



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 175 OF 2016

ROBERT KIPROTICH LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's

Criminal Case No. 194 of 2012 by Hon. J. N. Nthuku S. R. M on 23/11/16).

JUDGMENT

1. The appeal herein arises out of a judgment where **Robert Kiprotich Langat**, the Appellant, was convicted on a charge of defilement and sentenced to life imprisonment.
2. The case presented by the state was that on the **15th day of August, 2012**, the Appellant called the Complainant, a **5 years old child** and removed her pants then violated her sexually. The child was subjected to medical examination where it was established that her hymen was perforated and her anus had lacerations. The matter was reported to the police who investigated and charged the Appellant.
3. When put on his defence, the Appellant denied having defiled the complainant.
4. The learned trial magistrate considered evidence adduced and reached a finding that the complainant had no reason to frame the accused. That her evidence was corroborated by that of the Doctor and Government Analyst.
5. The Appellant was aggrieved by the conviction and sentence meted out. Therefore he appealed on grounds that: The learned magistrate erred in law and fact: By convicting the Appellant on a single testimony which contravenes Section 124 of the Evidence Act; replying on the evidence of a used condom as an indication of penetrative sex; and failing to accord due weight to the Appellant's defence.
6. The Appellant through the firm of **Gordon Ogolla, Kipkoach & Co. Advocates** canvassed the appeal through written submissions. The main issue for determination was identified as whether the case against the Appellant was proved beyond reasonable doubt by the prosecution.
7. It was contended that the element of penetration was not proved and the prosecution failed to link the Appellant with the alleged penetration. That evidence of the Complainant was not corroborated hence Section 124 of the Evidence Act was not complied with.
8. That the learned magistrate acted on evidence of a rumour having found that the Complainant did not understand the meaning of oath. The case of **Joseph Maina –Vs- Republic (2016) eKLR** was cited in this regard where the court state as follows:

“This is a contradiction with the second voire dire for PW2. From the requirement of the law I am satisfied that the voire dire was defective. The trial magistrate did not establish that the said child witness understands the nature of an oath.....”

9. That in reliance on the medical evidence where the alleged defilement by the Appellant could not be reconciled with the medical report, the learned magistrate disregarded the Appellant's submissions without any reason and shifted the burden of proof to the Appellant when it noted that “the accused person never explained how the police came into the possession of a condom containing his sperms.”
10. Regarding reliance on the DNA result, it was argued that the procedure having not been adapted, was unlawful. That in the absence of the DNA evidence, the appellant would not have been linked with the act. In this regard the case of **Daniel Salat herein V. Republic (2015)**

eKLR was cited.

11. Further it was urged that the defence of alibi put up was not rebutted by the prosecution. That the prosecution failed to apply to the court to obtain evidence for purpose of rebutting the alibi of the appellant.

12. The State through, learned counsel **Mr. Omutelema** opposed the appeal. He urged that the ingredients of the offence were proved beyond reasonable doubt. That the evidence of the child, PW1, was confirmed by that of PW2 her mother, the clinical officer who attended to the child whose age was proved by her mother. The Appellant was a neighbour and well known by the child.

13. He stated further that the court conducted *voire dire* examination and the child was affirmed because she did not understand the meaning of oath. She was however intelligent, was cross-examined and was firm and consistent. That per the proviso to Section 124 of the Evidence Act, if the child could be believed the court can act on her evidence and this was the case herein. That the condom recovered from the house of the Appellant was properly adduced in evidence and even without the DNA evidence the court could still rely on other evidence adduced and the alibi defence put up was not believed by the court.

14. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

15. To prove and sustain the charge of defilement the prosecution was duty bound to establish the following ingredients:

§ *That there was penetrative sexual intercourse of a female.*

§ *That the female was a minor whose age must be established.*

§ *That it was the accused/appellant who had sexual intercourse with the female minor.*

16. **PW2 L A** the mother of the Complainant stated that she was 5 years old. A child health card that was issued at birth has the date of birth as 26th August, 2006. This was sufficient proof of the child who was six (6) years old at the time of the incident.

17. The child having been of tender age was taken through *voire dire* examination prior to testifying. The contention of the Appellant is that the child did not understand the meaning of oath. Therefore the court should not have relied on her evidence. The reason why the *voir dire* examination is conducted is to determine the competence of the witness to testify, whether he/she is intelligent enough to give evidence. In the case of **Peter Kariga Kiune, Criminal Appeal No.77 of 1982 (unreported)** the court stated that:

“where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination whether the child understands the nature of oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth....”

18. In the case the learned magistrate formed the opinion that the child was seized of sufficient intelligence to testify and she understood the importance of telling the truth. From the questions put to her and answers given it is apparent that she understood that being deliberately untruthful would result into receiving serious punishment.

19. It is the contention of the appellant that evidence of the child was not corroborated. Section 124 of the Evidence Act provides thus:

“.....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.”

20. In any other case evidence adduced by a child of tender years would call for corroboration, in order for the accused person to be convicted. But the proviso to **Section 124** of the Act is very clear, as long as the court finds the child to be truthful then a conviction can ensue.

21. The child stated that the Appellant inserted his “chuchu” into her bottom. That he did “tabia mbaya” to her. On cross-examination she stated that he took her to his house where he committed the act. She was taken to Njoro Health Facility the following day (17th August, 2012) where she was examined and treated. The treatment notes that were adduced in evidence show that there was a fresh perforated hymen and the anus had lacerations. A high vaginal swab done revealed numerous epithelial cells and pus cells. PW3 Jacob Chelimo, the clinical officer who filled the P3 used the treatment notes to fill the P3. The medical practitioner opined that the child had been defiled.

22. Penetration is defined by the Sexual Offences Act as follows:

“Partial or complete insertion of the genital organs or a person into the genital organs of another person.”

23. She alluded to “chuchu” is a word commonly used by children to refer to a male genitals as having been inserted into her anus. Medical

evidence adduced therefore proved the act of penetration.

24. The State/Respondent argues that the act of penetration was perpetrated by the Appellant herein. In her judgement the learned trial magistrate believed the child when she stated that her assailant was the appellant. The Appellant was known to the child. He was a neighbour. In her testimony she said that before the Appellant committed the act he put on a condom. A condom was removed by the police. PW2 stated that the AP from Wanjeri arrested the Appellant and recovered a condom. **PW4 No.xxxxx Corporal Lydia Chepkosgei Chepkwony** stated that she visited the scene and sent the condom used to the government chemist. PW5 Henry Kiptoo Sang was the Government Analyst who did the analysis. It was his testimony that the condom submitted had seminal stains and many degenerated spermatozoa. Also submitted was a blood sample of the Appellant. He concluded that DNA profiles generated from the seminal stains in the condom matched those of the Appellant. PW1 identified that particular condom as resembling the one that the Appellant used.

25. It is however the contention of the Appellant that the law was not complied with for the appellant was not asked to consent to the process as required by **Section 122 (1) (A)** of the Penal Code. The alluded to Section provides thus:

“A police officer of or above the rank of inspector may by or order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.”

Section 122C of the Penal Code Provides thus:

“Nothing in Section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made: provided that every such consent shall be recorded in writing signed by the person giving the consent.”

Section 122D of the Penal Code provides thus”

“The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of Section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under Section 122A or a consent under 122C is first proven to have been made or given.”

26. It is evident that the law was not followed in carrying out the DNA test. The Appellant herein was represented by counsel when the issue of the DNA report was being adduced in evidence. It was indolent on the part of the learned counsel to have not objected to its production in evidence. The learned magistrate should not have allowed such evidence to be adduced because it was inadmissible.

27. In his defence, the Appellant came up with an alibi defence. In the case of **Karanja V Republic (1983) KLR 501** it was held as follows:-

“..... a trial court in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

28. The Appellant stated that he was at his place of work until 6.00p.m. **DW2 E W** who stated that she was his employer testified that he was at work until 6.00p.m. She however stated that he was working on the farm without her supervision. **DW3 R C** his mother denied having seen him from the time he went to work until 8.00p.m. **DW4 D L** his brother learnt of his arrest the following morning.

29. **PW1** was examined by the Appellant’s legal representative who did not put forward the Appellant’s alibi defence at the earliest stage, when he was cross-examining the witnesses to test their response. Therefore, the defence put up should have been viewed as an afterthought. It was therefore not erroneous for the learned magistrate to dismiss it. In the result, failure by the prosecution to act pursuant to Section 309 of the Criminal Procedure Code to adduce evidence to rebut the allegation was inconsequential.

30. Even without evidence of DNA, the prosecution did adduce evidence that was believed, therefore there was sufficient proof that the perpetrator of the act of penetration into the child’s genital organs was the Appellant.

31. The sentence meted out was the mandatory prescribed sentence for the offence.

32. In the result, I find the conviction having been based on sound evidence which I hereby affirm. The appeal is therefore void of any merit and is dismissed.

Dated, Signed and Delivered at Nakuru this 13th day of December, 2018.

L.N. MUTENDE

JUDGE