



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO 14'B' OF 2014

BETWEEN

F K K.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal out of the conviction and sentence of B.N. Ireri Ag. PM in the Principal Magistrates Court at Vihiga Cr. Case No.267 of 2012 delivered on 31/12/13)

J U D G M E N T

Introduction

1. The appellant F K was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the 10th day of February 2012 at Emanda sub location in Vihiga county within Western province the appellant intentionally and unlawfully defiled girl child namely E.M by causing penetration of his genital organ namely penis to enter genital organ namely vagina of the said child who was aged ten (10) years.

2. In the alternative the appellant was charged with indecent act with child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. Particulars of the said offence were that the appellant on the 10th day of February 2012 at Emanda sub location in Vihiga within Western province willfully and intentionally caused his genital organ to make contact with the genital organ of the girl child namely E.M aged ten (10) years old by touching her vagina.

3. The trial Court, after carefully considering the evidence of the eight (8) Prosecution witnesses and the evidence of the appellant who did not call any witness found the appellant guilty and convicted him of defilement under Section 215 of the Criminal Procedure Code. The appellant was sentenced to life imprisonment.

The Appeal

4. Being aggrieved and dissatisfied with both the conviction and sentence the appellant filed this appeal and set out the following grounds:-

1. THAT the trial Magistrate erred in law by convicting him on a defective charge sheet.
2. THAT the Prosecution's witness testimonies were marred with contradictions and inconsistencies.
3. THAT the complainant who was coached by her parents framed him because of an unending feud

and grudge existing between the two families. He is therefore asking this Court to allow the appeal, quash the conviction and set aside the sentence.

5. The appellant handed in written submissions dated 01/10/2015 and Mr. Omwenga for the State in opposing the appeal addressed himself on ground (2) of the appeal and submitted that the allegations that the Prosecution witness testimonies were marred with contradictions and inconsistencies were untrue. He further submitted that the resulting conviction was proper and safe and urged this Court to dismiss the appeal.

6. In a short reply the appellant submitted that he had not in his whole life been infected with any STD. He denied that clothes were seen in his compound and maintained that those clothes were brought to Court from the complainant's home. He added that PW1 – PW4 were all family members who also did business together. The appellant contended that it was necessary for a school teacher to be called to confirm that PW1 was a school going child.

7. This being a first appeal this Court is duty bound to re-consider and evaluate the evidence on record afresh and come up with its own conclusion bearing in mind the fact that it neither saw nor heard the witnesses. In this regard, the cases of **Pandya –vs- R [1957] E.A. 336** and **Kariuki Karanja –vs- Republic [1986] KLR 190** are relevant.

The Prosecution Case

8. At the trial the Prosecution called a total of eight (8) witnesses. PW1 was the complainant. She was taken through a *voir dire* examination and the Court was satisfied that she understood the importance of telling the truth and allowed her to give sworn testimony. She told the Court that she was ten (10) years old, lived in Majengo and schooled at *[particulars withheld]* Primary School and that she was in class six (6). She testified that she knew the appellant though she did not know his name.

9. On 10/2/12 she went to school in the morning, went for lunch at 1.00pm and went back to school. In the evening after school as she was heading home she found the appellant standing outside their school. The appellant called her and told her that her grandmother was at his house and was calling her. The appellant grabbed her hand and took her to his house which she said was near the Court and the dispensary. They found the appellant's mother and child who were outside the house but none of them spoke to her. She had her books. She described the house which had two rooms and she was taken to the sitting room. This was about 3.00p.m. She then asked the appellant where her grandmother was and he told her that she would come in the evening but she did not come.

10. In the evening the appellant laid her on his bed on top of some clothes, took his thing to urinate (penis) and put it into her vagina after removing all her clothes and panty and did to her "bad habit" which he did everyday. She was at his house for many days. Whenever she would ask him that she wanted to go home he would refuse. She told the trial Court that the appellant never left the house and used to urinate inside a jerrican. His mother was the one who used to take her (PW1) to the toilet. She explained that one day she saw her brother B K and wanted to go with him but the appellant prevented her from doing so.

11. Later when her grandmother came to the appellant's house the appellant hid her (PW1) inside the toilet. She further told the trial Court that one day she and the appellant's son D went to collect firewood three women held her and took her to the Police and thereafter she was taken to Vihiga Hospital where she was treated see "PEXh 1" and "PEXh 2" being the treatment notes and P3 form respectively. She further told the trial Court that her grandmother had reported to the Police that she was lost. At the appellant's house she was with the appellant's mother, father and child and they used to sleep in the sitting room. She experienced pain and her panty which was blood stained was thrown into the toilet by the appellant. She even mentioned the name of the appellant's son D.

12. When she was cross examined by the appellant, she explained that she was alone when coming from school as the other children were sweeping the class, she was in school uniform when the appellant held

her hand and took her to his house. She re-iterated her evidence in chief and added that she was at the appellants house from 10/2/12 to 19/2/12. She further told the trial Court that the appellant would walk with a knife in the house and he told her not to leave the house. She stated she was living in fear. She further repeated what the appellant did to her and added that she would scream but the appellant would remove a knife threatening to kill her. She also told the trial Court that her mother died and that she lived with her grandmother. She explained that D and others would see her and call her by name and that the appellant took her panty and threw it in the toilet.

13. PW1 also explained that the clothes she wore on that date were with her grandmother. She explained that she wore school uniform, yellow sandaks, maroon sweater, maroon petticoat and P.E clothes PExh 3 to PExh 7. On further cross examination she maintained that it was the appellant who took her to his house and that she was not told by her grandmother to tell lies against the appellant.

14. PW1's grandmother E M (PW2) testified that on 10/2/12 PW1 left home and went to school at *[particulars withheld]* primary school together with her brother B. She explained that PW1 was in class 3 and that on that day she went for lunch at 1.00p.m but did not come back home in the evening. She looked for her in the neighbourhood without success. When her search did not bear any fruit PW2 reported to the Police at Vihiga on the 26/2/2012. On 27/2/12 PW1's brother told her that he had seen PW1 at Vihiga Dispensary but she (PW1) ran away. PW2 stated that she went near Vihiga dispensary the next day and saw PW1 at the compound of the appellant. She also said she saw the mother and father to the appellant.

15. The child (PW1) ran away when she saw her, and that is when PW2 went to the Police station and reported that she had seen the child but when they went back with the Police to the home of the appellant they did not find any person. The second time they went they found the appellant who told them that his mother had taken the child to his sister to work as a house help. PW2 then informed some women who sell at the road who later got hold of PW1 and arrested her and took her to the Police and then to Mbale hospital for treatment. PW2 identified PW1's treatment notes and the P3 form. She also identified PW1's clothes being PExhibits 3 – 7 at the compound of the appellant. She also explained that the mother of the appellant was in the compound but did not co-operate with her. The appellant was later arrested. PW1 told her how she was lured by the appellant to go to his house on the pretext that PW2 was there. PW1 also told her how the appellant used to have sex with her and that he would touch her vagina and she bled. PW2 also stated that was the first time the complainant had disappeared from home. She was cross examined by the appellant and during the cross-examination, she maintained that she found the child at the appellant's home and the appellant even asked her for forgiveness.

16. PW2 reiterated her earlier testimony and also maintained that the complainant's clothes she produced in Court were found at the appellant's home. She explained that she did not even get the complainants panty and books as the complainants panty was thrown away. D K (PW3) told the trial Court that on 23/2/2012 at around 1.00pm a lady came to her house asking for a child of 10 years who had disappeared from home for three (3) weeks. She left instructions that if they saw the child they should inform her.

17. PW3 saw the child after being told by other children who had seen a child who was living at the home of F K the appellant. She had seen the child at the appellants home and she thought the child was a relative of the appellant. On cross examination by the appellant she explained that what she stated was true and that they took the child to the Administrative Police Camp at Vihiga. PW3 said she saw the child when the child had gone to collect firewood. She maintained that the child was living with the appellant.

18. PW4 C E also confirmed that she had seen the child (PW1) with D who was the son of K (the appellant). PW5 Sammy Chelule a Senior Clinical officer attached at Vihiga District hospital filled the P3 form for the complainant which had been sent to him by the OCS Vihiga hospital. He told the trial Court that the complainant had been treated at Vihiga Health Centre. He examined PW1 who he said had a history of defilement. PW3 found out that PW1 was in class 3 at *[particulars withheld]* primary school and was aged ten (10) years. PW5 also observed that PW1 was a minor, and she had a hymen which was healed with no visible bruises on her labia. The area between her vagina (perineum) was intact, cervix was intact there was some whitish discharge which was smelling, no blood stain HIV test was negative,

urine had positive pus cells whose significance was that she had an S.T.D. Other tests were negative. PW5 concluded that PW1 was defiled and infected with an STD which was treated. He further explained that PW1 left home on 7/2/12 to 2/3/2012 hence period of delay could not show conclusive evidence of defilement but he concluded that PW1 had been defiled. He produced the treatment book which was marked as PEx 1(a) and Laboratory test results marked as PEx1 (b) while the P3 form was marked as PExhibit 2.

19. On cross examination PW5 explained that the patient was taken to him on 2/3/2012 in the company of her grandmother and a Police officer. He also examined the appellant and stated that the discharge was a sign of defilement or penetration. He further explained that the girl had an S.TD according to Laboratory results. He also explained that the appellant's urine did not show any sign of STD but he had examined him ten days after the defilement and it is possible he had sought for treatment elsewhere.

20. PW6 Kenneth Migoli the Assistant Chief of Ikumba sub location was told by the OCS to look for the appellant who was to be arrested for the offence of defilement. He saw the appellant at Navuhi primary school on 9/3/2012 at 4.00p.m during the school's academic day and called the O.C.S who sent Police officers who arrested the appellant and took him to the Police station. He told the trial Court that he had also received a report from the child's grandmother that the child had been defiled. This report he also received from the head teacher of the child's school. He knew the appellant as a member of Imanda sub location and also saw him in Court.

21. On cross examination by the appellant PW6 affirmed that he saw the appellant at Navuhi primary school area. He explained that the appellant had gone into hiding and had not been seen for two (2) days. He also told the trial Court that the child's items were found in the appellant's house. PC Jonathan Langat No.79934 attached at Vihiga Police station investigated this case. He testified as PW7. He received the complaint herein on 27/2/12. The complainant told him that on the 10/2/12 as she was coming from school the appellant cheated her and lured her to his house where he defiled her. Her (complainant's) guardian reported that the girl had disappeared from her house. They went to the house of the appellant but did not find the complainant. Later the complainant was brought to them and upon interrogating her she told them that the appellant had defiled her. They were informed by the Assistant chief (PW 6) that the appellant had been seen at Navuhi primary school from where they arrested him. He then charged him (appellant) with the offence herein. He also issued the complainant with the P3 form on which her age was also assessed as per the report "PExh 8". He recorded witness statements of all witnesses.

22. On cross examination PW7 confirmed that he visited the scene of crime. PW8 ISAACK CHELIMO an oral Health Officer at Vihiga District Hospital produced the age assessment report on the complainant after he did oral examination. He assessed the complainants age at approximately 9 ½ years. The age assessment report was marked as PEx 8.

22. At the close of the Prosecution the trial Court found that a prima facie case had been established against the appellant. Section 211 CPC was explained to the appellant who opted to give a sworn statement and did not call any witness.

Defence Case

23. The appellant told the trial Court that he was arrested at 18.50 hrs on the 27/2/2012 when he went to see his boss MP Yussuf Chanzu at a function at Navuhi Primary School. He claimed that he was put in the cells for eight (8) days and was not allowed to say anything. Thereafter he was charged in Court with the offence which he claimed he knew nothing about and did not commit. He closed his case at this juncture. In its judgment, the learned trial Court found the appellant guilty of the offence of defilement and convicted him of the same.

Issues for Determination

24. From the Petition of appeal and the submissions by both the Respondent and the appellant the

following are the issues for determination:-

1. Whether the charge sheet was defective.
2. Whether the Prosecution witness testimonies were marred with contradictions and inconsistencies.
3. Whether the complainant framed the appellant.

25. On the first issue it is clear from the charge sheet that the appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act No.3 of 2006. In the alternative he was charged with the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. Particulars of the offence were properly set out in the charge sheet.

26. Even though the appellant raised the complaint of the charge sheet as a ground of his appeal, he never pointed out the defect in the charge sheet in his submissions. That notwithstanding this Court finds that there is no defect in the said charge sheet as alleged by the appellant. What constitutes a defective charge sheet was spelt out in the case of Yosefu & Another –vs- Uganda [1960] E.A 236. The East Africa Court of Appeal held:-

“The charge was defective in that it did not allege an essential ingredient of the offence.....” and in Sigilai –vs- Republic [2004] 2KLR 480 it was held that **“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to the specific charge that he can understand. It will also enable the accused to prepare his defence.”**

27. On the other hand Section 134 of the Criminal procedure Code provides for what the components/ingredients of the charge sheet constitute. It states **“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

28. In the instant case, the appellant knew from the outset that the charge facing him was one of defilement. Its particulars were clearly spelt out which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. The charge in this case as stated above was proper and had no defects.

29. On the second issue and from the evidence by the Prosecution, it came out clearly that PW1 disappeared from their home on the 10/2/2012. PW2 her grandmother who stayed with her as a guardian searched for her and also reported to the Police that the girl had gone missing when her search efforts bore no fruit.

30. PW1 was found by PW3 who arrested her and took her to the Police station. PW1 told the Police where she was and what the appellant did to her. PW6 examined her and her age was assessed by PW8. Exhibits were produced to prove that she was defiled see PExhibits 1 (a) and (b) and PExhibit 2. I find that the evidence by the Prosecution witnesses was consistent. There was no contradiction as alleged by the appellant. The trial Court therefore was right in convicting the appellant on the strength of the Prosecution witness evidence which was not rebutted by the appellant. The appellant did not raise any alibi defence as alleged in his submissions. He only explained to the trial Court what happened when he was arrested.

31. Lastly the complainant’s evidence was clear, precise and consistent as to what had happened to her during her incarceration at the appellant’s home. Her testimony was not shaken on cross examination. It should be noted that her testimony did not require corroboration in light of the proviso of Section 124 of the Evidence Act which states **“.....provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be**

recorded in the proceedings the Court is satisfied that the alleged victim is telling the truth.” In this case, the trial Court recorded that the complainant understood the importance of telling the truth and that she could be sworn. The complainant was duly sworn before she testified.

32. The appellant stated in his submissions that the complainant was HIV positive. According to the P3 form the HIV test conducted on the complainant was negative and therefore the appellant's allegation about the HIV status of the complainant is not supported by documentary evidence. Further, the fact that he was not found with an STD did not mean that he did not penetrate the complainant. It was explained by the Clinical officer (PW6) that he examined him (appellant) ten days after the incident and there was a possibility that he had gone for treatment elsewhere before he was seen and examined by PW6.

Conclusion

33. For the reasons stated herein above, the appeal herein lacks merit on both conviction and sentence. The same is hereby dismissed. I confirm the judgment by the learned trial Court on both conviction and sentence. Right of Appeal to the Court of Appeal within 14 days from today.

34. 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 - for Respondent

Lagat & Okoit - Court Assistant