



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 111 OF 2013

CHARLES NYABUTIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kisii CM CR NO. 719 of 2011) (Hon. Anne C.A. Onginjo. CM.)

JUDGMENT

1. The appellant, **Charles Nyabuti**, appeared before the Chief Magistrate at Kisii, charged with defilement, contrary to **Section 8(1)** read with **Section 8(2)** of the Sexual Offences Act, in that, on the 10th June 2011, at Kisii County, he intentionally and unlawfully penetrated into the genital organ of L A, a girl aged seven (7) years using his genital organ.

2. After a full trial, the appellant was convicted and sentenced to life imprisonment but being dissatisfied with the outcome preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on **29th October 2013**, by the firm of **Messrs Kaburi Henry & Co. Advocates**, in which he basically complains that he was convicted on the basis of evidence which was insufficient and devoid of credibility. He also complains that the charge preferred against him was unconstitutional and that his defence was disregarded by the trial court. He therefore urged this court to allow the appeal and set him free.

3. At the hearing of the appeal, the appellant was represented by the learned counsel, **Mr. Nyatundo**, who filed written submissions in support of the appeal.

The learned prosecution counsel, **Mr. Ochieng**, opposed the appeal on behalf of the state/respondent, and submitted orally that the appellant was aware of the charge presented against him and any error on the charge sheet was not fatal. That, the learned trial magistrate correctly analyzed the evidence and found that the necessary report was made and that the complainant was subjected to medical examination and treatment.

4. The learned prosecution counsel, further submitted that the complainant was the only eye witness and that her evidence was properly accepted by the learned trial magistrate. That, her evidence on how she was undressed and defiled by the appellant was corroborated by the medical evidence. That, the defence raised by the appellant was a mere denial and no evidence was availed by him to corroborate his “*alibi*”.

The learned prosecution counsel urged this court to dismiss the appeal.

5. In response to the respondent's submission, the appellant's learned counsel submitted that the error in the charge sheet presented a serious issue on the validity of the charge. That, the charge sheet referred to another person as the complainant victim rather than the actual complainant Pw1.

That, the complaint received by the police was that an unknown male person had defiled the complainant thereby implying that the appellant was never identified as the assailant. That, in any event, there was no proof of identification by way of an identification parade.

6. Learned counsel further submitted that the appellant was arrested long after the act and no effort was made to trace him after the fact. That, pw2 indicated that the appellant went underground yet the actual assailant was said to be an unknown male person. That, it was highly likely that Pw2 had a grudge against the appellant and hence her assertion that he went underground. That, the learned trial magistrate failed to consider that the p3 form did not indicate presence of spermatozoa contrary to what was stated by pw2. That, the manner in which the complainant was examined by pw2 was not defined by the trial court thereby raising the possibility that she (pw2) may have used her fingers thus tearing the complainant's hymen.

7. After due consideration of the rival submissions in the light of the grounds of appeal, the duty of this court was to first and foremost consider the evidence afresh and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness (**see, Okeno vs Republic (1972) EA 32**).

8. In that regard, the case for the prosecution was briefly that, the complainant **L A (pw1)**, was at the material time a primary school pupil aged about eight (8) years old. She was on the material date heading to school in the company of another girl called Cynthia, when they met a man and enquired from him what time it was. The man responded that it was 7.00a.m. and then took them into a nearby maize plantation where he defiled the complainant after telling Cynthia to go away and call an unknown woman. The man removed his trousers and the complainant's school uniform and then defiled her. He later gave her some biscuits and sweets.

9. The complainant's mother, **C A (pw2)**, was at her place of business when she was summoned to the complainant's school where she was informed that the complainant had been defiled. Some biscuits and sweets allegedly given to the complainant by the assailant were shown to her. She took the child to the school latrine and examined her genitalia. She saw some semen and called her husband. He arrived at the school and they took the complainant to hospital where she was medically examined and treated. They then reported the matter to the police.

10. At a later stage, the assailant was seen at a construction site by the complainant and identified. He was said to be the appellant and was immediately arrested by the police after they were notified of his presence at the site which was near the complainant's home. **Luke Onger (pw3)**, a teacher at the complainant's school was on the material date on duty when he noticed that the pupil called Cynthia Kemunto had arrived with a packet of biscuits and sweets. He made enquiries and was informed by Cynthia that she and the complainant were heading to school when a man lured them into a maize plantation and gave them the biscuits and sweets. She (Cynthia) however escaped leaving the complainant behind.

11. The teacher (pw3) took away the biscuits and sweets and immediately thereafter saw the complainant passing outside the school fence. He called her but she ran away. He nonetheless sent three pupils to go and fetch the complainant whom they found and brought to school. She was frightened and could not talk. It was then that her mother was summoned to the school.

12. The incident was investigated by **Cpl. Lucy Makokha (pw4)**, who later preferred the present charge against the appellant after it was confirmed by the clinical officer, **Dennis Omurua (pw5)**, that the complainant was a victim of defilement.

The clinical officer prepared the necessary medical examination report (P3 form) and signed it. He later

produced it in court (p.ex 4).

13. The defence case was that the appellant was at a building site where he worked as a mason when police officers arrived there and arrested him. They took him to Kisii police station without him knowing the reason for his arrest. He was not aware of any offence committed by himself.

In essence, the appellant's defence was a denial.

14. From all the foregoing evidence, it is apparent to this court that the fact that the complainant (pw1) was defiled was not really disputed by the defence. Indeed, the fact was established by the complainant's own evidence coupled with that of the clinical officer (pw5) and to some extent, the complainant's mother (pw2) who after examining the complainant's genitalia observed that she had been penetrated.

15. Thus, the ingredients of the offence were fully established by the evidence led by the prosecution and the charge as framed was not defective even though the particulars referred to the complainant as L A while the evidence referred to the name L A. The name L is at times referred to as L. It is one and the same name but the pronunciation is different. In any event, the variance in name and in particular, the first name, would not be fatal and therefore render a charge sheet defective. Such error is curable under **Section 382** of the Criminal Procedure Code.

16. The mere fact of penetration rendered the offence complete in terms of **Section 8(1)** of the Sexual Offences Act and in terms of the definition of penetration under the said Act. A partial or complete insertion of the genital organs of a person into the genital organs of another person amounts to penetration. It did not matter whether or not the complainant's hymen was torn or that the clinical officer did not find spermatozoa on her genitals. In her evidence, she confirmed that she was penetrated by a male person and this was corroborated by medical evidence.

17. By and large, the crucial issue for determination in this matter was whether the appellant was positively identified as the person responsible for sexually molesting or defiling the complainant.

It is notable that the evidence of identification came from the complainant alone although at the material time of the offence she was said to have been in the company of her schoolmate called Cynthia, who was not called to testify and corroborate the complainant's evidence on identification.

18. In her evidence, the complainant referred to a man who took her and Cynthia into a maize plantation and either defiled both of them or her only. The man was not known to them. He was a stranger.

The complainant's examination in chief did not reveal that she actually identified the appellant as the man who defiled her. She only implied as much during cross-examination. Never did she say that she saw him at a construction site at later stage and identified him. That allegation came from her mother (pw2) yet the mother did not witness the offence and it was not known why she alleged that the appellant went underground yet the complainant did not clearly mention him as the culprit no sooner had the offence been discovered by her teachers.

19. It is clear to this court that the evidence of identification against the appellant was not cogent or even credible. It is without doubt that the complainant was defiled but the culprit remained unknown as there was nothing to establish beyond reasonable doubt that it was the appellant.

It was therefore erroneous for the trial court to find on the evidence of the complainant alone that the appellant was responsible for the offence. The complainant may have impressed the trial court as a truthful witness but her evidence with regard to identification of the appellant was in the opinion of this court not reliable and more so, considering that the appellant was previously not known to her. She may have been honest but mistaken in the identification of the appellant. Probably, the narrative would have been different if the appellant was a person previously known to her.

20. This court does not find that the appellant was positively identified as the person who defiled the

complainant. Consequently, his conviction by the trial court was not safe and sound. This appeal therefore succeeds to the extent that the conviction is hereby quashed and the resultant sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

J.R. Karanja

Judge

3/3/2016

[Delivered and signed this 3rd day of March 2016.]