REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 86 OF 2014

P K W .....APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From the Original Criminal Suit No. 188 of 2013 of P.M's Court at Kyuso

– B. M. Mararo PM)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8(1) as read with (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22nd August 2013 at [particulars withheld] sub location in Kyuso district within Kitui County intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of M. M a child aged 7 years. In the alternative he was charged with indecent act contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place did commit an indecent act with MM a child aged 7 years by making his penis touch her vagina. He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to life imprisonment.

Dissatisfied with the decision of the trial court the appellant appealed to this court. He filed his appeal on 6th October 2014, on the following grounds:-

1. The trial magistrate erred in law and facts when convicting and sentencing him without noting that some crucial witnesses were never called to testify as required under section 150 of the Criminal Procedure Code.

2. The trial magistrate erred in law and fact when he admitted prosecution evidence which was totally contradictory violating the provisions of Section 163 C of the Evidence Act Cap 80.

3. The trial magistrate erred both in law and facts when he convicted and sentenced him very sevearly without considering that the prosecution relied on second and third person testimonies as there were no eye witnesses.

4. The learned trial magistrate erred both in law and facts by failing to observe that the person who presented P3 form was not qualified to do so and as such the P3 forms were fake and unreliable.

5. The learned magistrate erred when he convicted and sentenced him very severely without considering that judges Rule No. 4 was broken which said that a police officer appearing in court as an arrester should not be the investigating officer.

6. The trial magistrate erred in convicting and sentencing him without considering that there was a grudge between him and the mother of the complainant who was his employer.

7. The trial magistrate erred in law and facts when he convicted and sentenced him seeverly while he was a first offender and did not show leniency.

8. The learned magistrate erred to conclude that the prosecution had proved their case to the required standard while his defence was not misplaced at all contrary to Section 169 of the Penal Code.

The appellant also filed written submissions in which he raised questions about failure of the magistrate to examine the complainant on her intelligence. I have perused the said written submissions. The appellant elected not to make oral submissions.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that no one witnessed the incident as the appellant and the victim entered the house. However two witnesses saw the appellant and the complainant going into that house. Counsel submitted that there were no contradictions in the prosecution evidence. Counsel stated that though there were no injuries suffered in the private parts of the victim, there was evidence of sexual activity. According to counsel the magistrate considered the evidence on record before coming to his conclusion. Counsel submitted that the P3 form was not fake as alleged by the appellant. Counsel added that there was no law which prohibited an arresting officer from being an Investigating Officer. Counsel further added that the issue of an existing grudge was not raised by the appellant in cross examination.

In response the appellant submitted that the complainant PWI stated in court that he did not defile her. He complained that all other witnesses came from one family and that the case was a frame up.

At the trial the prosecution called 6 witnesses. PWI was the complainant she appeared in court on 23rd October 2013 and was not able to testify. She was stood down. She was recalled on 26th November 2013 and after saying a few words, she again was not able to proceed and the court felt that she was traumatized and was thus stood down. She ultimately testified on 19th June 2014. It was her evidence that she was in class 1 and 8 years of age. She acknowledged that she was not able to testify in court earlier because she had been scared. It was her evidence that on 22nd August 2013 at 7.00p.m while at her grandmother's house with K and S, the appellant came and asked her for a matchbox. She went into the house to get a matchbox but the appellant entered the house and closed the door and told her to sleep on the bed. He removed her pantie and his own pantie and penetrated her. She screamed and left the house crying and told the story to K and S. The grandmother was absent and her mother had also gone to [particulars withheld]. When the mother came back, they told her about what had happened. When the appellant was asked about the incident he denied defiling her. It was her evidence that she went to hospital on a Friday while she was defiled on a Thursday. She stated that the appellant was actually her uncle. In cross examination she stated that the appellant did not hurt her. She denied being told to lie.

PW2 was K M a standard 3 pupil. It was her evidence that the complainant was a cousin. The witness was nine years old. She stated that on the 22nd of September 2013 she was with S and the complainant when the appellant came and asked the complainant to get him a matchbox. When the complainant entered the house the appellant followed and closed the door and did something wrong to the complainant. The complainant then came out crying saying that the appellant had raped her. When the mother of the complainant came back, they informed her about the incident. The appellant after the incident left for [particulars withheld] Town. According to this witness the grandfather who was old and blind was around. She maintained that the appellant defiled the complainant.

In cross examination she stated that she did not know how much time it took to defile the complainant and also did not know what they were doing in the house.

PW 3 was S M a Nursery School child who did not know her age. This witness was not sworn. It was her evidence that as they were sitting with the complainant and K, when the appellant came from grazing

and did something wrong to the complainant. That he raped her in her grandmother's house. She saw them enter the house and the appellant closing the door. The complainant came out crying while the appellant left. When the mother of the complainant came back,they narrated to her what had happened. According to this witness the grandfather was in the house he however did not see what happened because he was blind. It was her evidence that the door was locked from inside. She stated that the appellant was her uncle. The appellant did not cross examine this witness.

PW4 was M M the mother of the complainant. It was her evidence that on 22nd August 2013 she went to [particulars withheld] Town and returned home at around 8.00 Pm when she found her child the complainant crying. The other children said that she had been defiled by the appellant. When she asked the appellant about the matter her denied. She then went to [particulars withheld] and informed the employer of the appellant M M about the incident. The said employer came with a neighbour and the appellant still denied the incident but later admitted.

It was her evidence that she took the complainant to [particulars withheld] hospital the next day. They recorded as statement and were given a P3 form. They were escorted to Kyuso District Hospital and the complainant was medically examined. According to her when she checked the complainant initially found traces of sperm but no injuries. She stated that the appellant was an uncle of the complainant as his sister was married to her brother. She identified the P3 form and other treatment notes as well as the OB entries. She stated that the complainant was 8 years old and relied on a medical card. She stated that the complainant was a assessed for her aged which was 7 to 8 years.

In cross examination she stated that she was saying the truth though she was not present during the incident. She stated that the complainant was not injured but had been penetrated. She denied trying to seduce the appellant who rejected her.

PW5 was Mwendwa Mulaki a casual labourer at [particulars withheld]. It was his evidence that on 23rd August 2013 she was at [particulars withheld] and on the next day which was 23rd in the evening, his employer told him that his wife wanted him at home. He went home on foot and on arrival at 9.00 Pm found the children asleep. His wife told him that on 22nd of August 2013 the appellant had come and found children playing and defiled the complainant but did not injure her though she had sperms. The next morning they went to Kyuso police station.

In cross examination he stated that he did not ask the appellant anything about the matter as he thought that he would flee. He stated that the appellant had been employed for 4 months. He stated that he was saying the truth.

PW6 was David Mbithi a Clinical Officer. He referred to the medical history of the complainant. He stated that on 26th August 2013 he filled the P3 form for the complainant who had been defiled 5 days previously and treated at [particulars withheld] Health Centre. Nothing un usual was found on the head, thorax, abdomen and upper lower limbs. He stated that the complainant had been treated with antibiotics, and that the degree of injury was harm. There were no bruises on the labia minora but the hymen was broken. There were no traces of spermatozoa. The age assessment was done on the 3rd of January 2014 by Makasi Mwenda a colleague and the age of the complainant was established to be 7and 8 years. He produced the medical notes, P3 form and age assessment as exhibit 1-5.

In cross examination he stated that the child had been defiled. He maintained that the hymen had been broken and that he examined her a week after the date of incident.

PW7 was Jackline Maluba a Police Corporal. She stated that she took over investigations from Police Constable Kiptanui who was on maternity leave. According to her the investigations had established that on 22nd August 2013 the appellant went to the homestead and found children playing, asked for a match box and then entered the house and defiled the complainant. That the appellant had sex with the complainant and then opened the door. The complainant and the other children informed the mother when she came. According to her the matter was reported on 25th of August 2013 and statements were recorded, and appellant was arrested on 27th August 2013 and brought to court.

In cross examination she stated that she did not know the appellant before. She stated that the Investigating Officer did not visit the scene. She admitted that the case was investigated by another officer.

When put on his defence the appellant gave an unsworn statement and stated that on 22nd of August 2013 he went home from grazing cows in the evening. He also went to [particulars withheld] and met M M on the way. She asked for Kshs 500 /= which he did not have. She forced him to go to his boss but he refused. According to him, she wanted him to sleep with her but he refused because she was a married woman. When he went to town and was talking with his boss, she came and told his boss that he had slept with her daughter. He denied the allegation. When he went to the village elder with the child and the grandmother, the child said he had done nothing to her. The child's father was away and he was called by his wife. When he came his wife told him that the appellant had slept with his daughter but did not harm her. According to him the

mother of the complainant should have accused him of sleeping with her and not her daughter. He stated that the prosecution should have called other witnesses who were at the scene.

This is a first appeal. As a first appellate court, I am duty bound to reexamine all the evidence on record and come to my own conclusion and inferences. *See the case* ***of Okeno -vs- Republic (1972) EA32.***

I have reevaluated the evidence on record. It is clear that PW1 the complainant PW2 and PW3 all of them children of tender years, knew the appellant well before. He was their uncle. It cannot be faulted therefore that they could easily identify the appellant.

On the date of the incident these three children were in the homestead playing when the appellant came in the evening after grazing the cows. The evidence is that the grandfather of the children who was blind was in the said homestead. This man was not called as a witness to testify on whether he heard any noise from any of the children. The appellant stated that after returning the livestock from grazing, he went to [particulars withheld] town. No evidence from the prosecution contradicts this story. He stated that there was a disagreement with the mother of the complainant because of her failed sexual advances on him. This was denied by the said mother of the complainant. The issue turns on credibility as to whom among them was saying the truth. The appellant put questions in cross examination raising this issue. He also raised the issue in his defence which was unsworn.

In sexual offences of defilement, the prosecution is required to prove 3 elements of the offence beyond reasonable doubt. Firstly, the age of the victim. Secondly, whether there was penetration. Thirdly, whether the accused is the culprit.

On the age of the complainant herein, I find beyond reasonable doubt that the complainant was aged between 7 and 8 years. The magistrate must have seen her testify and infact on two occasion she was not even able to testify. She was in Lower Primary and the age was actually assessed in January 2014 as between 7 and 8 years. I find that it had been proved by the prosecution beyond any reasonable doubt that the complainant was aged between 7 and 8 years.

With regard to the issue of penetration the evidence from the mother of the complainant, who was the first person to physically examine her, was that there were no signs of injury in the private parts of the complainant. She however stated that she noted the presence of sperms which I take to be semen. She however did not specifically state on which part of the complainant's body she found the presence of semen. She was specific that she did not notice any form of injury on the complainant. The medical evidence is also that no injuries were noted in the private parts of the complainant. However it is stated that the hymen was broken. There is no further indication as to how the hymen of the complainant was broken.

The P3 form was filled 5 days after the alleged incident. The person who attended the complainant and is said to have found the hymen to be broken did not come to testify in court. In my view, with the evidence on record, especially the fact that both the mother of the complainant and the medical evidence showed

that the complainant at her young age was not injured in any way due to the sexual activity she described with the appellant, it was imparative for the prosecution to show how such breakage of the hymen would be caused by sexual activity as describe by the complainant. It was therefore necessary to call the medical attendant who first treated the complainant and noted that the hymen was broken to testify in court. He or she was not called to testify. The evidence on the breaking of the hymen of the complainant was therefore secondary evidence. Since penetration is a very important ingredient in the proof of defilement, the gap left by the prosecutions failure to call the witness who confirmed the breaking of the hymen to testify in court, weakened the prosecution case to such an extent that the conviction cannot be sustained. The failure to call the crucial witness has created in my mind a doubt, the benefit of which I will have to give to the appellant. See the case of ***Bukenya -Vs- Uganda [1972] EA 549.***

With regard to the issue of the appellant being the culprit, since there is no proof of penetration it cannot be said that he was the culprit.

In conclusion, I find that this appeal has merits. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and signed at Garissa this 5th day of October, 2015

GEORGE DULU

JUDGE