



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO. 9 OF 2015
(FORMERLY MERU HCCRA 44 & 46 OF 2012)

P K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of P.M. KIAMA – P.M made on 18/6/2013 in Marimanti Principal Magistrate’s Court Criminal Case No. 289 of 2012).

J U D G M E N T

1. P K M, the Appellant herein faced the charge of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006 before the Principal Magistrate’s Court, Marimanti. It was alleged that on the 26th and 27th April, 2012 at Marimanti Market, Marimanti Location of Tharaka South District within Eastern Province, the Appellant intentionally caused his penis to penetrate the vagina of “D K” a child of 12 years. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. No. 3 of 2006. The Appellant denied the charge but after trial, he was convicted of defilement and sentenced to twenty (20) years imprisonment.
2. Aggrieved by that decision, the Appellant has appealed to this court. In his Petition of Appeal, the Appellant contended that the trial court erred in convicting him on uncorroborated evidence; that vital witnesses failed to testify; that the medical evidence did not link the Appellant to the offence; and finally that the court failed to consider the Appellant’s defence. This being a first appeal, this court is enjoined to review and re-evaluate the facts afresh and draw its own independent findings and conclusions. See **Ekeno .v. Republic [1972 EA 352]**. However, in doing so, this court must be guided that it did not see the witnesses testify.
3. The prosecution case was that on the night of 26th and 27th April, 2012, the complainant (PW1) was at their home sleeping on a sofa set when at about 1 am the Appellant came and the complainant opened the door for him. She went back and fell asleep. Then the Appellant went to her, removed her skirt and pant, laid on top of her and defiled her. She screamed and felt pain after the act. Her screams woke up J K (PW3) who was in an adjacent room to where the act occurred. However, when PW3 came out she found the Accused outside the house chewing miraa while and the complainant was at the door crying. The mother of the complainant was away that night. When she came the following day, the complainant and PW3 informed her of what had occurred the previous night.
4. The complainant told the court that her pants and thighs had blood. She accompanied her mother to make a report at Marimanti Police Station on 27th April, 2012. She was later examined at Tharaka District Hospital whereby she was issued with a P3 Form (PEXh 1). In cross-

- examination the complainant told the court that she knew the Appellant as her uncle. PW3 on her part told the court that on the material night she heard the complainant crying; she went to find out why but the complainant whom she found crying at the door of their house refused to tell her why. PW3 also found the Appellant outside chewing miraa. She had been seeing the Appellant in the complainant's house for about a month. PW3 informed the complainant about the incident where upon the complainant told the mother that the Appellant had defiled her.
5. PW2 was Dr. Karanja Mwangi who produced the P3 form (PEXh 1) for the complainant. The same showed that the complainant was examined on 15th May, 2012. It was found that the complainant's hymen had been perforated; there were abrasion on the vaginal wall and the conclusion was that there had been vaginal entry. PW4 told the court how, when on patrol on 27th April, 2012 at about 8.40 p.m, they found the Appellant had been arrested by members of the public who were about to lynch him. They re-arrested him and took him to Marimanti Police Station. PW5, Corporal Danton Moraa told the court how she investigated the case after the report of defilement was made on 27th April, 2012. That after the medical examination revealed that the complainant had been defiled, she charged the Appellant with the offence of defilement.
 6. In his defence, the Appellant told the court that on 26th April, 2012, he was in his home at Mwingi. That he heard that his sister, the mother of the complainant, was intending to sell the family's ancestral land. That he therefore travelled to Marimanti and arrived there on 27th April, 2012 at 7.10 a.m. That he questioned his sister why she wanted to sell the ancestral land. That she told him that since he was opposed to her idea of selling the land, she would do it in his absence. According to him, the complainant's mother framed him with the charge of defilement because he was opposed to her intended sale of the family land.
 7. At the hearing of the appeal, the Appellant relied on his written submission which the court has considered. According to Mr. Ongige, the prosecution had proved its case to the required standard and the Appeal should be dismissed.
 8. The first ground was that the trial court erred in convicting the Appellant on contradictory and uncorroborated evidence. That the complainant had told the court that she was four years old and in class four. That she saw the Appellant for the first time when he allegedly defiled her. He finally submitted that the complainant did not tell Kariithi (PW3) that she had been defiled on the material night. The record shows that, in the testimony the complainant told the court that she was schooling at Tunyai Primary School in class four at the time she was testifying. The indication of the age of four (4) in my view would be a misnomour. The age assessment form produced as PEXh 1 shows that at the time the complainant was being examined in March, 2013, she was aged twelve (12) years. The complainant told the court that she knew the Appellant as her uncle. She was firm in cross-examination that it is the Appellant for whom she opened the door on the material night and that he is the one who defiled her. She stated that when the Appellant defiled her, she screamed because of pain thereby attracting the attention of K (PW3) and Jeconia who came to inquire as to what was happening. PW3 corroborated the evidence of the complainant. She told the court that on 27th April, 2012 at about 2.00 am, she heard the complainant screaming; she and one Jaconia came out and found the complainant at the door crying whilst the Appellant stood nearby. That although the complainant did not tell her why she was crying, the following day when the mother came, the complainant told the mother that the Appellant had defiled her. In view of the foregoing, it is not correct that the complaint's evidence was contradictory and uncorroborated. This court finds that the complainant's evidence was corroborated by that of PW3. That ground is therefore rejected.
 9. The second ground was that the trial court failed to consider that vital witnesses failed to attend and testify. The Appellant submitted that the complainant's mother who was a crucial witness yet she failed to testify. This court has considered the record. There is no statutory number of witnesses who are supposed to testify to prove a fact; Section 143 of the Evidence Act is clear on this. In the instant case, the incident occurred at night. The complainant was the only eye witness. PW3 and one Jaconia were the only other people who rushed to the scene in response to the complainant's screams. The complainant narrated to court what had happened whilst PW3 told the court the circumstances surrounding the occurrence of the offence. C M, the complainant's mother was not at home at the material time. She only turned up the following day. Her evidence would have been what she had been told by the complainant and PW3. The

- two (2) testified before the trial court. I do not think that the mother of the complainant was a crucial witness. Those who testified told the court all that she could have said. I also do not think that there was any crucial witness who was not called to testify. The contention that the complainant's mother refused to testify because she knew that the charges were false is not correct. The complainant's mother is a sister to the Appellant. She may have discovered that the offence her brother was facing was very serious and may have refused to testify to save him. In any event, I do not think that she is a responsible mother. How else can one explain the fact that she slept in the bar the material night leaving two small children unattended? That ground fails.
10. The other ground was that the medical evidence did not connect the Appellant with the offence. The Appellant submitted that it was not clear from the testimony of PW2 when the complainant was examined at the Tharaka District Hospital, Marimanti. That the P3 form (PEXh 1) showed that the complainant was sent to hospital on 15/5/12 yet the form was signed on 16/5/12. From the record, it would seem that the Appellant's complaint may after all not be without basis. It is clear that whilst the offence occurred on 27th April, 2012 at around 2 am and the matter reported to the police later that evening, the police took over two (2) weeks to send the complainant to hospital. She was sent to hospital on 15th May, 2012. The P3 form (PEXh 1) was however signed on 16th May, 2012. It is not clear on which of the two days the complainant was examined.
11. Be that as it may, whilst medical evidence is crucial in sexual offences, the same is only corroborative. If there is enough credible evidence of defilement independent of the medical evidence, a charge can still stand. In the instant case, the medical evidence was only to show that the complainant's hymen was no longer intact. The same corroborated the evidence of the complainant and PW3, that after the defilement, the complainant felt extreme pain and bled as a result. In this regard, I do not think that the inconclusivity of the medical evidence affected the prosecution case or the decision which the trial court arrived at. That ground also fails.
12. The final ground was that the Appellant's defence was not considered. That the same was strong enough to have displaced the prosecution case. The Appellant submitted that it is usual nowadays for those who do not agree with their relatives to frame them with defilement charges as a way of keeping them away from society. According to him, his sister, the mother of the complainant had framed him with the charges he was facing because he had opposed her intentions of selling the ancestral land.
13. The record shows that the Appellant attempted to set up an alibi in his defence. He told the court that on the material day, 26th April, 2012, he was in his home at Ngane in Mwingi when he heard that his sister C M, the complainant's mother, was intending to sell the ancestral land. That he travelled to Tseikuru arriving at Marimanti on the morning of 27th April, 2012 at 7 a.m. That he did not go to his said sister's home but went to the home of his other sister known as T N who was living at Marimanti. That it was later at 8 pm he was arrested at the instance of complainant's mother.
14. The trial court found as fact that PW3 had been seeing the accused in the house of his said sister, the complainant's mother for close to a month before the date of the incident. PW3 also told the court, which it believed, that she saw the Appellant on the material night outside the complainant's house whilst the complainant was crying at the door step. The trial court found that the Appellant did not effectively challenge this piece of evidence. In this regard, the trial court found, which this court agrees with that the Appellant's defence did not displace the prosecution case. The prosecution had proved its case beyond reasonable doubt. In any event, the Appellant did not call his other alleged sister T N or any other relative from Mwingi to confirm the Appellant's allegations. The prosecution witnesses had placed the Appellant squarely at the scene of the crime.
15. In the circumstances, I find that the Appeal has no merit and I dismiss the same.

DATED and DELIVERED in Chuka this 12th day of May 2016

A.MABEYA

JUDGE

Judgment read and delivered in open court in presence of the parties

A.MABEYA

JUDGE

12/5/2016