



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.170 OF 2014

BETWEEN

C L ALIAS P APPELLANT

AND

REPUBLICRESPONDENT

**(Being an appeal from conviction and sentence of Hon. E. S. OLWANDE, Ag SPM dated 7/11/2014
in Butere PM's Cr. Case No.8 of 2014)**

J U D G M E N T

Introduction

1. The appellant herein C L alias P was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006. Particulars of the offence are that the appellant on the 3rd day of January 2014 in Khwisero district within Kakamega County intentionally caused his penis to penetrate the vagina of L.S a child of fifteen (15) years.
2. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The Prosecution alleged that on the 3rd day of January 2014 in Khwisero district within Kakamega County intentionally touched the vagina of L.S a child aged fifteen (15) years with his penis.
3. The appellant was also charged in count II with assault causing bodily harm contrary to Section 251 of the Penal Code, the particulars of the offence being that on the 3rd day of January 2014 in Khwisero district within Kakamega County unlawfully assaulted L.S thereby occasioning her actual bodily harm.
4. The appellant was convicted on the main count 1 and sentenced to twenty (20) years and on count 2 he was sentenced to 2 years imprisonment which sentences were to run concurrently.

The Appeal

5. Being aggrieved by the said conviction and sentence the appellant filed his appeal on the following grounds:-
 1. THAT he did not plead guilty to the charges.
 2. THAT the trial Court convicted him yet the evidence on record was uncorroborated, fabricated inconsistent and malicious discredited and lacked probative value.
 3. THAT the trial Court convicted him on the evidence of a single eye witness.
 4. THAT the trial Court did not consider that the medical report exonerated him from any wrong

- doing.
5. THAT the trial Court relied on rumours and innuendos to convict him.
 6. THAT the trial Magistrate erred both in law and fact in convicting the appellant by basing her judgment on personal opinion which could be biased as in this instant case.
 7. THAT he was not medically tested to ascertain that it was him who committed the crime and/or the report produced as exhibit was not admitted as evidence/exhibit.
 8. THAT the sentence meted was very harsh in the circumstances.
 9. THAT there was no proof of age of PW1.
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6. The appellant prays that the appeal be allowed, conviction quashed, sentence set aside and he be set at liberty. The appellant also filed supplementary ground of appeal dated 23rd June 2015 to buttress the earlier grounds. The appellant filed his written submissions which are on record and also put down his points in writing which have also been filed and on record. Mr. Omwenga the State Prosecution Counsel opposed the appeal. He submitted that the complainant's testimony was supported by the Prosecution witnesses. He submitted further that PW1's, PW3's and PW7's evidence was not contradictory in any way and that based on the said evidence, the trial Court committed no error in convicting the appellant. He submitted further that the conviction was safe and the sentence appropriate. He urged the Court to dismiss the appeal.
 7. In a short rejoinder the appellant maintained that the evidence by the Prosecution was planned and further that the Prosecution case was full of inconsistencies. He asked the Court to allow his appeal.

The Prosecution Case

8. This Court will consider each of the issues raised by the appellant as hereunder bearing in mind that as the first appellate Court it must re-evaluate the evidence on record and come up with its own conclusions. See case of **Pandya –vs- R [1957] E.A 336** and **Kariuki Karanja –vs- Republic [1986] KLR 190**
9. The Prosecution called a total of seven (7) witnesses. PW1 who was the complainant was taken through a *voir dire* examination, and thereafter, she told the trial Court that she was born in 1998 and was in class 6. She referred to the baptismal card (PEXh 1) from the African Divine church which showed that she was born on 20/11/1998. She testified that on 3/1/2014 between 6.00 p.m and 6.30p.m as she was standing outside their gate near the road the appellant came by, got hold of her and covered her mouth with his hand and lifted her before carrying her to his house which was about 200m away.
10. When they got into the house the appellant threw her on the bed and she started screaming. The appellant held her by the neck and threatened to kill her if she cried. The appellant then forced her to open her legs, tore her panty and penetrated her vagina using his penis. She felt pain and started to bleed. She continued to scream and struggled with the appellant and she got up. People then responded to her distress call and the appellant then ran away. She was injured in her private parts and explained further that while she was struggling the appellant hit her several times on her face. Her eyes got swollen and her mouth bled.
11. Among the people who came to her rescue were Kennedy PW4 who she saw as he (Kennedy) lit the house with his torch. She was taken to the Police Station where she reported the incident. She identified her panty in Court which was produced as "PEXh 2". After recording her statement at the Police station she was taken to Yala District Hospital where she was treated and given medication see "PEXh 3". The P3 form the Police gave her was duly filled and was produced as "PEXh 4". She told the Court that she did not know how the appellant was eventually arrested. She knew the appellant as Papa.
12. On cross examination by the appellant she stated that she had never slept with any man and that no man had ever fondled her or touched her private parts. PW2 S O A testified that the complainant (PW1) had visited her aunt who is his daughter in law and had stayed at his (PW2's) home for one (1) week before the incident occurred.
13. PW2 also told the trial Court that he knew the appellant whose home was about 100m from his. His name was P L also known as C. He explained that the appellant was like his nephew in the clan. He testified that on the 3/1/14 at around 6.30pm he got information that the appellant had

- defiled PW1. As he went out to find out what had happened he met the complainant who was being carried on a motor cycle. The complainant had already reported the incident to the Police. He then accompanied her to the hospital and then back to the Police Station.
14. PW2 stated that he interrogated the complainant who told him that the appellant had taken her to his home and raped her. PW2 also stated that the complainant's face was swollen. He took the complainant to the hospital where the P3 form "PEXh 4" was filled. Thereafter they started to look for the appellant as he had run away. The appellant was arrested the next day at about 8.00p.m. at Lwanda where PW2 and the village elders found him at the junction of the road to Siaya – Kisumu road. PW2 also stated that the complainant's torn panty was shown to him when he arrived home and he advised the complainant to hand it over to the Police. He identified the panty in Court being "PEXhibit 2" and went ahead and said that he had not fallen out with the appellant on any account.
 15. On cross examination by the appellant PW3 stated that he did not witness the incident as he was out at Khumusalaba. He reiterated that as he went out, he met the complainant who had already reported the matter to the Police and that there were people who saw the appellant after he had raped PW1. He also reiterated the complainant's testimony that she had not slept with any other man.
 16. PW3 ALUSHULA OMWAKWE told the trial Court that on the 3/1/14 at 6.30p.m he was together with his cousin Kennedy when they heard screams coming from the direction of the appellant's house which is about 10 meters away from theirs. They ran towards that direction and stormed into the appellant's house where they saw the appellant running out of the house through the back door and the complainant was crying and was bleeding from the mouth. He also saw blood trickling down her legs. They took the complainant to Khumusalaba Police Patrol base as they suspected that she had been defiled because of the blood on her legs. Her relatives then came and asked her what had happened and she explained to them that the appellant had forced himself on her. The complainant's relatives then took her to hospital.
 17. He later recorded his statement. He did not know how the appellant was later arrested. Cross examined by the appellant PW3 explained that he saw the appellant run away but they could not catch him because the accused ran fast. He further explained that they did not scream because people had already gathered at the scene after they (people) had heard the complainant's distress call. He also stated that the appellant was the only one they saw coming out of the house.
 18. PW4 KENNEDY ONGODI ANYANZWA told the trial Court that on 3/1/2014 as he was going home he met PW3 on his way. As the two walked along, they heard screams from the home of one Moses. They ran to the said house and as they approached the door they heard the sound of the back door opening. He ran to the back side and saw the appellant running away. They could not catch him as he was a fast runner. He then went to the front door where the complainant told him that she was the grand-child of O. Since the complainant could not explain what happened to her because of the many questions that were being asked to her at the same time they decided to take her to the Police for a quiet interrogation and (complainant) told them that the appellant had wronged her. PW4 stated that he noticed blood trickling down her legs as they were on the road.
 19. PW4 also explained that when the incident happened it was getting dark but it was not very dark and he could tell it was the appellant he saw running out of the house. He recorded his statement and explained that he had not fallen out with the appellant. He also did not know how the appellant was arrested but only learnt later that he had been arrested.
 20. On cross examination PW4 explained that he saw the appellant clearly and that while in Court the appellant was wearing the same clothes he saw him with that evening namely a Barcelona T-shirt red in colour. He explained further that he had seen the appellant with that T-shirt on several occasions before the incident. He added that he referred to the T-shirt as Barcelona because the colours were those of the Barcelona football team and also that he (PW4) knew the appellant very well.
 21. PW5 ZABLON ANANDA ONJIRI told the trial Court that he knew the appellant C L. PW5 testified that on 5/1/2014 at about 7.30pm he received a call from a Police officer and went to the Police station where he met someone who told him that he had been wronged by someone who had sought refuge in Lwanda. He was told that the person had defiled a child and had been seen somewhere at the stage at Lwanda. He accompanied the informer to the stage where he was shown the appellant. He arrested the appellant then took him to Lwanda police station and handed

- him over to the Police.
22. On cross examination PW5 explained that the appellant was shown to him as the person who had defiled the child and that it was the father of the child who pointed out the appellant. He explained further that he was given the handcuffs he used on the appellant by the Police because his duty as a Community Policing Officer is to assist the Police.
 23. PW6 No.59137 Sgt ALEX ONYANGO OGUTU officer in charge of Khumusalaba Patrol Base in Khwisero district investigated this case. He told the trial Court that on the 3/1/2014 at about 7.40p.m he received PC Wanyama and the complainant who was accompanied by his grandfather S O. The complaint was that the complainant had been defiled by a person known to her. He ordered PC Wanyama to book the report in the OB and also referred the victim to hospital for examination and treatment.
 24. On 4/1/14 the complainant brought her treatment book and he issued her with a P3 form which she (PW1) took back to the Station on the 5/1/2014. He stated that the complainant had been examined and the doctor had confirmed that there was defilement. He produced the treatment book from Yala level 4 hospital "PEXh 3" and the P3 form "PEXh 4". He recorded the complainant's complaint and also visited the scene of crime and was shown where the complainant had been defiled. He found her panty at the scene and took it as an exhibit (PEXhibit 2). He also recorded the statement of other witnesses who rescued the complainant.
 25. PW6 testified that he tried to locate the whereabouts of the appellant. It was on the 5/1/2014 when the complainant's grandfather told him that the appellant had been seen in Lwanda township and gave him a note to take to the officers at Lwanda to assist in arresting the appellant. Later he was called and told that the appellant had been arrested and had been taken to Lwanda Police Station. He collected the appellant the next day and took him to Khwisero Police station. He added that the appellant was taken to Khwisero district hospital where he was examined and treated. He showed the appellant's treatment notes (MFI P5) and the P3 form ("MFI – P6").
 26. PW6 stated that after completing the investigations he preferred the charges herein against the appellant. He also produced the complainant's panty "Exh P2" He also received the complainant's baptismal card which he produced and which was marked "PEXhibit 1". On cross examination he explained that it was possible that the complaint was made twenty (20) minutes after the incident. He also told the Court that no handcuffs were used to arrest the appellant, and that he did not do any dusting of the fingerprints but maintained that the complainant and other witnesses identified the appellant as the perpetrator of the crime against the complainant.
 27. EVERLYNE ATIENO ODHUNO [PW7] a Clinical officer working in Yala sub county hospital and a holder of a diploma in clinical medicine and surgery from KMTC Kisumu referred to "MFI P 3 and P4" namely the treatment notes and P3 form in respect to the complainant. She stated that the complainant went to their facility on 1.1.14 (though the offence is said to have occurred on 3/1/2014) with a history of having been assaulted and defiled by a person known to her. She examined her and found that the complainant was in fair general condition, her clothes had blood stains and her creamish coloured panty was torn. Her facial region was swollen and tender on the left side and there was also tenderness on the upper thigh. Genital examination did not reveal bruises but there were hymeneal tags which meant that her virginity had been broken. She also observed that there was tenderness on digital examination and an obvious opening of the vaginal introitus. She further observed that there was also a foul smelling mucous discharge from the vagina and blood on the external genitalia. She stated that laboratory tests revealed that she was HIV –ve, syphilis –ve and she was not pregnant. However no spermatozoa was seen in the urine.
 28. She concluded that there was a possibility of defilement which may have taken place within 72 hours before PW1 was brought to hospital. She also concluded that PW1 had also been assaulted and the injury assessed as harm. She filled the P3 form and signed it on 5/1/2014 which she produced together with the treatment notes.
 29. On cross examination by the appellant she explained that there was a possibility of defilement because of some injuries she observed in the genitalia. She also explained the nature of the treatment she gave to PW1. She told the trial Court that on that day the complainant was in her monthly period. She also explained that there was no spermatozoa and it could be out of various reasons. Further that the age of injury was approximated from the time when the incident took place and when she saw the complainant. She also told the trial Court that the complainant was wearing her panty which was torn. At the close of the Prosecution case the trial Court found that a

prima facie case had been established to warrant the appellant to be placed on his defence, and after due compliance with Section 211 of the Criminal Procedure Code, the appellant opted to give sworn evidence and did not call any witness.

The Defence Case

30. The appellant herein C L O, DW1 was the only defence witness. He testified that on 5/1/2014 he was arrested by a man who pointed a gun at him while he was at the Lwanda market. He claimed that he was pursuing a land claim with his uncles who were supposed to give him money sent by his sisters to buy land but the uncles had refused. He also claimed in his defence that his uncles had planned to kill him and had sent some thugs who cut him on the head.
31. The appellant also claimed that the case herein was a frame up because of the land issue. He maintained that he did not know the complainant. On cross examination the appellant told the Court that the case herein was for defilement. He also stated that since the complainant said in her testimony that she did not know him, it meant that she was forced to come and testify against him. He added that PW3 and PW4 were the people who had been sent to kill him. The defence then closed its case at this juncture.

Analysis and Determination

32. From the evidence the following are the issues for determination:-

- a. Whether the appellant was properly identified?
- b. Whether there was a medical report and whether it exonerated the appellant.
- c. Whether the sentence was proper and the judgment according to the provisions of the law.

33. On the 1st issue this Court finds that the evidence of the complainant was properly corroborated by PW3 and PW4. They responded to the distress call by the complainant a few minutes after the appellant had defiled her. They saw the appellant who ran away when he heard them (PW3 and PW4) approaching the scene. The incident herein took place at about 6.30p.m both PW3 and PW4 confirmed it was not yet dark. PW4 told the Court that he had seen the appellant earlier during the day. He even described what he (appellant) was wearing: the Barcelona T-shirt. Both PW3 and PW4 knew the appellant even before the incident. Their evidence was that of recognition. The appellant was their neighbour and the appellant used to live at his aunt's place. The complainant told the Court that she did not know the full names of the appellant but she only knew him as "p". She also stated that she used to see him around.

34. From the evidence it came out that the appellant was a neighbour who was known by the neighbours including PW2. He (appellant) stayed only a hundred meters from the complainant's home. The incident took place at 6.30p.m and there was light. PW3 and PW4 recognized the appellant. I am satisfied that the circumstances for identifying the appellant were favourable and free from error.

35. As stated in the case of **ANJONONI & OTHERS -VS- REPUBLIC [1981] KLR 594** "recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other." See also the principles that a Court ought to take into consideration when relying on visual identification to sustain a conviction as set out in **Wamunga -vs- Republic [1989] KLR 424** at page 426 where the Court states thus "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

36. The appellant has not raised an alibi nor did he challenge the evidence given by the Prosecution on his identification at the scene. In his submissions he only sought to know the precise timings of the incident. I must say that the complainant spent plenty of time with the appellant and therefore was able to identify him properly in the light. PW3 and PW4 also had torches and were also able to see the appellant running away as they approached the appellant's house. I need not

be labour the point, whether the appellant was seen at the back of the house or in the compound. It remains that he was seen as he did not give a different version of where he was on this particular day.

37. On the issue of the medical report, this Court finds that the P3 form was produced by PW7 and it contained her findings. She also estimated the age of the complainant as 15 years which corroborated the complainant's own testimony that she was born on 20/11/1998 and at the time she was testifying she was fifteen (15) years old. The appellant submitted that there was no age assessment report produced by the Medical officer PW7. This argument cannot be sustained because a P3 form was produced which contained all the information including the age of the complainant. The Baptismal card produced by the Prosecution confirms what PW7 estimated as the age of the complainant. In defilement cases it is important that the age of the complainant be ascertained. That was done in this case.
38. In the persuasive case of **WILLIAM ODHIAMBO SIARA –VS- REPUBLIC [2014] e KLR HC. AT KISUMU CRIMINAL APPEAL NO.77 OF 2012** the learned Muchelule J. delivered himself as follows:-

“.....it was contended that the age of PW3 was not proved beyond doubt. I agree that because of the fact that the various sentences under the act are dictated by the age of the complainant, it is incumbent upon the Prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card which showed date of birth. It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and unless they are shown to have been made at the time when the Prosecution was launched are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation.....”

39. Further in the case of **JOSEPH KIETI SEET –VS- REPUBLIC [2014] e KLR H.C. AT MACHAKOS CR. APPEAL NO.9 OF 2011** the learned Mutende J also persuasively held as follows:-

“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni –vs- Uganda Court of Appeal Criminal Appeal No.2 of 2000 it was held that in defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”

40. The trial Court herein took the child through a *voir dire* examination meaning she was a minor. The trial Court also observed that she (PW1) was a minor before taking her evidence. Having found that the medical report the P3 form showed the complainant's age there was therefore no need to undertake another age assessment. In any event, the child dedication card gave the complainant's date of birth.
41. It is true that the appellant was not examined by the Clinical officer, but the circumstances of the case herein show that he was seen at the scene of crime but he ran away. The complainant was found at the scene of crime and she told PW2, PW3 and PW4 that the appellant had wronged her. PW7 confirmed that the complainant was defiled. From the circumstances therefore there was no need to examine the appellant, he was at the scene and I am satisfied that he is the one who committed the crime. He has not in any way challenged the evidence adduced against him nor did he say that he was not at the scene. He ran away from the scene of crime and was arrested after some few days. It was therefore not possible to examine him, even if the Police and the doctor waited to do so.

42. Lastly on the sentence and the judgment by the trial Court, this Court finds that the trial Court considered the mitigation by the appellant before sentencing. The learned trial Magistrate did not give her opinion as alleged by the appellant but was guided by the evidence on record. She

considered both the Prosecution and Defence evidence in making her final decision and was guided by the provisions of Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006 in passing sentence.

Conclusion

43. In conclusion and for the reasons above stated, I find that the appellant's appeal lacks merit on both conviction and sentence on both counts. The appeal is accordingly dismissed in its entirety. I confirm the judgment of the learned trial Magistrate. Right of Appeal within 14 days.

44. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 2nd day of December, 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in person for appellant

Mr. Omwenga (present) for Respondent

Mr. Okoiti - Court Assistant