



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 18 OF 2013

PETER KAMAU NJUGUNA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court, Molo (H.A. Nyaga) delivered on 7th February, 2013 in Criminal Case No. 1377 of 2011)

JUDGMENT

1. The appellant, **Peter Kamau Njuguna**, was charged with the offence of defilement contrary to **Section 8(1) and 8(2)** of the **Sexual Offences Act**. The particulars of the charge were that on diverse dates between 1st June, 2011 to 12th July, 2011 at **[particulars withheld]** in Molo District of Nakuru County, intentionally and unlawfully did cause the penetration with his genital organ penis into the genital organ namely vagina of **S.M.** a girl aged 9 years.
2. In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**.
3. The facts of the case as recorded by the trial magistrate are that the complainant, **(PW1)** confided in her teacher **PW3** that she had been defiled by the appellant on three separate occasions. The matter was reported to the police and the appellant was arrested. The complainant and the appellant were examined by **PW4** at Molo District Hospital and a P3 form was completed for each. The appellant denied committing the offence. He testified that on the material day, he was arrested and taken to Matumaini Chief's Camp. He was later taken to hospital and subsequently charged in court for defilement.
4. The appellant was tried and convicted at the Senior Principal Magistrate's Court at Molo and was sentenced to life imprisonment.
5. Being aggrieved by the conviction, the appellant filed a Petition of Appeal on 18th February, 2013 raising the following summarized grounds:-
 - i. **That the learned magistrate erred in finding that the prosecution had proved its case beyond reasonable doubt in spite of absence of sufficient evidence;**
 - ii. **That the learned magistrate erred in relying on evidence that was contradictory, inconclusive and uncorroborated.**
 - iii. **That the learned magistrate erred in law and fact when he failed to address the grudge that existed between the Appellant and PW2.**
 - iv. **That the learned magistrate erred in law by shifting the burden of proof to the Appellant;**
 - v. **That the learned magistrate erred in law in dismissing the evidence tendered by the**

Appellant in defence.

- vi. The appeal was heard on 7th October, 2014 with Mr. Kangethe appearing for the Appellant and Mr. Kibelion appearing for the State. Counsel for the Appellant submitted that the trial court relied on evidence that had material inconsistencies, contradictions and was uncorroborated. In particular the complainant failed to provide the actual dates when she was defiled by the appellant. The time frame provided on the charge sheet was too large to sustain a conviction.
- vii. Further the evidence of **PW3** and **PW4** was inconsistent as to when the complainant and appellant were examined by **PW4**. **PW3** states she accompanied the complainant and appellant to hospital on 14th July 2011 whilst the clinical officer, **PW4**, testified that she examined the complainant and appellant on 16th and 18th July, 2011 respectively.
- viii. Counsel also submitted that there was no evidence on record to connect the offence to the appellant. Further that the age of the complainant was not ascertained and her testimony contradicts the age appearing on the charge sheet.
- ix. Counsel's final submissions were that the appeal be allowed in its entirety and the conviction be quashed.
- x. Mr. Kibelion opposed the appeal. He submitted that the trial court properly evaluated the evidence and convicted the appellant. He stated that the medical report corroborated the evidence of **PW1** that she had been defiled. **PW1** properly identified the appellant as the person who defiled her on several occasions.
- xi. Counsel further submitted that the issue of age was irrelevant as at the time the appellant was charged. The trial court however addressed the issue during sentencing and the sentence imposed by the trial court was lawful. Counsel finally submitted that contradictions as to the dates when the complainant and the appellant were examined by **PW4** were not significant because they appear on the P3 that were completed by **PW4**. He urged the court to disallow the appeal and uphold the findings of the trial court.

ISSUES FOR DETERMINATION

12. After taking into consideration the rival oral submissions of both Counsels and upon reading the Record of Appeal this court has framed the following issues for determination;

- i) **Whether the evidence on record is inconsistent, contradictory and uncorroborated so as to render the conviction unsafe;**
- ii) **Whether there was an existence of a grudge;**
- iii) **Whether the prosecution proved its case beyond reasonable doubt.**

ANALYSIS

13. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno V. Rep.** (1972) EA 32.
14. On the issue of uncorroborated evidence of the Complainant particularly on the issues of identification of the appellant and her defilement, this court notes that the trial magistrate conducted a *voire dire* test and made a finding on the truthfulness of **PW1**'s evidence in stating that the complainant **"appreciated the need to tell the truth"**.
15. The Complainant's evidence on identification was that of identification by recognition. She told her teacher **PW3** and later on, her father that the person who had done bad manners to her was Peter Kamau and that he grazed cows that belonged to a person known as J.
16. Upon re-evaluating the evidence on identification this court is satisfied that the trial magistrate correctly invoked the proviso to Section 124 of the Evidence Act. She knew the Appellant by his full name and also knew whom he worked for and the nature of his job which was to graze the cows and the issue of identification did not need corroboration. The Complainant was a minor and she was found to be a truthful witness.
17. This court is satisfied that the complainant positively identified the appellant by way of

- recognition and concur with the findings that this evidence could stand as it is and did not need corroboration.
18. Still on the issue of corroboration the Appellant's further contends that the evidence on the defilement was not corroborated. The trial magistrate made a statement in his judgment to the effect that such offences are done in private and in the absence of witnesses. This court reiterates that the trial magistrate found the complainant to be a truthful witness and correctly invoked the proviso to Section 124 of the Evidence Act. That notwithstanding the evidence on defilement is corroborated by the medical evidence adduced by PW4 the clinical officer who made a finding on defilement.
 19. That when she examined PW1 she found blood and a broken hymen and evidence of repeated defilement. This court is satisfied that there was conclusive corroborated evidence on defilement.
 20. This ground of appeal is found lacking in merit and is disallowed.
 21. On the issue of contradictory evidence relating to the dates that the incidences took place, the appellant further submitted that the time frame on the Charge Sheet is too large to sustain a safe conviction. That there was also a variance in the dates as to when the Complainant went for the medical examination.
 22. The appellant states that he was arrested on the 14th July, 2011 and the offence is said to have been committed on the 16th July, 2011. Upon perusal of the Charge Sheet, this court notes that the Appellant was arrested on the 15th July, 2011 and that the last act of defilement is stated therein to have been committed on the 12th July, 2011 not as alleged in the submissions on appeal.
 23. This court opines that the Appellant did not demonstrate the prejudice he suffered by the variance of the dates in evidence as to when both he and the complainant were examined. This court notes the span from the date of arrest to the date of examination is only two (2) days and that period of time is found not to be large and is further found to be insignificant.
 24. The appellant also raised the issue of the inconsistencies in evidence that related to the age of the complainant.
 25. The Charge Sheet reads nine (9) years and in the voire dire test and in her testimony the complainant states her age as being eleven (11) years. The evidence of PW4 the Clinical Officer who examined the Complainant was that she was aged nine (9) years at the time the examination was carried out. The P3 tendered in evidence indicates the age of the Complainant as nine (9) years.
 26. The age of the Complainant is a crucial factor when determining the sentence to be imposed. This court has had occasion to peruse the P3 Form which indicates the age of the Complainant as nine (9) years. The evidence of PW4 states in her evidence that the Complainant was nine (9) years at the time the offence was committed and also at the time of the medical examination. This court is satisfied that the medical evidence adduced proved the age of the Complainant as nine (9) years.
 27. The critical evidence related to defilement and after finding this factor proven the trial magistrate addressed the issue of age when passing sentence and stated that the ages nine (9) years and eleven (11) years both fell under the same penalty section. This court concurs with the submissions of Prosecuting Counsel that the trial court noted the disparity and dealt with it appropriately.
 28. This court finds this ground of appeal is found lacking in merit and it is hereby disallowed.
 29. The issue of an existing grudge between the Appellant and the Complainants family was raised by the Appellant in his appeal. That the grudge was between the Appellant and PW2 and arose from the grazing of animals on the same piece of land. Upon perusal of the Appellants defence testimony this court notes that there was no mention of a grudge. It is noted that the Appellant did not raise this issue when PW2 testified and that he only raised when cross-examining the PW5 who was the police officer on duty when the report was made and she rightfully stated that she would not be the best placed person to know about the existence of a grudge as between PW2 and the Appellant.
 30. This court is satisfied that the trial magistrate did not have to make any appraisal, evaluation or determination on the issue of an existing grudge as it was never raised in the Appellant's statement in defence.
 31. This ground of appeal is found lacking in merit and is hereby disallowed.

FINDINGS

32. For the reasons stated above this court makes the following findings;
33. This court finds that there were no inconsistencies in evidence on age of the Complainant and identification of the Appellant. This court finds that the age of the Complainant was proved and that the appellant was positively identified.
34. The court finds that corroboration was not mandatory and this issue was properly addressed by the trial court when it invoked the proviso to section 124 of the Evidence Act.
35. This court finds that the prosecution proved its case beyond reasonable doubt and further finds that the trial magistrate did not err in disregarding the issue of a grudge as it did not form part of the defence testimony.

DETERMINATION

36. The appeal is found lacking in merit and is dismissed.
37. The conviction and sentence are found to be safe and lawful and are hereby upheld.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 10th day of February, 2015.

A. MSHILA

JUDGE