

5. Ground five – mode of arrest was under controversy

The person who alleged to have arrested me did so by hearsay, was not availed in court. The charge sheet and its particulars does not originate from the first report which is illegal and does not support the report made on 10/12/16. See *Ndegwa v. Republic* [1985] KLR 534.

6. Ground six, seven and eight – I was not accorded a fair trial

I was not represented by a counsel, this was a fundamental prejudice to the accused. I was not granted bail/bond as provided by section 123 of the CPC.

7. Ground Nine and Ten – Incompetent Clinical Officer.

PW3 the clinical officer is not registered under the medical and dental service providers as enjoined by section 7 of the Health Act. He did not disclose his qualifications proving the same.

4. In reply to the appellants written submission Ms. Macharia Ass. Prosecutor made oral submissions in court in opposition to this appeal and stated as follows:

Ms. Macharia – for the DPP

*“Appeal is opposed*

*The main ground of appeal is that there was no interpretation when PW1 was testifying.*

*I note that there was interpretation from Kiswahili to Pokot at the plea taking and even on the evidence of other witnesses.*

*The appellant was able to cross-examine the witnesses in Kiswahili. It is not true that he could not understand what the complainant was saying and that issue could have been raised then.*

*The evidence of PW1 the mother of the complainant is crucial. She is the one who found the appellant under the granary with the victim child sleeping beside him (the appellant laughs and says it is a lie.) The child was 2 ½ years. It was about 6pm the appellant told Pw1 that he had picked the child at 4pm but he did not explain why he had picked the child from many other children while they were playing.*

*On examination with the minor, the findings were that there was defilement, bruises on labia minora and whitish discharge. The doctor concluded that there was penetration.*

*We submit that the evidence was conclusive. We urge the court to consider the age of the child who was defiled who was about 2 ½ years.*

*If the court finds that there was miscarriage of justice in the interpretation of evidence of pw1, the court should order a re-trial.*

*Otherwise, the court should dismiss the appeal and let the appellant serve the sentence.”*

5. The prosecution availed a total of four witnesses who gave evidence against the accused as follows:

**“PW1 I K**

*I stay in [particulars withheld] I know the accused he is a neighbour; I have two children.*

*On 9/12/2016 at about 9am I left my elder daughter with C children as I went to Kinyach. I left JC with other children the eldest being 7 years old. When I came back at 6pm I did not get the child, I was told that she had been taken at 4pm by the accused.*

*I went to the accused's house, he was lying under the granary besides the complainant. He told me that he had collected the child at 4 pm. I do not know why he had taken child.*

*Next day I noted the child looked disturbed, she was just sitting down, not cheerful and could not walk properly. I checked her private parts, she had a lot of blood stains, I also saw some whitish discharge.*

*The child told me that the accused injured her at the private parts.*

*I reported the incident to the elders who came along and checked the child. We took the child to hospital at Kimnai. She was given first aid and recommended we take her to Kabarnet; next day we took her to Kabarnet. We were further referred to Nakuru where the child was admitted on 11/12/2016 and discharged on 14/12/2016.*

*Upon discharge from Nakuru we reported the case to Kabarnet police station. The doctor confirmed that the child had been defiled.*

**Cross-examination by accused**

*You took the child from C home at about 4pm. When I left for Kinyach you were back at home.*

**PW2 Michael Kakuko**

*I stay at Kipnai, I am the Area Chief Kipnai Sub-location. On 9/12/2016 I was called by Lydia a subordinate staff at Kipnai dispensary, I went to the dispensary. She told me that the child had been defiled, the child was bleeding from her private parts. I asked the mother to take the child to Kabarnet for treatment. She then implicated the accused to the defilement.*

*Next day I went to look for the accused. I called the DO who sent me a motor vehicle and police officers. The accused was then arrested and taken to Kolowa AP Camp – DO's office.*

**Cross-examination by accused**

*The complainant's mother implicated you as the one who defiled the complainant.*

**PW3 Benjamin Kendagor**

*I am a clinical officer at Kaptimbor. On 17/1/17 I recovered the complainant 2 1/2 years accompanied by her mother and police officers with allegations on defilement on 9/12/2016 by someone known to her mother.*

*She was treated on 10/12/2016 at Barnet memorial and referred to Nairobi women's Hospital Nakuru where she was admitted to 12/12/2016.*

*On examination her hymen was present but there were bruises on the labia minora, there was also whitish discharge. Urination showed epithelial cells present. Whitish discharge, presence of epithelial cells and bruises on the labia minora concluded that there was penetration.*

*Age assessment on her left hand to determine her age, with 20 non-permanent tooth she was under 2 years.*

*The medical reports from the victim, she was treated at Kabarnet for defilement and referred for further treatment at Nakuru.*

*The medical records for the victim from Nairobi Women's hospital Nakuru filled by Edwin Clinical Officer shows that the child was admitted on 10/12/2016 on account of sexual assault by a neighbour. She had swollen genitals, hymen was intact.*

**Cross-examination by accused**

*The accused was not convicted in hospital, I did not examine him. Due to lapse of time examining you would not have yielded any positive results.*

**PW4 No. xxxxx P.C Moses Mirragon**

I am the Investigating officer of Nginyany police station. On 13/12/2016 at about 12pm I was at the station when police from Kalowa operation camp brought the suspect for allegedly having defiled a girl aged 2 years at [particulars withheld] village.

I rearrested the accused, the victim was then undergoing treatment at Provisional General Hospital Nakuru, and she had been admitted. The following day the accused was arraigned in court as we ought to complete investigations.

On 29/12/2016 the victim was brought by her mother together with the Area Chief, I recorded the statements. She alleged to have left the child at a Neighbour's home and went to Kinyach market on coming back she was told that the accused had picked the complainant and went with her to his home.

She went to check and found the suspect relaxing under a granary and the child was sleeping beside him; she picked the child and took her home. Next morning realized that the child had difficulties in walking, she checked her private parts and noted blood from her vagina. The child stated that it was the accused who defiled her.

I took the victim to hospital for age assessment and charged the accused before court.

#### **Cross-examination by accused**

The child was defiled as per the doctor's assessment. The evidence in court shall show whether you defiled the child or not."

6. The appellant/accused gave an unsworn defence as **DW1** and stated as follows:

**"DW1 Lokori Losiakol**

I hail from Koikoi, on the material date I went to work upto 3pm when I went to take Busaa but I did not get any. I ate at a friend's place bathed at the river and went home and went to bed.

I got someone, Romanda at my house at night; he told me that I was being sought. We went to the Chief's Office, there were five men at the office together with the complainant's grandfather. It was alleged that I had defiled the complainant, I denied the allegations.

I stayed at the Chief's office to the third day when the chief came and it was reported to him that cattle had been stolen. We went to search for the complainant.

The chief returned with a search party at about 2pm with two suspects. A motor vehicle was called and I was taken to Kolowa, where I spent the night.

The charges were a fabrication, the next day I was taken to Marakwet where I spent the night. I was taken to Chemolingot then to Nginyang where I slept at the police station and later charged before court. I did not commit the offence. They tried to coerce me to concede but I refused."

7. The trial court considered the evidence of the prosecution against the accused in consideration of the accused's defence and had this to state:

#### **Analysis and Determination**

The issues for determination by this court is whether the offence of defilement has been proved and if so, whether the accused was the perpetrator.

The critical ingredients that form an offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

On the issue of age of the complainant; am guided by **F O v. Uganda** Court of Appeal No. 2 of 2000 in which the court held that;

**"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."**

The complainant's mother (PW1) testified that the complainant was aged two and half years old. Pw3, testified that the complainant was subjected to age assessment, and was estimated to be approximately 2 years old. Age assessment report was produced to that effect. The court also observed the complainant, and I am satisfied that he was thus a child in the meaning of the Children's Act.

The Children's Act define a "child" to mean any human being under the age of eighteen (18) years. Having established that the complainant was aged 2 years old, I make a finding that he was thus a child in the meaning of the Children's Act.

The identity of the accused herein is not in dispute. The complainant's mother was very categorical in her testimony that she very well knew the accused prior to the incident. The accused, she stated was their neighbour. She was firm that upon being told that the

*accused collected the victim and took her away, she went to the accused's home where she found the accused lying beside the victim under the granary.*

*The incident herein took place in broad day light. There was no room for any mistaken identification. The complainant's mother identified the accused by recognition. I reach a finding that the accused has been positively identified as the complainant's assailant.*

*On the issue of penetration, the clinician (pw3) who examined the complainant and filled up the form and emphatic that on subject the complainant to medical examination, the hymen was present but there were bruises on both labia majora and minora and that urinalysis showed presence of several epithelia cells.*

*He concluded that due to the whitish discharge, presence of epithelia cells and bruises on the complainant's private parts, there had been penetration.*

*The clinical findings on examination are consistent with the complainant's testimony through her mother. In fact. The medical evidence corroborates the complainant's evidence. I am convinced and make a finding that the complainant's anus was penetrated.*

### **Disposition**

*I hold that the evidence adduced before this court has established with certainty, and beyond doubt that the accused on the material day and time defiled the complainant. I find merit in the defence offered by the accused, the same did not however dislodge and or rebut the overwhelming prosecution's evidence."*

### **Issues for determination**

8. The issues for determination are whether the offence herein was proved beyond reasonable doubt and, if so, whether the appellant was proved to be the person who committed the offence.

### **Determination**

#### ***Act of the defilement***

9. From the medical evidence presented by the clinical officer PW3, the claim by the complainant's mother (PW1) that the child had blood stains in her private parts appears to have been confirmed by the findings and conclusion of penetration as–

*"On examination her hymen was present but there were bruises on the labia minora, there was also whitish discharge. Urination showed epithelial cells present. Whitish discharge, presence of epithelial cells and bruises on the labia minora concluded that there was penetration."*

10. I would find the fact of defilement proved as penetration need not be complete and partial is sufficient in terms of section 2 of the Sexual Offences Act, No. 3 of 2006.

### **Circumstantial evidence**

11. There is, however, only circumstantial evidence alleged by PW1, the complainant's mother that she was told that the accused had taken the child from the home where she had left her, that the accused was found lying under a granary with the complainant's sleeping beside him, and that she had the next morning discovered injuries on the complainant's private parts which was confirmed by medical examination.

12. The complainant's mother said that she had left the girl in the neighbour's home at 9.00am when she went to Kinyach market and upon return later was told by some children that the accused had taken the complainant at 4.00pm. She testified that the accused had told her that he had taken the child at 4.00pm. Obviously, that was nothing untoward about the fact that the accused had taken the child with him or that he was lying under the granary with the complainant sleeping beside him because she had just taken the child home with and it was not until the next day that she noticed that the child was disturbed.

13. In **Kariuki Karanja v. R** (1986) KLR 190, the Court of Appeal considered circumstantial evidence held that:

*"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: **Rex v. Kipkering Arap Koske**, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence."*

14. The court cannot rule out that the complainant may have been assaulted, if she were, by any other person between the time the mother left her at the neighbour's home at 9.00am and the time she came back from the market and allegedly found her at the accused's home. The fact of having been found lying under a granary with the complainant asleep beside him is not inconsistent with his innocence of the charges of defilement. The complainant may have been assaulted before the accused took her at 4.00pm, if ever he did, as alleged by the complainant's mother. The children who allegedly told the mother that the accused had taken the complainant were not called as witnesses. The accused

was not found in the act of assaulting the complainant and it was all circumstantial evidence, which must in accordance with authority, be inconsistent with his innocence and inexplicable on any other hypothesis than that of guilt. It is not so in this case, and it would consequently be unsafe to convict of the circumstantial evidence adduced by the prosecution.

### **Identification of the accused**

15. The only evidence which connects the accused to the act of defilement of the complainant is the evidence of the complainant's mother (PW1) who testified that she had been told by children who were not called as witnesses that it was the appellant who had taken the complainant from the neighbour's home where she had left her with other children and that she had found the complainant lying beside the appellant under a granary, and further that the complainant had told her that it was the appellant who had injured her. Without calling as witnesses the children who told her that the appellant had taken the complainant and the complainant who told her that it was the appellant who injured her, the mother's testimony is inadmissible hearsay.

16. In addition, PW1's evidence is truly the identification evidence of a single witness for great caution is counselled before it can be made a basis for conviction. See *Oluoch v. R* (1985) KLR 549 where it was held that:

*"It is trite that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care: Roria v. Republic (1967) EA 583, Abdallah bin Wendo & Anor. (1953) 20 EACA 166 and Benjamin Mugo Mwangi & Anor v. Republic Cri. Appeal No. 100 of 1983 (unreported)."*

17. Although, the complainant knew the appellant as a neighbour removing the possibility of error of identification as the person allegedly found with the complainant lying under a granary while the complainant slept as the identification is said to have been during the day sometime after 4.00pm, her involvement of the appellant in the offence required corroboration. The complainant mother's evidence is not protected by the Proviso of section 124 of the Evidence Act from the general rule requiring corroboration of evidence of single identifying witness. The protection is afforded to the victim, not the mother or other relative, of the sexual offence as follows:

### **"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 that 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. [Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]"*

18. That the complainant's mother found, at worst, the appellant lying next to the sleeping complainant without corroborating evidence of either the child herself testifying, as best she can, on what transpired with the appellant, or of the corroborative fact of the appellant's taking the complainant girl with him by the evidence of the children who told the complainant so, it is not safe to convict the appellant on the uncorroborated evidence of the complainant's mother as to the identity of the assailant.

### **Gaps in the prosecution evidence**

19. This case is fraught with grave danger of wrongful conviction in the absence of the evidence of the child complainant and of the children who allegedly informed the complainant's mother that the accused had taken the child, and consequently placing the complainant in the hands of the accused, and providing opportunity for the accused to defile her. The complainant's evidence would have pointed to the accused as the person who took advantage of her after taking her from the rest of the child. In the presence of these gaps, it is wholly unsafe to convict the appellant.

### **Request for retrial**

20. Responding to the complaint by the accused that the proceedings were not interpreted in a language that he understood, the DPP suggested that the court should order a retrial if it formed the view that was the case and there had been a defective trial. The court has confirmed from the record that there was Pokot language interpretation and that the accused had been able to cross-examine the witnesses at length and consequently dismiss the objection on language of the trial. However, while considering the order for retrial, it is noted that in this case the court has found that there was lack of sufficient evidence of sufficient evidence, which cannot be a ground for ordering a retrial.

21. The present case is not suitable for retrial. The court has quashed the conviction and set aside the sentence because of lack of sufficient proof and not for any illegality defect in trial procedure. As held by the Court of Appeal in *Opicho v. R* 2009) KLR 369-

*"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the Prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."*

22. The appellant has served imprisonment for 1 year and 5 months of the sentence for a wrongful conviction. It is not in the interests of

justice that the appellant who has served such imprisonment be retried in a trial giving opportunity for the prosecution to fill in the gaps in their case as identified above. In accordance with the test for retrial as to possibility of conviction in the retrial, I do not consider that the appellant would be properly convicted on the evidence before the court, even if a retrial were ordered.

23. It is greatly regretted that the want of sufficient evidence has led to the dismissal of a charge of defilement against a 2 ½ year-old victim, but it is simply unsafe to convict in the circumstances of this case. The girl may have been assaulted, but the appellant was not proved, beyond reasonable doubt, to have been the perpetrator.

#### **ORDERS**

24. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appellant's conviction for the offence of defilement contrary to section 8 (1) and (2) of the Sexual Offences Act and the sentence of imprisonment for life therefor are quashed and set aside.
2. There shall, therefore, be an order for the appellant's immediate release unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF DECEMBER 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:-**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.