REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 45 OF 2013

BERNARD MWANGI GATIBA……..APPELLANT

VERSUS

REPUBLIC ……..……...…….RESPONDENT

(Being an appeal against sentence and conviction in Kangema Principal Magistrate's Court Criminal Case No. 164 'B' of 2008 (Hon. S.N. Mbungi) on 22nd August, 2008)

JUDGMENT

The appellant was charged with the offence of defilement of a girl under 11 years contrary to section 8(2) of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the offence, on the 9th day of October, 2007 at [Particulars Withheld] , in Murang'a District within central province, the appellant unlawfully had carnal knowledge of D W N, a girl aged six years.

In the alternative, the appellant was charged with the offence of indecent assault of a female contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. Under this alternative count, it was alleged that on the 9th day of October, 2007 at [Particulars Withheld] in Murang'a district within central province, the appellant unlawfully and indecently assaulted D W N by touching her private parts.

After taking the evidence of five prosecution witnesses and the unsworn statement of the appellant, the learned magistrate concluded that the prosecution had proved the case against the appellant beyond reasonable doubt and convicted the appellant accordingly. He was sentenced to life imprisonment.

Being dissatisfied with the learned magistrate's decision, the appellant appealed against the sentence and conviction on the following grounds:-

1. **That the learned magistrate erred in law and in fact in concluding that libia minora and libia majora form part of the female genital organs;**
2. **The learned magistrate erred in law and in fact in not ascertaining the age of the complainant;**
3. **The learned magistrate erred in law in failing to consider that the appellant's constitutional rights were violated when he was held in custody for twenty days before he was arraigned in court;**
4. **The learned magistrate erred in law and in fact in failing to give reasons why he rejected the appellant's defence; and,**
5. **The learned magistrate erred in law in not holding that the prosecution case was not proved**

beyond reasonable doubt.

When the appeal came up for hearing on 17th October, 2013, the appellant relied on his hand written submissions in the prosecution of his appeal. Ms Maranga for the state opposed the appeal and urged the court to find that the appellant was properly convicted and sentenced.

According to submissions by the state counsel, the complainant's age was established to be six years old at the time the offence was committed and that the prosecution had proved beyond reasonable doubt that she had been defiled by the appellant; the appellant did not call any evidence to displace the prosecution evidence.

As far as the violation of the appellant's constitutional rights was concerned, his redress lay in damages. The state urged to uphold the conviction and the sentence.

This court will consider the submissions by the appellant and the state in the context of the evidence proffered at the trial. Indeed it is this court's duty to evaluate the evidence afresh and come to its own conclusions without forgetting that the subordinate court heard the evidence first hand and had the advantage and the opportunity of seeing and hearing the witnesses.

The record shows that the trial court took the unsworn evidence of the complainant; the unsworn evidence was taken because according to the court, "the witness was very young to take an oath".

In the unsworn statement, the complaint said that she was a pupil in class one at [Particulars Withheld] Primary School and that she knew the appellant because he lived in the same plot where the complainant resided. She told the court that she used to play with the appellant's son. She recalled that on the day in question, her mother was away at the market when the appellant called her into a house; he asked her to sit and thereafter he inserted his penis into her vagina. She said that the appellant "urinated into her vagina". Apparently, the complainant was not wearing her pants. She related this story to one Wagigiga and her mother, who got curious when she saw a wet patch behind her dress. She identified this dress in court. The complainant was taken to the police where she was issued with a P3 form and later to the hospital where she was treated.

The complainant's mother confirmed that the complainant is one of her two children and that she was aged six. On 9th October, 2008 she had been picking tea which she later took to the buying centre. When she went back home, she found her younger child playing with a neighbour's child; however, when she entered her friend's house, she found the complainant seated crying while the appellant was lying on a bed, apparently in the same room. She said the bed belonged to a friend of hers. When she enquired from her daughter why she was crying, she only looked at the appellant. It is when she took her outside the house that she noticed that the complainant's dress was wet at the back. The complainant told her that the appellant had "urinated in her". The complainant's mother called a friend to witness what had happened to her daughter and together they called people who arrested the appellant and took him to the police, at Kangema police station; it is at this station that a report of this incident was made. She later took the complainant for treatment. This witness told the court that she knew the complainant as a neighbour and there was no grudge between them.

The clinical officer who examined the complainant could not produce the P3 form in which his findings were recorded; that officer who apparently hailed from the rift valley province had failed to turn up in court on several occasions due to the volatile security conditions following the 2007-2008 post-election violence. For this reason and since the appellant did not object to the production of the form by any other person, the P3 form was produced by one Danson Maina who testified that he was conversant with his colleague's handwriting.

According to the medical report in the P3 form, the complaint's vagina had bruises. The complainant's clothes were described as wet with sperm cells. The appellant was also subjected to HIV and urinalysis tests. The results indicated that he was HIV negative and nothing abnormal was

detected in his urine. The P3 forms and the complainant's treatment notes were admitted in evidence as prosecution exhibits.

Raphael Kibue Kimani (PW4) told the court on 9th October, 2007, he was on his way to his shamba when he heard some screams; when he checked what the screams were all about, a woman who was among those that were wailing told him that the appellant had defiled her daughter. The complainant and the appellant were at the scene. When this witness called the officer in charge of Kangema police station to inform him of what had happened the officer asked him to arrest the appellant and take him to the station. The witness arrested the appellant and took him to the police. He also said that he noticed that the complainant's clothes were wet.

The investigations officer sergeant Bernard Mutubishi confirmed that on 9th October, 2007 the complainant was brought to the police station by her mother and Raphael Kibue (PW4). The complainant's mother reported a case of defilement and as part of his investigations he retained the complainant's dress and the appellant's underwear.

In his unsworn statement, the appellant informed the court that after his day's work he went back home where he found the complainant playing with another child. According to him he stopped them from playing and went to bed. It was while he was sleeping that the complainant's mother came and asked him to accompany her and board a motor vehicle to Kangema police station. It is at Kangema police station that he was arrested.

The learned magistrate considered the foregoing evidence in the light of the charges against the appellant. Section 8(2) under which the appellant was charged reads:

8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Defilement itself isdefined in section 8(1). That section reads as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The essence of section 8(2) of the Act is that a person who causes penetration with a child of 11years old or less is guilty of the offence of defilement and is liable to imprisonment for life.

Although the appellant has taken issue with the complainant's age in his grounds of appeal, he never contested this aspect of the prosecution evidence at the trial stage. The complainant's mother said her daughter is six years old which also was the age indicated in the medical officer's report as evidenced in the P3 form that was admitted in evidence. The appellant did not cross-examine the complainant's mother on this issue; he did not cross-examine the medical officer at all. There was no reason why the learned magistrate would not have held that the complainant was six years old and I do hold that he made the correct finding.

The next question that ought to have concerned the trial court was whether, on the basis of the available evidence, there was penetration of the complainant as defined in section 2 of the Sexual Offences Act. Under that section, "penetration" is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person. It follows that for the appellant to have been found liable for the offence of defilement under section 8(2) of the Act, his genital organs must have been partially or completely inserted into the genital organs of the complainant.

In his judgment, the learned magistrate took into account the evidence of the complainant, her mother and the medical officer to find that the complainant's genital organs had been penetrated and that they had been penetrated by the appellant.

There is no doubt that the complainant was a child of tender years and therefore under section 19

of the Oaths and Statutory Declarations Act, she ought to have been subjected to a voire dire examination before her evidence was taken. Despite what appeared to be consistency in her testimony the omission to subject her to a voire dire examination rendered her evidence to be of little value.

All that the learned magistrate noted on the record was that the witness was too young to testify on oath; that may have been true but he could only arrive at such a conclusion after he had examined the complainant on whether she understood the nature of an oath or whether she understood the duty to speaking the truth. In the case of Sakila versus Republic (1967) EA 403 the court said at page 406 that where a voire dire examination is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion miscarriage of justice.

In the absence of the evidence of the complainant, the only other evidence available was, to a large extent circumstantial since none of the rest of the witnesses saw the appellant defiling the complainant. In this regard the evidence of the complainant's mother, the medical officer and the investigating officer was crucial. The complainant's mother found the complainant crying in the same house where the appellant was sleeping at the material time; she told her that the appellant had assaulted her sexually; the medical examination revealed bruises on the complaint's libia minora though the hymen was intact.

In this court's view, it is apparent from the evidence of the complainant's mother and the medical officer that the complainant was sexually assaulted and circumstances pointed more to the appellant's guilt than his innocence. In the Court of Appeal decision of Simon Musoke versus Republic (1958) EA page 715 at page the court said;

"… ***in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

This decision has been followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

The inculpatory facts in the case against the appellant appear to me to be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The only other question is whether the sexual assault the complainant was subjected to fitted the description of defilement of a child as defined under section 8(1) of the Sexual Offences Act. The P3 form was clear that though the complainant's libia minora was injured, there was no penetration. With this evidence on record, the learned magistrate erred to have concluded in his judgment that,

"I found that the accused penetrated the outer side of the complainant vagina. The complainant (sic) vagina had bruises on libia minora. It is in my own opinion that the labia minora forms part of the women vagina."

The available evidence was clear beyond peradventure that the appellant was more culpable for the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act than for the offence of defilement. Section 11(1) aforesaid provides;

11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

An act that is indecent is defined in section 2 of the Act and for purposes of this appeal part (a) thereof is pertinent; under that part an "indecent act" is defined as an unlawful intentional act which causes-

a. ***Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
b. **….**

The evidence on record suggests that though there was contact of the appellant's body with the genital organs of the complainant, there was no penetration. There was no evidence to support the appellant's conviction for the offence of defilement and in the absence of such evidence, the conviction cannot be allowed to stand. I would allow the appellant's appeal to the extent that the conviction for the offence of defilement under section 8(2) of the Sexual Offences Act is quashed and substituted with a conviction for the offence of indecent act with a child contrary to section 11(1) of that Act. Accordingly, the life sentence meted out by the trial court against the appellant is set aside and substituted with a sentence of ten years imprisonment commencing from 29th October, 2007 when the appellant was put in custody.

Signed, dated and delivered in open court this 10th day of February, 2014

Ngaah Jairus

JUDGE

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