



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.59 OF 2013

JACKSON MUTEMBEI MBAE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **Jackson Mutembei Mbae** was charged with the offence of defilement contrary to **Section 8 (2) of the Sexual Offences Act No.3 of 2006**.

The particulars of the offence were that on the night of 12th April 2012, at (particulars withheld) the appellant did an act which caused penetration with his male genital organ into the genital organ of **DN** a girl aged 3 years. In the alternative the appellant was charged with the offence of indecent assault contrary to **Section 11 (1) of the Sexual Offences Act No.3 of 2006**.

After the trial, the appellant was convicted on the main count and sentenced to 25 years imprisonment. The Appellant was aggrieved by the conviction and sentence and preferred this appeal setting out the following grounds of appeal:

- 1. That the court erred in finding that the identification or recognition was not free from possibility of error;**
- 2. That the prosecution witnesses tendered uncorroborated and conflicting testimonies;**
- 3. That the prosecution failed to avail vital witnesses mentioned during the trial;**
- 4. That the appellant was not taken for medical checkup;**
- 5. That the victim was not called to testify during the trial;**
- 6. That the conviction and sentence were not backed by the weight of the evidence tendered;**
- 7. That the trial court flouted the provision of Article 50 (2) (c) of the Constitution.**

The appellant therefore prays that the conviction be quashed, the sentence be set aside and the appellant

be set at liberty. The appellant filed written submissions on which he relied.

At the hearing of the appeal on 29th October 2015, Mr. Mulochi, Learned Counsel for the State opposed the appeal and submitted that PW1, the mother of the complainant narrated how the complainant informed her how the appellant undressed her and lay on her; that PW2 who examined the complainant found that there was evidence of penetration and that the hymen was broken and her clothes were blood stained; that the birth certificate showed that the complainant was 3 years old; Despite the fact that the offence was proved, the appellant was sentenced to 25 years imprisonment; and that under Section 8 (2) of the Sexual Offences Act, once found guilty a person is liable to life imprisonment. He therefore urged that the sentence meted out on the appellant was illegal and the court should hand the appellant the proper sentence.

This being the first appellate court, my duty is to examine and analyse all the evidence adduced in the lower court afresh and arrive at my own conclusions and determinations but remembering that this court did not have the opportunity to see the witnesses to weigh their demeanor. (See *Okeno v Rep 1972 KLR 32*).

Briefly, the prosecution's case was as follows; **PW1 SG** was at her home on 12/4/2012 when a lady called Christine came and asked her if she knew where her child was. She responded by telling her that the child was outside playing with other children. Christine then told her that she had found the appellant with the child and the child was crying. The child was aged 3 years. She then followed Christine and indeed found the child crying in a building which was still under construction about 30 meters from her house. It was her evidence that before she found her child, she had met the appellant on the way and that she didn't talk to him. She then picked her child and asked her where she had been, whereupon the child informed her that the appellant had told her that they go to his home; that he removed her panty and lay on her and pressed on her and hurt her on her private parts and she felt pain. PW1 then observed the child and noticed that her panty was blood stained and that she was bleeding from her private parts. She then reported the incident at Mitunguu Police Station where she was referred to hospital and the child was treated. She further testified that she used to see the appellant around.

PW2 who was the complainant in this case, was observed by the court to be a child of tender years and did not testify as the court found her to be of insufficient intellect to testify.

PW3 Elias Kiambi a nursing officer at Mitunguu nursing home testified that on 12th April 2012, PW1 took to her a child aged 3 years with a history of defilement. On examining the child, he found that the hymen had been broken; he took samples from her vagina which revealed no spermatozoa but there was an infection. He then sent them to Kanyakine General Hospital for post exposure to HIV and advised them to report to Mitunguu police station.

PW4 PC Daniel Nzioka, a police officer attached at Nkubu police station testified that on 12th April 2012 he was at Mitunguu police station when a lady (PW1) went there with her 3 year child and reported that the child had been defiled by someone known to her. He then booked her report and referred her to hospital; that the appellant was later arrested by the area chief and escorted to the police station. He further testified that the child identified the appellant as the person who defiled her.

PW5 Saberina Kaimathiri a Clinical Officer at Kanyakine District Hospital produced a P3 Form in respect of DN a child aged 3 years who had a history of having been sexually assaulted. On examining the child, he found her dress was blood stained, her hymen was broken and no active bleeding was seen. There was no discharge and spermatozoa noted and HIV test was negative. She further testified that the evidence of broken hymen at such tender age was indicative of penetrative sexual intercourse. The degree of the injury was assessed as grievous harm due to permanent injury to psychological health of the child

After close of the prosecution's case, the appellant was found to have a case to answer and he elected to remain silent and await the decision of the court.

I have considered the submissions by the parties and the grounds of appeal. In addition, I have

reevaluated the evidence on record. There was no eye witness to this incident as is common with offences of this nature. The complainant's birth certificate was produced in evidence as PEX. 3. She was born on 18/4/09 and by April 2012, she was only 3 years old. The complainant did not therefore testify after the court found that she was not possessed of sufficient intelligence to testify being a child of very tender age.

Be that as it may, PW1 who was the complainant's mother gave a clear and detailed account of the events of that day as narrated by to her by the complainant. It was her evidence that on the material day she was in the house believing the complainant was outside playing only for one Christine to inform her that she had seen her elsewhere and led her there. She then followed the said Christine to a house which was under construction and found the complainant having been defiled by a person she referred to as uncle and that the child explained how the person led her to the scene. She then observed the child and noted that her pants had blood stains and that she was bleeding from her private parts.

PW3 and 5, a nursing and clinical officer respectively, corroborated PW1's evidence that the complainant had been defiled.

Upon examination of the complainant, both PW3 and 5 found that her hymen was broken and she had injuries to her genitalia. PW5 was more particular that evidence of broken hymen at such a tender age was indicative of penetrative sexual intercourse. Penetration was proved on the complainant. The only question is who committed this heinous act on such a minor child? The child was in court and the court on examining her said that the child was not of sufficient intellect to testify. In the judgment the trial court rightly observed that the law allows the mother to testify on behalf of the child in such a situation. The appellant's complaint that the child complainant should have testified is untenable.

The appellant has complained that key witnesses who were mentioned were not called. I have in mind Christine who reported to PW1 about the whereabouts of her daughter. Christine was a key witness because I believe, she is the one that led to the arrest of the appellant since he was not found at the scene. PW1 told the court that the said Christine had been threatened by the appellant. However, the prosecution should have assured the witness of protection and compelled her to come to testify. In my view, the prosecution failed to call a very key witness in the case in the name of Christine and there is a gap in the prosecution case on how appellant was identified and arrested.

PW1 received information from Christine about 7.00 p.m. Ordinarily 7.00 p.m. would be dark. PW1 told the court how she met the appellant while on his way to the scene. She was not with Christine because she remained behind. PW1 did not know the appellant by name but just used to see him in the area. She did not disclose to the court how she came to know that the appellant was the assailant. PW3 told the court that the appellant was arrested by the Area Manager and members of public but the said Area Manager was not called as a witness to explain how he came to know that the appellant was the assailant. In my view, Christine and the Area Manager should have been called as witnesses to confirm the identity of the assailant. Though it was alleged that the appellant had threatened the said Christine, there was no evidence that she was ever bonded and declined to attend court nor were there any efforts to protect her from the alleged threats. As regards the Area Manager, there is totally no evidence on record as to why he was not called as a witness.

As pointed out earlier, PW1 testified that she only used to see the appellant but did not know his name. She did not find the appellant with the child. She said:

"... I used to see the accused and I did not know him very well, I am not related to him There is electric light along the area. I walked even the houses next had electric light on. I find Dorothy alone; I had met you on the way there."

PW1 did not disclose for how far away from the scene she met the appellant; she did not tell the court how far she was from him when they met; how far the lights were from him or how much light was available at the scene. See **R v Turnbull 1976 (3) All E.R. 549 at pg 552** where the court said the following on identification:

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’ ”

In the end, I find that there is totally no evidence on record on how the appellant was identified. It was not a case of recognition.

The appellant also complained that he was never taken to hospital for examination. PW2 testified that when he examined the complainant, she had an infection. Since the identification was not watertight the police should have taken the appellant for medical examination to determine whether or not he had an infection and therefore whether he is the one who infected the complainant. In the case of ***Andrew Cauri Ndungu v Republic NAI CA Criminal Appeal No. 132 of 2008 [2013] eKLR***, the Court of Appeal stated that;

“We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.”

In the instant case the appellant could not be positively connected to the offence and it was necessary to subject the appellant to a medical test.

Lastly, the appellant contended that the learned trial magistrate erred in law in flouting provisions of Article 50 (2) (c) of the Constitution. The said Article provides as follows:

“50 (2) Every accused person has the right to a fair trial which includes –

(c) to have adequate time and facilities to prepare a defence.”

The appellant did not attempt to demonstrate how the above Article was flouted. After the close of the prosecution case, he did not ask for time to give his defence but just said he would say nothing but await decision of the court. Consequently nothing turns on this point.

After careful consideration of all the evidence on record, and even though the appellant said nothing in his defence, the burden squarely rests on the prosecution to prove its case beyond any doubt, I find that the prosecution failed to discharge that burden. The appellant was not positively identified as the perpetrator of the offence. No doubt the complainant was defiled but the identification of the appellant was not watertight and there remain doubts on his identity that must be resolved in his favour. The appellant may be a prime suspect but that is not sufficient to found a conviction. The conviction is unsafe. It is hereby quashed, the sentence is set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

3/12/2015

PRESENT

Mr. Mulochi for State

In Person for Appellant

Ibrahim/Peninah, Court Assistants