REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 141 OF 2011

DAVID KARIUKI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. E.Tanui –Resident Magistrate delivered on the 28th June, 2011 in CMCR Case No. 135 of 2008)

JUDGEMENT

The appellant **DAVID KARIUKI KAMAU** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court facing a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On 23rd day of March, 2008 at [Particulars withheld] Farm in Nakuru North District of the Rift Valley Province, willfully and unlawfully caused the penetration of his male organ into that of E W a child aged 14 years".***

Additionally the appellant faced an alternative charge of **INDECENT ACT TO A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006.**

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 1/12/2010. The prosecution led by **INSPECTOR MAKORI** called a total of four (4) witnesses in support of their case.

The complainant **'E W'** who was said to be a 15 year old child did not give evidence in this case as she was said to be mentally retarded.

PW2 E W was the complainant's mother. She told the court that on 23/3/2008 she was at home with her daughter. After bathing the complainant left with a neighbour's son called **'K'** to go and play. The child did not return and **PW2** went to search for her at the home of the said K.

PW2 failed to find the boy K or her daughter at their homestead. One **'Mama K'** told her to check in the accused's house. **PW1** went to the accused's house and asked him if he had seen her child. The accused replied in the affirmative. He stated that the child was sleeping in his bed. **PW1** went into the bedroom and found the complainant lying on the accused's bed covered with a blanked. She noted that the child's panty was partly removed. Only one leg was in and her skirt had been pulled upto her waist.

PW1 removed her child and took her to Subukia Health Centre where she was examined and treated. She later reported the matter to the police and 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 onto his defence. The appellant opted to make a sworn defence in which he denied having defiled the complainant.

On 28/6/2011 the learned trial magistrate delivered his judgment in which he convicted the appellant and sentenced him to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

MR. OOGA Advocate argued the appeal on behalf of the appellant whilst **MR. CHIGITI** learned state counsel opposed the appeal.

This being a first appeal this court is obliged to re-examine all the evidence adduced during the trial and to draw its own conclusions on the same. In **AJODE Vs REPUBLIC [2004] 2 KLR, 82,** the Court of Appeal held that

> ***"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"***

In such a case of Defilement the prosecution is required to tender evidence to prove the following

(a) The age of the victim

(b) The fact that penetration occurred

(c) The identity of the perpetrator

In this case **PW1** the mother of the complainant told the court that her child was aged 15 years. The child's Immunization Card was produced as an exhibit **P. exb 3**. The same indicated that the complainant was born on 23/3/1993. This is an official document which is acceptable as proof of the date of birth. Having been born in March, 1993, the complainant was aged 15 years in March, 2008 when this incident occurred. I am satisfied that the age of the complainant was proved beyond reasonable doubt.

The next question is whether the complainant was in fact defiled as alleged. The complainant though present in court did not herself testify in this case. The prosecution produced a report dated 13th October, 2008. **P .exb 1**. This report prepared by Dr. Njau a psychiatrist based at Nakuru PGH indicated that the child was examined and found **'to be mentally retarded, she had low intelligence, underdeveloped speech, impaired concentration, memory and attention'**. Dr Njau concluded that the complainant was not in a position to follow court proceedings and was not able to testify.

PW1 who was the complainant's mother told the court that she found her daughter inside the appellant's bedroom lying on the bed covered with a blanket. **PW1** also noted that the child's skirt had been raised upto waist level and her panty had been partially removed. **PW1** took the child to Subukia Health Centre for examination.

PW2 BARASA JUMA was a clinical officer who at the material time was attached to the Subukia Health Centre. He produced the P3 form respecting the examination conducted upon the complainant as well as the findings thereof. The P3 indicated that upon examination the child's hymen was found to be perforated and a sticky white substance was found inside her vagina. On this **PW2** explained that

> ***"It is not normal for female children to have the sticky discharge in their genitalia".***

Therefore the findings above indicate that there had been some nature of a sexual assault on the complainant. The fact that her hymen was found to be perforated is a clear sign that penetration had occurred. From the evidence availed during the trial I am satisfied that the fact of defilement was proved beyond reasonable doubt.

The next crucial question requiring an answer would be the identity of the defiler. As stated earlier the complainant did not testify thus she did not identify the appellant as the man who defiled her. The court as stated earlier declared the complainant to be a **'vulnerable witness'** and did not attempt to obtain any evidence from her.

PW2 the child's mother told the court that her daughter left their compound with a certain **'K'.**

It is my view that notwithstanding this report from the doctor the court had an obligation to question the complainant and determine for itself her level of understanding. **PW1** the child's mother told the court that she was in class 6 at [Particulars withheld] Primary School. Therefore this child must have been possessed of some rudimentary social skills and understanding given that she attended school. **PW1** also told the court that on the material day the complainant left with a boy called **'K'** with whom she was playing. Obviously the complainant had the capacity to communicate and play with other children. She may have been well able upon questioning in private in chambers to state some few facts or to at least indicate if she knew the appellant.

The fact that the child was declared as a vulnerable witness did not mean that she would not be required to testify. All this means is that the court would allow the adoption of extra measures to secure her testimony *e.g* testifying through an intermediary who could be a child counselor or a social worker, or testifying by way of images or drawings, etc in order to get the child to tell her story. The trial magistrate should have at the very least made an observation as to what reaction the child had to seeing the appellant. No such observations were recorded. The fact that the court failed to deploy any such measures means that no evidence was recorded from the victim herself.

In absence of any statement from the complainant herself regarding what happened to her, the only evidence left for the court to rely upon was that of the mother **PW1**. In her testimony **PW1** made no reference at all to what her child may have told her regarding anything the appellant may have done to her. Even though child was mentally challenged I have no doubt that she had a way of communicating with her own mother with whom she resided.

PW1 did not indicate to the court if she had made any enquiry from the child after finding her in the appellant's house nor did **PW1** tell the court what if anything the child said to her.

I find that the failure by both the prosecution and the court to attempt to adduce any form of evidence from the complainant herself greatly weakened the prosecution case. I am not persuaded that the complainant was totally unable to tender any form of evidence. Sexual offences

are normally committed in secret and there's unlikely to be any witnesses. Thus it is crucial that the victim's evidence be recorded.

In the absence of any testimony from the complainant the prosecution sought to rely on circumstantial evidence to identify the appellant as the man who had defiled the child. In order for circumstantial evidence to prove the guilt of the accused such evidence must point squarely at the accused as the perpetrator of the offence, and there should be no room for any doubt. In the absence of any form of identification by the victim herself then certainly a doubt must remain.

Immediately prior to the incident the child was said to have been playing with a certain boy called **'K'** . **PW2** later went to search for the complainant in the homestead of this **'K'** but failed to find her. **PW2** then continued to search and met the appellant. Upon enquiring about the whereabouts of her child the appellant told her that the child was sleeping in his bed. **PW2** stated that entered the appellant's bedroom and indeed she found her daughter lying on his bed covered with a blanket. It would certainly be suspicious for a girl child to be found lying half dressed in a man's bed.

In his defence the appellant denied that the child was found inside his house. Unfortunately despite there having been an indication that other people were in vicinity, no witness who saw the child in the appellant's house was called to testify. **PW2** in her evidence stated that a certain **'Mama K'** told her to go and look for her child inside the appellant's house. This **'Mama K'** who was a crucial witness was not called to testify. No reason was given for this omission. Similarly the boy called **'K'** with whom the complainant had left her compound with was also not called to testify. He would be a crucial witness to explain where he went with the child, at what point they parted company and if he saw the complainant walk away with the appellant or with any other person for that matter. These were all critical witnesses whom the prosecution failed and/or declined to call. In the circumstances this court is entitled to draw an adverse inference from the failure to call these key witnesses. The prosecution in my view did not bother to call all the witnesses necessary to prove their case beyond reasonable doubt.

PW1 told the court that she found her child lying on the appellant's bed covered with a blanket. **PW1** went on to state that the child's panty was partially removed and her skirt was raised. **PW1** told the court that she took that panty to the police station and handed it over to police. This was a crucial piece of evidence as it may have had stains of blood or seminal fluid which could then be tested for any possible links to the appellant.

Surprisingly this panty was not produced as an exhibit, nor was any analysis done on the same. **PW3 PC NAOMI OYOYI** who was the investigating officer contradicted **PW1** when she stated under cross-examination

> ***"I didn't recover the victim's under-pant which was not handed over to me".***

This is a major contradiction in the prosecution case which remained unexplained.

The offence of Defilement is a very serious charge. It bears a heavy mandatory sentence upon conviction. As such courts must demand that the prosecution prove such a charge beyond reasonable doubt. No anomalies, contradictions or doubts should be entertained. In his case in the absence of any direct testimony from the victim implicating the appellant and with no evidence to corroborate the evidence of **PW2** as to where she found her child, I find that a vestige of doubt remains about the identity of the defiler.

The possibility though slim that the child may have been defiled elsewhere and only came or was brought to sleep in the appellant's house has not been excluded. The persons who saw the child immediately prior to her being found were not called to testify. The benefit of that doubt must be accorded to the appellant. I therefore allow this appeal and I quash the appellant's conviction. The 20 year sentence is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 12th day of June, 2017.

Appellant in person

Mr. Chigiti for State

Maureen A. Odero

Judge