



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 135 OF 2013

MOSES WANJITALA WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Ruling of the Chief Magistrate's Court at Naivasha Hon. J Mwaniki –Principal Magistrate delivered on the 9th July, 2013 in CMCR Case No. 2027 of 2012)

JUDGMENT

The appellant **MOSES WAJITALA WANYAMA** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Naivasha Law courts.

The appellant has been arraigned before the trial court on 16/7/2012 facing two Counts of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the two charges were given as follows

Count No. 1

“On the 5th day of July, 2012 in Naivasha Municipality within Nakuru County, intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vaginal of VNW a girl aged 8 years old”

Count No. 2

“On the 6th day of July, 2012 in Naivasha Municipality within Nakuru County, intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of VWW a girl aged 8 years”

Additionally the appellant faced two alternative charges to each count of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant entered a plea of ‘**Not Guilty**’ to both counts. His trial commenced on 3/10/2012. The prosecution led by **INSPECTOR MOHAMED** called a total of six (6) witnesses in support of their case.

PW1 VW an 8 year old child was the complainant in the case. The child was taken through a *voire dire* examination after which the trial magistrate determined that she did not understand the nature of an oath.

Thus the witness gave unsworn evidence.

PW1 told the court that on 5/7/2012 at 5.00pm she was alone in their house in [Particulars Withheld] washing her school uniform. The appellant came into the house and lifted the child and carried her onto the bed. He then removed her panty and her biker, lowered his own trouser and defiled her. **PW1** told the court that one '**Mama Blessy**' came and caught the appellant in the act. This lady ordered the appellant to leave and he did so. The child did not inform her mother about the incident since the appellant had threatened to slaughter her if she revealed it to anyone.

PW3 L N L was the class teacher of the complainant at [Particulars Withheld] Academy. She told the court that on 10/7/2012 she came to class at 2.00pm and found other students laughing at the complainant. Upon enquiring **PW3** discovered that the complainant had drawn pictures of two adults having sex. **PW3** reported the matter to the school director. When the child was asked about the drawings she began to cry. Upon further coaxing the child revealed that she had been defiled by a neighbor. The school authority reported the matter to the child's mother.

PW2 DN was the mother of the complainant. She confirmed that she lived alone with her child in [Particulars Withheld] Estate and further confirmed that the child would often be alone in the house when she returned from school. **PW2** told the court that after the school authorities revealed to her what had happened she took the child to hospital for a medical examination and also reported the matter to police. Upon conclusion of police investigations the appellant was arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed upon his defence. The appellant gave an unsworn defence in which he denied having defiled the complainant and claimed that he had been arrested for no reason.

On 9/7/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant of the first Count of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal. The appellant who was not represented during his appeal opted to rely entirely upon his written submissions which had duly been filed in court. **MR. CHIGITI** learned State Counsel made oral submissions in which he opposed the appeal and urged this court to uphold both the conviction and sentence of the trial court.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own independent conclusions on the same (see **AJODE Vs REPUBLIC [2004] KLR, 82**). Similarly in **MWANGI Vs REPUBLIC [2004] KLR 28**, the Court of Appeal held as follows:-

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and 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 had the advantage of hearing and seeing the witness”.

I have carefully perused the written submissions filed by the appellant. In his first ground he alleges that here was a violation of his constitutional rights rendering the entire trial a nullity. The appellant cites the fact that he was placed in police custody on 12/7/2012 and was not taken to court until 14/7/2012 thereby his right to be arraigned before a court within 24 hours of his arrest as provided by Article 49(1) (f)(1) of the Constitution was violated. I do note that indeed the appellant was not taken to court within 24 hours of his arrest but his does not render his trial a nullity. The courts have severally held that such a violation is actionable in civil law and the appellant is at liberty to file a suit to claim damages from the relevant

authority. I therefore dismiss this ground of the appeal.

In any case of defilement the prosecution must prove beyond reasonable doubt the following

1. The age of the victim
2. The fact of penetration
3. The identity of the perpetrator

On the question of age the Court of Appeal sitting in Malindi rendered itself thus in the case of **KAINGU ELIAS KASOMO Vs REPUBLIC Crim. Appeal No. 504 of 2010,**

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence upon conviction will be dependent on the age of the victim”

The appellant submitted that the age of the complainant in this case was not proved. The complainant herself gave her age as 8 years. Ordinarily age will be proved by way of a document such as a Birth Certificate, Immunization Card etc. No such document was produced in this case.

However, **PW2** the complainant’s mother said she delivered the child at home and therefore had no official record of her birth. The courts have lately taken a less restrictive approach to this issue of proof of age no doubt in the realization that many Kenyan women do deliver their babies at home and may take time before seeking to obtain official birth records. In **RICHARD WAHOME CHEGE Vs REPUBLIC [2014]eKLR,** the Court of Appeal held that

“..... it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth” (own emphasis)

PW2 who was the mother who gave birth to the complainant stated that

“She (complainant) was born in September, 2003. I do not have a birth certificate because I delivered in the house”

This is reliable evidence regarding the child’s date of birth. Having been born in September, 2003, the child would have been about 8½ years in July, 2012 when this incident is alleged to have occurred.

Aside from the testimony of **PW2, DR. DENNIS WAMALWA PW6** testified that an age assessment based on the child’s dental formula was conducted at the Naivasha Hospital. The assessment report which was produced in court gave her age as 8 years. This was credible scientific and medical evidence proving the age of the complainant.

Finally on this point the learned trial magistrate in his judgment observed that

“I saw the child that testified in court and I am in agreement with the doctor’s estimation of age. The minor appeared to be between the age of 7 and 9 years. I will take the age of the minor to be 8 years as approximated by the medical officer”

These are the observations of the magistrate who saw and heard the child testify before him. I have no reason to doubt the observations made by the trial court. Therefore I find that the age of the complainant in this case was conclusively proved to be 8 years as stated in the charge sheet.

The next question is whether there is proof of penetration. **PW1** told the court that she had been defiled.

In her testimony **PW1** stated at Page 10 line 1

“While doing bad manners to me he had removed my pantie, my biker, and my skirt..... He then slept on me on my tummy. He then put his thing usually used for urinating into my area I use for urinating while doing so I was screaming.....”

PW1 goes on to state at page 6

“After that I took a bath because of dirt. He had dirtified me around the area I use to urinate. The dirt was from him. It was colour black like sand. It was the colour of the cement. I also had dirt on my back side. I was hurting on my private area and chest”

The complainant was a young child. She has given a vivid and graphic account of what happened to her. She clearly lacked adequate vocabulary to describe the sexual act. Young children often refer to sexual intercourse as ‘**bad manners**’. She explained that the man had placed his penis into her vagina. It is highly unlikely that the child was fabricating this story. I have no doubt that what the child described as happening to her was an act of defilement. The ‘**dirt**’ which **PW1** was describing was undoubtedly seminal fluid.

PW2 the class teacher explained how a few days later the child was found drawing pictures of adults engaging in sexual intercourse. By this time **PW1** had not revealed this incident to anyone not even her mother. She explained that she feared to report the incident as the appellant had threatened to slaughter her if she told anyone what he had done. The only outlet the child had was through drawing pictures. This is commonly known as ‘**art therapy**’ and is an internationally recognized manner of communication by young children. By drawing these pictures **PW1** was in effect reporting what she had undergone. **PW3** luckily recognized this fact and escalated the matter to the school’s director. Eventually the child told her teachers and her mother that she had been defiled.

The appellant raises as an issue the fact that none of the complainant’s soiled clothes were produced as exhibits. He suggests that this shows that no defilement occurred. **PW1** explained that due to the ‘**dirt**’ on her person and on her clothes, she proceeded to change and wash then immediately after the act. As such there would have been no necessity to produce those clothes as having been washed no specimens would be found on them. Failure to produce any soiled clothing does not negate the fact of defilement.

PW6 the doctor corroborated the evidence of the child. He produced the P3 from **P. exb 1** indicating that upon examination the child’s private parts were found to have bruises and lacerations which is evidence of forcible entry. The hymen was broken an indicator that penetration occurred **PW6** further confirmed that the findings in Post Rape Care (PRC) form filled out on 11/7/2012 at Naivasha Hospital was consistent with the findings of the doctor upon examination. I therefore find that the fact of penetration has been proved beyond reasonable doubt.

The final factor requiring proof is the identity of the defiler. **PW1** identified the appellant as the man who defiled her. The incident occurred at 5.00pm. It was broad daylight and visibility was good. The appellant came right into the house where the child was. He lifted her and carried her to the bed. He lay on top of her. This means that the appellant was at all times in close proximity with the appellant. The whole incident took several minutes. The child had ample time and opportunity to see her attacker.

Aside from visual identification **PW1** stated that he knew the appellant as he was a neighbor in the plot where she and her mother lived. Although she did not know his name **PW1** knew the appellant by appearance. The child even knew which house he lived in. she stated at Page 11 line 13

“The accused stays in a plot we moved from. We moved on 29/7/2012. It was after he raped me that we moved. Accused used to stay in house No. 9 we were in house No. 4. He never used to come to our house when my mother was around....”

PW2 the complainant’s mother in her evidence confirms that the appellant was indeed their neighbor.

The child did not at any time waver in her identification of the appellant.

PW4 PC PATRICK NDAMBUKI confirms that the child pointed out the appellant to him. There is no suggestion of any grudge or bad blood that would cause the child to identify the appellant. I am satisfied that the complainant has positively identified the appellant. She saw him at the time of the act and she recognized him as her neighbor.

The appellant in his defence did not successfully dislodge the prosecution evidence. The appellant did not mention the material date in his defence. He only spoke about the date of his arrest.

In his submissions the appellant raised the fact that the lady ‘**Mama Blessy**’ who **PW1** claimed caught him in the act of defilement was not called to testify. Indeed this was a crucial witness. However, notwithstanding the failure of the prosecution to call her as a witness the case was in my view water tight. The failure of the witness to testify was not fatal to the prosecution case.

Based on the fore going I find that the prosecution proved the 1st charge of Defilement beyond reasonable doubt. Count No. 2 referred to a defilement incident which allegedly occurred on 6th July, 2012. No evidence was adduced in respect of any incident on 6/7/2012 this I find that Count No. 2 was not proved. I therefore uphold the conviction of the appellant on Count No. 1 of Defilement.

Following his conviction, the appellant was allowed an opportunity to mitigate after which the trial magistrate sentenced him to serve life imprisonment. This is the mandatory sentence provided for defilement of a child aged below 11 years in accordance with Section 8 (2) of the Sexual Offences Act. I therefore uphold this sentence.

Based therefore on the forgoing I find no merit in this appeal. The same is hereby dismissed in its entirety

Dated and delivered in Nakuru this 10th day of April, 2017

Appellant in person

Mr.Chigiti for State

Maureen A. Odero

Judge