



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 179 OF 2014

T N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 2831 of 2013 delivered by Hon. Linda C. Kosgei, RM on 6th November, 2014)

JUDGMENT

T N the Appellant herein was charged with offence of defilement contrary to Section (8)(2) of Sexual offences Act No. 3 of 2006. It was alleged that on diverse dates during the month of May 2013 at [Particulars withheld] village in Nairobi East District of the Nairobi Area Province intentionally and unlawfully committed an act which caused penetration with his male organ into female genital organ of A N a child aged 6 years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006 in that he intentionally touched the vagina of A N a child aged 6 years with his penis.

The Appellant was convicted for the charge of defilement and sentenced to life imprisonment. He was dissatisfied with both the conviction and sentence hence this appeal. His main grounds of appeal are that the prosecution did not prove the elements of the offence of defilement, essential witnesses in support of the case were not called, the prosecution relied on hearsay evidence and that the prosecution did not follow the law in adducing evidence.

The appellant filed written submissions in which he submitted that the essential elements of the offence of defilement namely penetration, age of the victim and his identification were not proved. According to the Appellant, PW1 testified that after the defilement by the Appellant whom she referred to "shemeji" she bled from her private parts. In contrast, he submitted that PW3 who was a Clinical Officer from MSF Clinic in Mathare did not support the assertion. Furthermore, PW3 did not notice any visible physical injuries both on PW1's vagina and external genitalia. This ultimately demonstrated the absence of penetration. He further submitted that the child being of tender age, her evidence ought to have been in consonance with Section 19 of Oaths and Statutory Declarations' Act (Cap 15) Laws of Kenya. His contention was that PW2 who was a child witness of 13 years ought to have been examined by the court on her ability to take oath before testimony. Unfortunately, a *voire dire* examination was not conducted which implied that her evidence was not credible.

It was further the submission of the Appellant that the trial court relied on hearsay evidence in convicting him. He in particular pointed to the evidence of PW2 who he said testified on evidence she collected from

her mother. He further stated that PW2 had testified that she had learnt of the defilement from one F of how shemeji' used to sleep with her.

Finally, it was the submission of the Appellant that the prosecution failed to call essential witnesses in prove of their case. He pointed out that PW1 testified that during the defilement she screamed and a person who owned the plot at the scene went to the scene and told him that if he continued to do that he would chase him out of the plot. Her testimony, according to the Appellant, was that this plot owner **'opened the door and saw us on the bed'**. He submitted that it was questioned how this plot owner by the name Muigoi was not called as a prosecution witness as he would have provided direct evidence against him. In summing up his submission, the Appellant stated that the trial court failed to take into account that there existed a close family relationship between himself and the complainant. His contention was that the complainant's mother was his girlfriend which placed her and the complainant at a vantage point to complain against him. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

On behalf of the Respondent, learned State Counsel, Miss Nyauncho opposed the appeal. She submitted that the prosecution proved all the three elements of the offence of defilement namely; penetration, age of victim and identification of the assailant beyond all reasonable doubt. She submitted that PW3 who was a medical officer observed that PW1's vaginal entry was enlarged whilst PW5, Dr. Joseph Maundu noted that her hymen was broken which was an obvious indication of penetration. Ms. Nyauncho submitted that under Section 2 of the Sexual offences Act, penetration would be proved even if the same was partial. She also urged the court to take note that PW's evidence was consistent and left no doubt that she had been defiled. The same had been corroborated by PW2 who was a child who saw PW1 go into the house of the Appellant.

On identification of the Appellant, Ms. Nyauncho submitted that the same was beyond reproach as he and PW1 were neighbours, and the latter referred to the former as 'shemeji'. She also submitted that the Appellant's defence was taken into consideration by the trial magistrate but was dismissed for lack of merit. She urged that the appeal be dismissed for want of merit.

This being the first Appellate court, its duty is to reevaluate the evidence and come up with its own finding but bear in mind that it has neither seen nor heard any witnesses and give regard for that. The prosecution's case was clearly set out in the evidence of the complainant who testified as PW1. She was a girl child aged 6 years and in nursery class. Her testimony was that the Appellant introduced to her as 'shemeji' and that he used to do bad manners to her. She recalled one day she was playing with another child called M who was older than her. The appellant called her and told her that he was going to buy her rice at a hotel. Instead, he took her to his house. By then PW1's parents had gone to work and was left under the care of her elder sister E M. At the time the appellant called her, E had gone to visit a friend. On arrival at the Appellant's house, he defiled her. She described the act in the words 'alinindinya', He removed her clothes including her pants. He also removed his clothes which included a trouser, a t-shirt and an under wear before proceeding to defile her. He defiled her on his bed. She screamed and the owner of the plot where the house was located went to the appellant's house. The plot owner warned the appellant that if he repeated what he had done he would chase him from the plot'. According to PW1, the plot owner actually found both of them on the bed. She ran away on seeing him. She rejoined her friend M to whom she reported the incident. M in turn informed her Aunt who took PW1 to hospital where she was treated. Thereafter, the matter was reported at Soweto Police Station after which the Appellant was arrested and charged. It was the further testimony of PW1 that the appellant defiled her three times. On the first incident, her mother took her to hospital; on the second incident her Aunt took her to hospital and on the third incident, both the Appellant and one, Baba Mwendé defiled her. The said Baba Mwendé defiled in the presence of the Appellant. The said Baba Mwendé was never arrested. On the first incident that the appellant defiled her, she did not report to her mother because she feared she would beat her. She testified that on all the incidents the appellant defiled her, the scene was in his house.

PW2, E M then aged 13 years was an elder sister to PW1. She testified that on a date in May 2013 at about 5.00 pm, she met her mother in the company of one Kawira and both were coming from a Police Post. Her mother asked her if she knew what had happened to her sister A. She responded that A used to

go to the house of the Appellant, "shemeji" in the morning. She testified that PW1 would report to her that the appellant would buy her rice and give her Kshs. 10/=. PW1 had also informed her friend M that the appellant used to defile her. She had also informed their Cousin one F W who did not report to anyone. According to PW2, PW1, had informed her that the appellant had defiled her about three times. In addition, she told her that she had also been defiled by a Baba Mwendu. PW2 then informed her mother what had been happening after which the matter was no longer a secret.

PW3, Irene Ngori Nyangwache of MSF Clinic, Mathare testified that on 19th June, 2013, PW1 was taken to the Clinic on allegation of being severally defiled, the last time being on 17th June, 2013. She noted no physical injuries. Her vagina showed normal external genitalia. Internally, the vagina had no injuries but its entry was enlarged. It was also regular in margin and pink in colour. The anus was also in good condition. HIV and sexually transmitted diseases' tests were normal. The urine had no Spermatozoa. PW3 produced PW1's medical report as exhibit No. 1.

PW4, M W N was a social Worker and a Children's officer at Kayole. She was called on 17th June, 2013 at about 6.00 pm and informed about the incident. She later came to learn that the person calling her was one Julie who informed her of the defilement of PW1. She advised that PW1 be taken to hospital where she worked. She later learnt that the assailant who is the Appellant was a Step father to the complainant. They lived within the same area but not the same house. She also identified PW1's Birth Certificate which showed that she was born on 25th August, 2006.

PW5, was Dr. Joseph Maundu of police Surgery. He examined her on 21st June, 2013 on allegation of having been defiled by a person known to her. On examination, there were no physical injuries and the external genitalia was normal. There were no tears and lacerations. The hymen was broken but no discharge was noted. He produced PW1's P3 form as an exhibit.

PW6, Police Constable Patrick Macharia then of Soweto Police Station investigated the case. He summed up the evidence of the prosecution. His further evidence was that PW1 was taken to police station on 19th June, 2013 by Health workers on allegations that she had been defiled by a person known to her. He thereafter arrested the appellant and charged him.

The appellant gave an unsworn statement of defence in which he denied having committed the offence. He stated that on 17th June, 2013, the complainant's mother went to his house and saw a contract he had made with one Mutuku for whom he was doing some electric and plumbing work. Out of the Kshs. 230,000/= that he was to be paid by Mutuku, a balance of Kshs 80,000/= remained unpaid. Thereafter, later in the day, he met the complainant's mother and her sister at a hotel. They informed him that somebody was calling him outside the hotel. When he went outside, he met with thieves whom he suspected had been sent by complainant's mother to steal from him. They stole his house keys and mobile phone. He proceeded to Soweto Police Station to report the incident. On arrival at the Police Station, he was placed into custody in the police station cells. Thereafter he was charged in court.

Having summarized the evidence and the submission by the respective parties, it is the view of this court that the issues for determination are whether the case was proved beyond reasonable doubt, whether the evidence of PW2 was a nullity for want of compliance with Section 19 of the Oaths and Statutory Declarations Act and whether the Prosecution failed to call crucial witnesses.

Determination

The first issue for determination is whether or not prosecution proved penetration. From the evidence of the victim, she was not specific on the actual dates she was defiled. However that is not a cause for alarm owing to her tender age which would negate her to recall dates. Be that as it may, it is factual that she was taken to hospital immediately after the last date she alleged she was defiled by the Appellant. The most unfortunate thing is that none of the adult relatives including her mother and aunt who participated in taking her for treatment were called to testify. From the evidence of PW3, a Clinic Officer based at MSF Clinic at Mathare she examined PW1 on 19th June, 2013 and produced a medical report in that

respect. Her examination revealed no abnormality in both the external and internal genitalia of PW1. She did not also exhibit any physical and internal injuries to her genitalia save to observe that the opening on her vagina was enlarged. In contrast, PW5, Dr. Joseph Maundu examined PW1 on 21st June, 2013 which was exactly three days after examination by PW3. Whilst he noted that PW1 had no physical injuries and had normal external genitalia, he concluded that the hymen was broken.

Of concern is why the two medical examinations on one person revealed such contrasted results yet there is no evidence that there was report of defilement against PW1 between 19th June, 2013 and 21st June, 2013. Whereas the court under Section 124 of the Evidence Act can believe the evidence of a minor in a sexual assault case without corroboration, where the prosecution chooses to call corroborated evidence, the same must be consistent with that of the minor victim. In this case the prosecution elected to call the medical evidence of two medical officers. The same unfortunately is completely contradictory which raises a credibility question. In the circumstances I find it difficult to believe that PW1 was defiled.

Further, it is questionable why PW1's mother and aunt to whom the incident was reported and participated in taking PW1 for medical examination failed to testify. This would have been crucial witnesses who would have shed light on what they knew about the case. The failure to call them gave the inference that if they had been called would probably have tendered adverse evidence against the prosecution. Again, PW1 did testify that on the last date that the Appellant defiled her, she and the Appellant were found in bed by the plot owner. Incidentally, there was no inquisition by PW1's mother from the plot owner whether he had found the Appellant red-handed. Besides, the police also appear to have ignored that line of investigation. This leads me to conclude that either PW1 was not telling the truth or some information was being hidden from the court. It would then lend credence to the Appellant's defence that the case was implicated against him due to a soured relationship between himself and PW1's mother.

Furthermore, I entirely concur with the Appellant that the evidence of PW2 was almost entirely hearsay evidence. She testified that she initially learnt of the incidence after she was told by one K who was in the company of her mother about the defilement of PW1. She also mentioned on one F W who told her that she knew that PW1 used to go to the house of the Appellant and that she would beat her when she went there. The said PW2 was an elder sister to PW1. She was then aged 13 years. Although her evidence also stated that PW1 told her that she used to go to the house of the Appellant, it was questionable why she did not deem it fit to tell their mother about it until K had enquired about the issue. This kind of evidence no doubt creates doubt on the credibility of the witnesses.

The Appellant raised the issue that the trial court failed to take *voire dire* evidence of PW2 before she testified which was in contravention of Section 19 of the Oaths and Statutory Declarations Act. I have cross-checked with the record of appeal and confirmed that the trial magistrate conducted the *voire dire* examination after which she concluded that the witness did not understand the meaning of taking an oath and did not therefore possess sufficient intelligence to give a sworn statement. She indeed gave an unsworn statement of evidence. That ground of appeal thus does not have merit.

In the end, I find the prosecution did not prove its case beyond a reasonable doubt. I allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless otherwise lawfully held. It is so ordered

Dated and Delivered at Nairobi this 19th Day of July, 2016

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Miss Kimiri for the Respondent.*