REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NUMBER 93 OF 2013

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 1497 of 2012 of the Principal Magistrate's Court at Kimilili)

ROBERT WEKESA NABISWA::::::::::::::::::::::::::::APPELLANT

VERSUS

REPUBLIC::RESPONDENT

JUDGMENT

Robert Wekesa Nabiswa, the appellant herein, was charged, tried, convicted and sentenced to serve life imprisonment for an offence of **Defilement contrary to section 8(1) (2) of the Sexual Offences Act no. 3 of 2006.**

The particulars of this offence are that on the 11th day of October 2012 in Kimilili-Bungoma District of Bungoma County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of S W, a child aged 10 years.

The prosecution case is that on 11.10.2012 the complainant in this case was going back to school. Along the way, she together with others started eating termites. The appellant who was working then in a sugarcane farm, gave the complainant a paper bag to pick termites for him. After she had picked them he insisted she takes them to him in the farm. She did so. The appellant pulled her into the sugarcane farm. He had a jembe and a panga. He warned her that if she screams he'll kill her and bury her in the farm. He removed her biker and also undressed. He had sex with her. He put his manhood into her vagina. When he was through he picked her ballpen. Soon thereafter the appellant took the ballpen to PW-2 who is the complainant's mother. He alleged that she had dropped the pen and he picked it. Complainant was behind him. She told the mother that she had gone back to school but when the mother observed her she noted she was not well. She called her landlord to find out from the complainant what was wrong. Complainant told them that the appellant had pulled her into a sugarcane farm and defiled her. They went and reported at Kimilili Police Station. She was issued with a P-3 form. It was filled by PW-3 at Kimilili District Hospital on 14.10.2012. He noted that the complainant had a white discharge which was blood stained. She had pain in the stomach. The rest of the body was normal. The genital area was bruised. Epithelial cells were traced. However no yeast nor pus cells were noted. The hymen was broken. Her age, using dental formula was assessed at 10 years. The officer concluded that she had been defiled. The appellant was then arrested and charged.

The appellant in his unsworn testimony, in his defence, stated that on 13.10.2012 while going to his place of business he was attacked by a woman and a man. He was beaten and his hand cut. His 20,000/- was

taken away. He went to report to the police. The police however placed him in cells and later charged him with a strange offence.

The appellant after conviction and sentence filed an appeal in this court on 8.7.2013 on the following grounds:-

> **1. That the trial magistrate failed to observe his constitutional right to a fair trial under Article 50(2) (e) of the Constitution.**
>
> **2. That the credibility of the prosecution witnesses was not well weighed.**
>
> **3. That the prosecution case was speculative and fabricated.**
>
> **4. That he was not informed of the charges in court in a language that he understands as provided for in the constitution.**

In his submissions, the appellant raised new issues. He stated that he was not subjected to medical examination to find out whether he was the real culprit. He also averred that he was arraigned in court on 15.10.2012 having been arrested on 13.10.2012 of which contravened the constitutional requirement of 24 hours from the time of arrest.

He challenges the age of the complainant. He argues that no birth certificate was availed, no baptismal card and no age assessment report. Given that she stated she was 10 years old, and also that she was born in the year 2000, which put her age in the year 2013 when she gave evidence to 13 years, the age need to have been otherwise ascertained.

The appellant also challenges the *voire dire* ruling. He alleges that the complainant was not intelligent enough to offer evidence, his identification or recognition by the complainant is challenged. He avers that no description of him was given to any person in authority.

Last but not least he submits that his defence was rejected without proper evaluation. It was not challenged by the prosecution and should have tilted the scale of justice in his favour.

The state opposed the appeal on the grounds that the ingredients of the offence of defilement were established beyond reasonable doubt. The appellant was known to PW-1 and 2 as a neighbour and was positively recognized. It was during the day and there was no vision challenges. The medical evidence confirmed there was penetration. There was no need to examine the appellant who was properly recognized. The failure to take him to court within 24 hours should have been considered in the lower court and not on appeal. PW-1 and PW-2 placed him at the scene. The conviction and sentence were proper. I am urged to dismiss the appeal.

In a case of defilement the ingredients which need be established are:-

> **1. The age of the complainant**
>
> **2. Identification or recognition of the suspect**
>
> **3. Penetration**

The evidence there is in relation to the age of the girl is what she stated in her evidence-in-chief that she was 10 years old on 7.1.2013 when she gave her evidence. She went further to state she was born in the year 2000. PW-3, the one who filled her P-3 form said her age was confirmed by the dental formula as 10 years. The magistrate held this to be sufficient evidence that she was 10 years old. However, as rightly stated by the appellant the issue of age was not well established. If PW-1 was born in the year 2000 as she stated, as of 7.1.2013 when she offered her evidence, she could have been either 12 or 13 years old depending on whether she was born between 1.2.2000 and 7.1.2000 or after 7.1.2000. Her mother, the

PW-2, did not address the issue of age. She would have been in a better position to state precisely when she was born. The doctor's evidence is opinion evidence. In this case we are even assuming PW-3 was a doctor as he did not state his title in the hospital and his qualifications. His expertise in the field was not established. He simply stated her age as confirmed by the dental formula was 10 years. He never explained the margin of error in the examination. Given the scenario, and the fact that we have different sentences for the offence of defilement depending on the age of the victim, it would have been safer to hold the age of the girl at 13 years old so as to give the suspect the benefit of doubt on the age issue. If this was the case the appellant would have been sentenced to 20 years imprisonment rather than life imprisonment.

I now turn to the ingredients of identification and or recognition. The time the incident constituting the said offence took place is not stated by the complainant and the mother. It can only be assumed it was during the day as complainant stated that she was going back to school and was eating termites along the way, while the mother stated the appellant went to her while she was watering vegetables. Such activities in which the two witnesses were engaged in are normally day activities. PW-1 while referring to the appellant in her evidence referred to him as "the accused." She said when she was taken to hospital accused was called at the said hospital. She identified him there as the one who defiled her. She knew him well.

PW-2 on her part regarding the same also indicated it is the accused who took to her the ballpen of the complainant. When the complainant was asked by the landlord what had happened to her she said it was the accused who had defiled her. She eventually said she knew Robert Wekesa well who was before court. On re-examination she said the complainant knew the accused so well.

The confusion I am finding in evidence of recognition is arising out of use of the word "accused" by the witnesses. It is clear that prior to the arrest of the appellant and him being charged with the offence there was no accused person in the matter. If he was known to the complainant before then and to the mother, the reports given before the appellant was charged should have indicated exactly how he was referred to. When the complainant reported to the mother about the incident, at that time she could not have referred to the appellant as an accused. The same would apply when the mother reported the incident to the police. This would have ascertained that the two knew the appellant before then. The complainant said she knew the appellant well but did not state how. The mother claimed the same but also did not say how. When she said, "I know Robert Wekesa well who is before court," that is not equivalent to knowing him before he was charged. She could have known him well after his arrest in the matter. If police were told the accused committed the offence, it's nebulous on how he was identified as the culprit. This failure could have resulted out of the prosecution and the trial court lapse in clarifying on the issue during the hearing.

The issue of the pen of which allegedly belonged to the complainant and was taken to the mother by the accused could be explained equally for and against him. PW-1 said he collected her pen. She did not state from where. PW-11(the mother) stated the appellant said he had picked the pen. It was no clear from where. One can argue that if the appellant had defiled the complainant and picked her pen at the scene he would not have had courage to take it to the mother on the very same day or soon after the incident. This is so as he would be giving himself in as the culprit. The other argument is that if he was along the same path with the complainant, saw her drop the ball pen, and was not able to catch up with her to hand it to her or wanted to endear himself to the mother, would have had good reason to take the ball pen to her. This as well could have been the reason why he was suspected given that it was soon after the complainant had been defiled, and more so if she had not properly recognized or identified her defiler.

This piece of evidence, of which the trial magistrate heavily relied on, and of which amounts to circumstantial evidence, does not point irresistibly to his guilt. The circumstances considered together do not form a complete chain that there is no escape from the conclusion of guilt to the accused person. This was held in the case of ***Abanga alias Onyango versus Republic Criminal Appeal number 32 of 1990 (UR).***

The trial court in this matter held that:-

> **"The evidence of the witnesses was clearly corroborated by the action of the accused himself when he took the pen to the mother PW-11. How did he know it belonged to the complainant and if he saw the complainant drop it why didn't he give it back to her?"**

The finding on this is wrong as it fails to meet the legal threshold of 'circumstantial evidence.'

The last ingredient is of penetration. While the evidence of the complainant that the accused had sex with her is well corroborated by that of PW-3 to the effect that she was penetrated, it's not clear that it's the appellant who did it. His identification or recognition by PW-1 and PW-2 is not proper. It amount to dock identification of which need be tested with greatest care to exclude the possibility of mistaken identification. The court before convicting on such evidence need be satisfied on facts and circumstances of the case that the evidence must be true and prior thereto warns itself of the possible danger of mistaken identification. The finding in ***John Nduati Ngure versus Republic Cr. Appeal No. 121 of 2014*** is to the said effect.

In this case the trial court did not weigh the evidence and warn itself as suggested. There is a possibility the appellant was mistaken for the real culprit when he took the complainant's ball pen to her mother. Though this was not his defence the burden of proof is upon the prosecution to prove the offence beyond reasonable doubt. I do accord him the benefit of doubt, allow the appeal, quash the conviction and the sentence. He should be set free forthwith unless otherwise lawfully held.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE