



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**APPELLATE SIDE**

**CRIMINAL APPEAL CASE NO. 318 OF 2012**

*(From the original conviction and sentence in Sexual Offences case no. 166 of 2012 of the Chief Magistrate's Court at Kakamega before Hon. J. S. Wesonga – RM)*

**E M S ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

The Appellant was charged with the offence of Defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the Appellant on the 29th day of December, 2011 in Navakholo District, within Western Province unlawfully intentionally caused his penis to penetrate the vagina of D K a child aged six years.

The Appellant was convicted and sentenced to life imprisonment. The grounds of appeal are that the sentence was excessive and irregular, the evaluation of the evidence by the trial magistrate is wanting, that the trial court erred by admitting the medical evidence, the evidence was contradictory and not corroborative, that the Appellant's evidence was dismissed and that his mitigation was not considered.

Mr. Ombaye, Counsel for the Appellant submitted that the Complainant did not understand the duty of telling the truth yet the judgment indicates that the court was convinced by the Complainant's evidence. It is also contended that it took some time for PW1 to report the alleged defilement. The treatment notes were not produced by the doctor who attended to the Appellant. Although corroboration is not required in sexual offences, this case required corroboration as the Complainant did not know the duty of telling the truth. The charge sheet gave the date of incident as 29th November, 2011 yet the incident occurred on 27th December, 2011. Mr. Ombaye further contends that the trial magistrate did not frame the issues or give reasons for the determination.

Mr. Noni, State Counsel, opposed the appeal. Counsel submitted that a birth certificate was produced to prove the age. Appellant was well known to the Complainant. The incident occurred in the morning and there is no issue of mistaken identity. The evidence of PW1 was corroborated by that of PW3, a clinical officer.

The record of the trial court shows that PW1 was the Complainant. She testified without being sworn as the trial court after conducting a *voire dire* found that the minor did not understand the duty to speak the truth and that she did not know what an oath is. PW1 informed the court that she was at home with her brother J who was three (3) years old. Her mother had gone to the farm. The Appellant went and took

her to the kitchen promising to give her something. The Appellant pushed her on the floor, parted her legs and defiled her. She felt pain and cried. The Appellant promised not to do it again. He promised to buy her mandazi and he left. PW1 did not tell her mother. She knew the Appellant as her uncle. She told her mother after two days as she was feeling pain on her private parts.

**PW2 G N** is the mother of PW1. It is her evidence that PW1 was six (6) years old as she was born on 11th October, 2005. She produced the birth certificate for PW1. On 29th November, 2011 she left her children in the morning and went to the farm. On 1st January, 2012 PW1 was in the toilet and started making noise. She checked on her and found that her hymen was absent and her anus was protruding outside. PW1 told her that it was the Appellant who had defiled her on 29th December, 2011. PW2 took PW1 to hospital and was later issued with a P3 form by the police. PW1 was referred to several hospitals for specialised treatment. According to her, PW1 became withdrawn and was not free with people. It is her evidence that PW1 knows the Appellant.

**PW3 ROBERT WANYONYI** was a clinical officer in charge of Chwele Subdistrict Hospital. He was initially based at Navakholo Subdistrict Hospital. It was his evidence that PW1 was initially seen at Sivile Dispensary and was referred to the sub-district hospital. He examined her and she had pain in the stomach and anus. He examined her vagina and the hymen was absent. Labia majora and manora had bruises. The anus was swollen and it was difficult for PW1 to pass stool. He concluded that PW1 was defiled. PW1 was referred to Bungoma and Webuye District Hospital as she required surgical treatment. It is his evidence that there is a small membrane separating the anus and the vagina and pressure on one organ can affect the other organ.

**PW4 APC NABOTH ONYANGO** was attached to the Aranda AP Post on 23rd January, 2012 he was sent to arrest the Appellant. **PW5 Corporal ALBERT KEMBOI** was based at Navakholo Police Station. He investigated the matter. The report was made at the police station on 9th January, 2012. The Complainant had been treated at Sivile dispensary but had been referred to Navakholo Subdistrict Hospital. He issued PW1 with a P3 form and took her to Navakholo Subdistrict Hospital. The Appellant was arrested and charged with the offence.

In his sworn defence, the Appellant stated that he was a student at [particulars withheld] Secondary School in form one; on 29th December, 2011 he went to work at their farm between 7.00am and 11.45am. He was weeding sugar cane. He saw PW2 at her farm. He did not go to PW2's house. He was 18 years old. The Complainant knows him and she is his niece. Their home is about 30 metres away from that of PW2.

The main issue for determination is whether PW1 was defiled and if so, whether it was the Appellant who defiled her. The evidence of PW3, the clinical officer does establish that PW1 was defiled. The medical evidence shows that the defilement ruptured PW1's hymen and her vagina was bruised and torn. Counsel for the Appellant contends that the clinical officer relied on hearsay information when he used the treatment notes to fill the P3 form. According to PW3, he attended to the Complainant and even referred her to either Webuye or Bungoma District Hospital for surgical treatment. I am satisfied that the medical evidence was proper.

PW1 gave unsworn evidence PW1 was aged six years and the court concluded that she did not understand what speaking under oath was. It is her evidence that she knew the Appellant as her uncle. The incident occurred in the morning and she could recall that it was the Appellant who took her to the kitchen promising to give her something to eat.

It is clear from the evidence that no other person witnessed the incident. The trial court believed the evidence of PW1. Although the trial court indicated that PW1 did not know the meaning of telling the truth, this does not mean that all what she said were pure lies. She narrated to the court how she was defiled. Indeed PW3 confirmed that she was defiled. She had difficulties in passing stool and this was due to the defilement. She gave the Appellant's name as her defiler. It was in the morning and according to her it was the Appellant who defiled her. The defence evidence is to the effect that the Appellant did not go to the home of PW2. The evidence shows that the Appellant's home is near that of PW2.

According to PW1, the Appellant called her to the kitchen, pushed her down, defiled her and left after promising to buy her *mandazi*. I do find that the defence evidence does not raised about on the evidence of PW1. Although PW1 was not cross-examined, her evidence does establish that it was the Appellant who defiled her.

With regard to the issue of dates on the charge sheet, I have seen the handwritten charge sheet which clearly gives the date of 29th December, 2011. I have also seen the handwritten record of the trial court and PW2 testified that she left her children on 29th December, 2011 as opposed to 2nd December, 2011 as per the typed record. That is a simple typographical error. It is clear that the evidence of PW1 was corroborated by that of PW3. PW1 testified that she was defiled. PW3 examined her and confirmed that indeed she was defiled.

A birth certificate was produced indicating that PW1 was born on 11th October, 2005. The Appellant alleged that he was a student. Initially he said he was 17 years old. The age assessment report by Dr. Vuhya K. L. dated 16th May, 2012 indicated that the Appellant was above 18 years old and was approximately twenty one (21) years old. This report wad done about five months after the incident.

I have gone through the judgment of the trial magistrate and I am satisfied that it is well reasoned and proper. When a trial magistrate evaluates the evidence and makes a conclusion, that is enough to satisfy the provisions of Section 169 of the Criminal Procedure Act. Even if the issues are not specifically framed, analysis of the evidence is normally done so as to establish the guilt or innocence of the accused. Mr. Ombaye contends that the trial court did not indicate that the prosecution proves its case. The fact that the Appellant was convicted shows that the case against the Appellant was proved beyond reasonable doubt.

In the end, I do find that the prosecution did prove its case as required. The Appellant was out on bond and did not attempt to produce his school documents to prove that he was a student. This is not shifting the burden of proof as once put on his defence, the Appellant had the onus of disproving the prosecution case.

I do find that it is the Appellant who defiled PW1. The Appellant was well known to PW1 as they are related. The Appellant himself confirmed in his defence that they are related. The appeal lacks merit and is hereby dismissed.

Dated signed this 11<sup>th</sup> day of **February, 2015**

**Said J. Chitembwe**

**JUDGE**

Dated, delivered and countersigned this 11<sup>th</sup> day of **March 2015**

**Ruth Sitati**

**JUDGE**