



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 16 OF 2016

(From original conviction and sentence in criminal case number 1961 of 2015 of the Principal Magistrate's Court at Kapenguria)

L C.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant herein, one Lomongura Chemakimika was tried and convicted by the lower court for an offence of **defilement contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act number 3 of 2006**. The particulars of this charge are that on the 9th day of November, 2015 at Sigor Trading Centre within West Pokot County, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of C.A, a female child aged sixteen years.

In this case the prosecution called 3 witnesses of which the complainant (PW-1) was the only eye witness. The rest were the doctor who examined the complainant and filled her P-3 form, and the investigating officer. The magistrate conducted a *voir dire* to PW-1. In regard to her age she stated that she was 3 years old. She also disclosed that she was schooling in class 3 at S School. The magistrate in her ruling on *voir dire*, indicated that the child appeared to be labouring under some disease of the mind which hindered her from appreciating things. She concluded that the girl may not be able to appreciate reality from fantasy. The girl was thus allowed to give an unsworn testimony.

Her evidence is that she was schooling then at S Primary school, in class 3. On 9.11.2015 at around 7.00pm she was in the house alone. L, the appellant herein, who was married to her mother, got into the house. He held her, removed her clothes and unzipped his pair of long trousers. He then inserted his genital organ into hers. She screamed in pain. She ran away and sought refuge in the house of appellant's brother, called L. The appellant tried to run after her. She reported to mama T what the appellant had done to her. Mama T informed PW-1's aunt known as Mama D. Neighbours' deliberated on the issue. She was taken to the police at Sigor. She was also taken to Sigor sub-county Hospital.

PW-2 examined PW-1 on 18.11.2015 at Kapenguria District Hospital. He established that her hymen was broken, indicative of penetration. Other tests done did not reveal any other abnormality. Mental assessment showed that the minor was mentally unstable. The child age was assessed as 16 years. He produced the P-3 form as exhibit 1 and age assessment report as exhibit-2.

PW-3 investigated the case and had the appellant charged.

The appellant in his brief unsworn testimony indicated that he is L C. He stays at S and is a farmer. On

12.11.2015 he was on his way home from a journey. At Kapushen he met some KPR officers and they arrested him for no apparent reason. He was taken to Sigor Police Station. At Sigor he was informed the reason for arrest. He was taken to Merich Police Station and then Kapenguria where he was charged. He denied the charges.

On 2.3.2016 the trial court found him guilty on the main count and sentenced him to serve 15 years imprisonment. Dissatisfied with the said conviction and sentence, he appealed to this court on the following grounds:-

- That he was convicted on fabricated evidence;
- That he was not taken for medical examination;
- That no reason was given for rejection of his defense and;
- That the ingredients of the offence were not established beyond reasonable doubt.

In his written submissions he indicated of some other grounds of which he titled, 'amended grounds of appeal'. The new grounds are that the age of the girl was accepted without any documentary evidence in support and that the trial magistrate erred in law and in fact when she failed to consider that PW-1 was mentally disabled and that her evidence was not corroborated.

Mr. Mark Nabuyumbu, appearing for the state, opposed the appeal. He averred that though PW-1 was labouring under a disease of the mind, she was able to express herself. She was consistent in her evidence of which was corroborated by PW-2 to the effect that she was penetrated. He relied on the case of ***Juma Mwaluma Ali versus Republic in Criminal Appeal number 222 of 2011*** in which case the victim was mentally handicapped to an extent that she did not offer evidence, but the conviction was found safe and sustained on appeal. Another case relied on by the state is of ***Benjamin Mutunga Muluvi versus Republic HCCRA No. 240 of 2011***. In this case the complainant was mentally challenged and gave evidence. The trial magistrate had observed in regard to her state and evidence that:-

“The complainant is mentally challenged. This notwithstanding, she was able to testify without much problems. However, this incapacity did not affect her ability to give clear and consistent evidence. I observed her in court and was satisfied with her ability to communicate without much difficulty. This is evident from the record of the proceedings ... As I have stated, the complainant’s recollection of the events of the material date was consistent. She gave clear and detailed evidence of the events of the date. Having observed her demeanor, I am satisfied with her testimony. The same was not sufficiently challenged by the accused in cross examination.”

The Court of Appeal agreed to the above observation by the trial court and held that the prosecution evidence was sufficient to warrant a conviction. The state urges me to make a similar finding given that the trial magistrate in this case observed that:-

“The minor, even though said to be mentally unstable, was able to communicate eloquently, she was able to listen and respond to questions posed to her in a logical manner. This is someone whose word could be relied on. She was also consistent in what she said right from the onset. Having warned itself against the dangers the court cautiously proceeds to convict the accused of defilement as charged.”

I am alive to the duty of this court being the first appellate court, not only to consider the issues raised in the petition of appeal, but also to re-evaluate the entire evidence on record and if so deserved come to an independent own conclusion, bearing in mind that I did not see the witness testify.

The crucial evidence in the prosecution case, which connects the appellant to the alleged offence is that of PW-1. She was said by the trial magistrate to be laboring under some disease of the mind. While PW-2 indicated that she was mentally unstable. The ***voir dire*** ruling indicates that she may not be able to appreciate reality from fantasy.

Concise Oxford English Dictionary defines reality as:-

1. **“State of things as they actually exists, as opposed to idealistic or notional idea of them.”**
2. **“a thing that is actually experienced or seen.”**
3. **“The state of quality of having existence or substance.”**

Fantasy on the other hand is defined as:

1. **“The faculty or activity of imagining improbable things.”**
2. **“a genre of imaginative fiction involving magic and adventure.”**

From the above definition one can say in the ruling the magistrate expressed uncertainty in the witness ability to appreciate what actually took place or happened (reality) from what she may imagine to have happened (fantasy).

In the *voir dire* she indicated she was 3 years old. The medical assessment indicated she was 16 years old. The big disparity questions her mental ability to objectivity. In her unsworn statement, regarding the charge, she said, **“He then held me and inserted his genital organ into mine.”**

“Genital organs” is a technical term defined under **section 2(1) of Sexual Offences Act**. It is defined to include the whole or part of male organ or female genital organs and also anus. Given the witness state of mind her rationality should not have been positively assumed, there was need to exercise caution by the prosecution and the trial magistrate in ensuring they fully understood what she meant. One would doubt whether she was able to appreciate the meaning of insertion of a genital organ into another.

She never said in her evidence that her hymen was ruptured or broken. She even never indicated that she bled. She did not also indicate that it was her first time to have sex. The evidence of PW-2 does not at all corroborate her evidence. PW-2 simply indicated her hymen was broken, an indicative of penetration. He never said when that actually or probably happened to place it within the range of when the offence allegedly took place. We also well know is not only by way penetration that a hymen can be broken; some exercises can accidentally break it. PW-2’s evidence was not therefore conclusive.

The evidence did not corroborate the complainant’s evidence as she could have engaged in sex prior to the incident constituting this offence, leading to its breakage. The trial magistrate finding in her evidence that PW-2’s evidence corroborated PW-1’s evidence on penetration was guided by some assumptions not logically derived from the offered evidence.

The trial magistrate, on page 24, of the judgment held as follows:-

“The minor, even though said to be mentally unstable, was able to communicate eloquently, she was able to listen and respond to questions posed to her in a logical manner. This is someone whose word could be relied on.”

The use of the word **“could”** instead of **“can”** was obviously meant to express some doubt. The trial magistrate was not certain of reliability of PW1’s word.

The standard of proof in criminal matters is beyond reasonable doubt; meaning the trial court need be certain that the offence was committed, and by the accused person. Any reasonable doubt arising should be resolved in favour of the accused person.

The two authorities offered by the state can be distinguished from the facts of this case. In the case of ***Benjamin Mutunga Muluvi versus Republic***, the complainant well testified and her evidence was well corroborated by other prosecution witnesses. In the case of ***Juma Mwaluma Ali versus Republic***, though the complainant did not testify, other witnesses offered sufficient evidence to warrant a conviction.

In this case, after well evaluating the entire evidence, I do find it only raised strong suspicion against the appellant; and suspicion no matter how strong is, cannot form basis for a conviction. There exist reasonable doubts as to whether the appellant committed by the alleged offence, of which ought to have been resolved in his favour.

The appeal accordingly succeeds; conviction and sentence granted are quashed and the appellant should be released forthwith unless otherwise lawfully held.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 14th day of March, 2017.

S. M. GITHINJI

JUDGE

14.3.2017