REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 1 OF 2014

(An appeal from the judgment of the Chief Magistrate, Embu in CMCR. Case No. 1388 of 2012 dated 10/1/2014)

MARTIN KAGUNDU NJAGI..... APPELLANT

VERSUS

PROSECUTION…….....RESPONDENT

J U D G M E N T

1. The appellant was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 in Criminal Case No. 1388 of 2012 and sentenced to serve life imprisonment. He was dissatisfied with the judgment and lodged this appeal.
2. The grounds of appeal are that the appellant was not subjected to medical examination to connect him with the offence and that the magistrate relied on the evidence of a single witness since crucial witnesses were not called to testify. Further that the magistrate erred in failing to find that that none of the exhibits were recovered from the appellants house and that the trial magistrate rejected the appellant's defence on weak reasons.
3. The appeal was disposed of by way of written submissions which have herein been considered.
4. The appellant submitted that the doctors report in the P3 indicated that there was no penetration, partial or complete which was found. He stated further that the information in the P3 form contradicts the evidence of PW1 and PW2. He further argued that the magistrate erred in allowing PW3 to testify and produce the post rape care form yet he was not the maker. That Dr. Peninah who was the maker of the medical replort was not called as a witness. The appellant was denied a chance of cross examining the maker and therefore his rights under Article 50 of the Constitution were violated.
5. The respondent submitted that the age of the victim was proved by the mother who gave the date of birth of the minor and further produced a clinic card showing the age. That the age assessment report of the victim was also produced by the doctor PW3 confirming that the minor was aged nine (9) years.
6. On penetration, the respondent said that PW1 gave a detailed account of how she was defiled by the appellant. She stated that the appellant inserted her fingers into her vagina and later inserted his penis therein. PW3 testified that there was no penetration but PW1 had blood stained discharge with foul smell which supports penetration resulting into infection.
7. The state counsel relied on the case of ***GEORGE OWITI RAYA VS REPUBLIC [2013] eKLR*** where the court held that there was superficial penetration because there was injury on the vaginal opening as medical evidence had indicated. There was also a whitish yellow and foul smelling discharge seen on the genitalia. It was held that there can be penetration without going past the hymen membrane. The inflammation on PW1's genitalia was therefore caused by the male sexual

organ. The evidence of PW1 and PW2 corroborated that of PW3.

8. The production of the Post Rape Care Report by pw3 was done as required under Section 77 of the Evidence Act. PW3 stated that the maker left government service but she was conversant with her writing and signature. This was supported by finding in the case of ***JACOB ODHIAMBO OMUMBO V REPUBLIC Criminal Appeal No. 80 of 2008*** where the court held that under section 77 of the Evidence Act, the P3 form need not to be produced by the maker.
9. The duty of the 1st appellate court was explained in the case of *KIILU AND ANOTHER V. R [2005] 1 KLR 174* where the Court of Appeal addressed itself thus:

> *"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."*

10. The complainant testified that on 1/10/2012 the appellant led her to his house where he removed her under pants, inserted his fingers into her vagina and finally inserted his penis too. She was taken to the hospital and police station by her mother later on.
11. The evidence of PW2, the mother of the complainant was that on the same day at around 6.00 p.m. she noticed that PW1 had an unusual smell from her private parts. She inquired and PW1 informed her that the appellant had given her two cakes before inserting his fingers and then his penis in her birth carnal. She reported the matter to the chief after which PW1 was medically examined at Embu PGH. PW1 produced a clinic card indicating that the victim was born on 9/9/2004.
12. The doctor, PW3 the doctor produced the victim's P3 form prepared by her colleague Dr. Peninah who had since left service at the hospital. PW3 said that she was conversant with the doctor's her handwriting and signature having worked with her for a period of about three years.
13. The investigating officer PW4 testified that the mother of the complainant PW2 reported that her daughter was defiled on 1/10/2012. He produced the age assessment report and the certificate of dedication both showing that the victim was born on 9/9/2004. A dentist attached at Embu PGH PW5 prepared the age assessment report indicating that the appellant was seven years old.
14. The appellant gave an unsworn statement of defence. He stated that on 1/10/2012 he worked from morning until 9.00 p.m. after which he went home to his family and slept at around 10.00 p.m. He did not defile denied defiling the complainant.
15. The applicable law in this appeal is Section 2 of the Sexual Offences Act provides that;

> *"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;*

16. Section 8 of the Sexual offences Act provides that;

> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

17. The ingredients of the offence include proof of age of the victim. It was explained in the case of ***MARTIN NYONGESA WANYONYI VS REPUBLIC [2015] eKLR*** where the court held that it is mandatory to prove the age of the victim in a defilement case.
18. The evidence of PW2 the mother of the victim was that PW1 was born on 9/9/2004. PW5 produced an age assessment report and a Post-Natal Clinic card showing the age of PW1 as 7 – 9 years. This evidence was supported by the evidence of PW1 and the post-rape report. The requirement of Section 8(2) of the Act is that the victim be 11 year or below. Proof of age in this case was established as required by the law.
19. In regard to penetration, it was explained in the case of ***MARK OIRURI MOSE VS REPUBLIC [2013] eKLR*** where the court held that all that was required is proof of penetration in the victim's

vagina by the appellant. Penetration may be partial or complete under the Act.

20. The legal definition of penetration under the Act means the partial or complete insertion of the male organ into the vagina of victim. I suppose the doctor was not aware of this definition when she made her remarks. The doctor who filled the P3 form concluded that there was no penetration despite finding that there was inflammation of the genitalia. The existence of the inflammation in the birth carnal, evidence of infection as shown in the P3 form and by the laboratory results was sufficient to prove penetration.
21. This was explained in the case of ***GEORGE OWITI RAYA VS REPUBLIC [2013] eKLR*** where it was held:-

> *There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane.*

22. In the ***RAYA CASE (SUPRA)***, the victim's underwear was stained with whitish-yellowish foul smelling discharge mixed with blood and the hymen membrane was intact. The vagina carnal was inflamed and painful with healing bruises showing that there was superficial penetration. The court nevertheless held that there was penetration.
23. In this case the P3 speaks for itself and the mere misdirection by the doctor that there was no penetration cannot be taken in isolation. This would amount to a departure from the legal definition of "penetration".
24. The magistrate's finding that there was penetration was based on the evidence of PW1, PW2 and as corroborated by the findings in the totality of the medical evidence. The conclusion of the expert is not binding on the court for it contradicts the main findings in the report. The doctor's report taken as a whole proved penetration.
25. There was no contradiction between the evidence of PW1 and PW2 on one part and the medical report as argued by the appellant. The evidence of the two witnesses is corroborated by the findings in the medical report.
26. The appellant alleged that it was wrong to omit the taking him for medical examination which he argued that it was important to connect him with the offence. This contention has been overruled in several decisions by the Court of Appeal.
27. In the case of ***MARTIN NYONGESA WANYONYI VS REPUBLIC [2015] eKLR*** the court held that;

> *"As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."*

28. Similarly, I find that it was not necessary to take the appellant for medical examination to prove the offence of defilement. There was no failure of justice occasioned by the said omission.
29. The appellant alleged that the magistrate relied on the evidence of a single witness and failed to consider that crucial witnesses were not called. In the case of ***MARTIN NYONGESA WANYONYI VS REPUBLIC [2015] eKLR (SUPRA)*** the appellant alleged that vital witness had not been called. The court observed as follows;

> *We are also satisfied that no prejudice was visited upon the appellant by the failure to call witnesses. In any event, section 143 of the Evidence Act provides that no particular number of witnesses is required to prove a particular fact, and, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case.*

30. The prosecution in this case called the witnesses whom it assessed as crucial to prove its case. In the present case, the appellant has not demonstrated what prejudice he suffered by failure to call some witnesses. The prosecution was also at liberty to call the number of witnesses they wished, to prove their case.

31. The judgment shows that the court considered the defence of the appellant and dismissed it on grounds that it did not shake the prosecution's evidence. The court noted that the complainant was a truthful witness and that the appellant did not challenge her evidence in cross examination. It is not correct therefore to say that the defence was rejected without a sufficient consideration.
32. I have carefully considered the evidence on record and find that the trial magistrate considered all the issues in the case and reached the correct conclusions. The judgment was based on cogent evidence.
33. As for the sentence, the appellant was sentenced to life imprisonment as provided by under Section 8(2) of the Act, the age of the complainant having been established to be under 11 years. The sentence was therefore within the law. The conviction and sentence are accordingly upheld.
34. This appeal stands dismissed for lack of merit.
35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF MAY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for respondent

Appellant present