REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 37 OF 2013

ERNEST KIRUI RONO ……..……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

Ernest Kirui Rono was charged and convicted of an offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. He was sentenced to serve a jail term of life imprisonment. He is dissatisfied with both the conviction and sentence. He filed this appeal challenging the decision of the trial court based on grounds found in his amended grounds of appeal filed in court on 24/2/2014 and his submissions made in court. He prays that the court quash the conviction, set side the sentence and set him free. The appeal is based on the following grounds:-

1. **That the appellant was not identified by any of the prosecution witnesses;**
2. **That relevant witnesses were not called by the prosecution;**
3. **That the conviction went against the weight of the evidence;**
4. **That the appellant's defence was not taken into account;**
5. **That Section 200 of the Criminal Procedure Code was not complied with;**
6. **That his rights under Article 50(1) of the Constitution were violated;**
7. **There was no medical evidence to corroborate the allegation.**

Mr. Omutelema, the Learned Counsel for the State opposed the appeal for reasons that the appellant was informed of the reason for his arrest which he alludes to in his defence; that Section 200 of the Criminal Procedure Code was complied with and Section 211 of the Criminal Procedure Code too was explained to him and since he was represented by counsel, whereby he responded that he would give sworn evidence; that the child got a tear during the ordeal and had to be admitted for repair and application for time; that PW3 who had direction positively identified him as the offence took place in broad daylight.

In support of their case the prosecution called a total of 7 witnesses. After a voire dire examination, the court was satisfied that the complainant did not understand the meaning of the oath, and allowed her to make an unsworn statement. She told the court that the appellant took her to the hill, asked her to show him where her mother was and when there, he did **'bad manners'** to her and showed the court her private parts as the place the bad manners were done.

J C (PW2) is the mother of the complainant, PW1. She recalled that on 23/9/08, she was returning home

when she was informed that her daughter had been defiled. She accompanied PW1 to Olenguruone District Hospital where she was admitted for ½ a month. She received information on 24/9/08 that the suspect was known, he was arrested at the stage after being pointed out. She did not tell the name of the person who informed her that the appellant was the offender.

Weldon Kirui Kerich (PW3), recalled that on 23/9/08 about 4 p.m., he met a person who asked for a route to Kaplemboi at about 4.00 p.m. About 4.30 p.m. he heard scrams in the direction the appellant had gone. He went there and found the child had been defiled. He identified the appellant to the chief and he was arrested.

J K R (PW4) the grand father of the complainant recalled that on 23/9/08, he was resting at about 4.00 p.m. The children entered the house and he noted that M was missing and upon enquiry was informed that she had gone with somebody who wanted the direction to the river. Later M came back and was bleeding. PW4 identified the appellant because PW2 used to work at their home. Undisclosed people who had seen him informed him it was the appellant who committed the offence.

PW5, Richard Cheruiyot Langat, a Senior Assistant Chief of Emitik in Olenguruone arrested the appellant after he was pointed out to him.

The appellant was re-arrested by PC John Sumaili (PW6) after he was arrested by members of public.

PW7, Dr. Raymond Churyai, testified that he examined the complainant on 25/9/08, who had been admitted on 23/9/08. She had suffered soft tissue injuries to the neck, a tear on the genitalia which required repair; bleeding through vaginal opening and he was of the opinion that there had been vaginal penetration.

When called upon to enter his defence, the appellant, told the court that PW2 is his ex-wife and she had called him informing him that the son was ill. He was away in Bomet and he travelled back home a day later and went to the hospital where he met the area chief who arrested him and told him about the defilement which he knew nothing about.

As the first appellate court, it is my duty to evaluate and analyse the evidence afresh and arrive at my own independent determinations and conclusions.

The complainant's age was assessed at approximately 6 years 9 months at the time she was defiled. There is no doubt in my mind that the complainant was defiled. She told the court that **'tabia mbaya'** was done to her as she pointed at her private parts. The evidence of the doctor, PW7, confirmed that indeed the complainant was severely injured with a 2nd tear of the posterior vaginal wall which had to undergo repair. The doctor opinied that there was vaginal pentration. An offence of defilement is committed when penetration is proved. Section 2 of the Sexual Offences Act defines **"'penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

Having found that the complainant was defiled, the only question that needs to be answered is who committed the heineous act?

The complainant was alone at the time the offence was commited. Nobody else witnessed the incident. When she pointed at the appellant as the culprit while in court her evidence amounted to dock identification. The prosecution did not establish whether or not she knew the appellant before. Although I appreciate that the complainant was admitted in hospital for a while, this is a case where an identification parade was necessary because the appellant was arrested only a day after the event. Dock identification has been said to be worthless unless corroborated by other independent evidence especially bearing in mind that this was a child of tender age. Nowhere was the court told that the complainant ever identified the appellant again from the time of the incident till she pointed him out in the dock. The incident occured on 29/9/2008 and PW1 testified over a year later on 10/12/09. Long period of time had lapsed and there is likelihood of the memory fading.

The only other witness who claimed to have seen the appellant was PW3 who said the appellant asked him for direction to Kaplemboi on the said day at about 4.00 p.m. Then he heard screams about 30-40 minutes later after which he found the complainant defiled. PW3 did not get the appellant with the complainant and according to him the complainant told him that she could not identify the offender because she closed her eyes. Being the first person to find the complainant after the ordeal, I believe that is what she told him meaning she did not identify the assailant. PW3 did not explain why he decided that the appellant was the culprit. There is also no evidence that the appellant was the only person who went the direction where the complainant was found defiled. 30 to 40 minutes was a long time and there should have been evidence to the effect that it is only the appellant who could have defiled the complainant at that place at that time. Again, even after the appellant's arrest, no identification parade was conducted where PW3 could identify the offender as the person he gave direction to. PW3 admitted in cross examination that he was never called to identify the appellant. PW3 did not tell the court whether or not he knew the appellant before. He identified him in court over one year later.

This case turns on the issue of identification. The appellant was arrested on the next day about 4.00 p.m. at Olenguruone Centre by PW5 (Assistant Chief) who acted on information from unknown people. In my considered view, apart from the evidence of PW1 which is very weak, PW3's evidence did not really link the appellant to the offence and could not be relied upon. In **Oluoch v Rep (1985) KLR 549** pg 550, the court held as follows:-

> **"2. A dock identification of an accused person by a witness where there has been no identification parade conducted earlier, and at which the witness is present, is almost worthless;**
>
> **3. A fact may be proved by a single witness but when such evidence is in respect of identification, it must be tested with the greatest care."**

How then did the complainant identify the appellant in court? In my view, the finding by the court that the complainant positively identified the accused had no basis bearing in my mind what I have considered above. The trial court considered Section 124 of the Evidence Act which did away with the need for corroboration of the evidence of a child in a sexual offence. However, in this case, the evidence on identification was very weak that it would certainly have required corroboration by the other independent evidence which was lacking. The evidence on identification was too weak to sustain a conviction.

Regarding the allegation that the appellant's rights under Article 50 of the Constitution were breached because he was not informed of the charges he was to face, I disagree with him because in his defence, the appellant stated that when he arrived at the police station, he was asked about the defilement.

Whether **Section 200** of the **Criminal Procedure Code** was complied with, the court record on 24/3/2010 shows that the appellant was represented by one Kirui who applied that the case continues where it had reached. This is because, H.N. Nyaga Senior Principal Magistrate, was taking over the conduct of the case from Soita, Senior Principal Magistrate. The court granted the request by the appellant's counsel and ordered proceedings to be typed so that they could proceed. **Section 200** of the **Criminal Procedure Code** was duly complied with and the appellant suffered no prejudice.

In his defence, the appellant claimed that PW2 was his ex-wife who called and informed him that the child was sick. He was far away in Bomet and when he went to hospital he was arrested. Although the appellant was represented throughout the case, he never alluded to PW2 being his wife. Counsel questioned PW2 at length but never made such suggestion. The defence was an afterthought. However, though in cross examination PW2 denied having known the appellant's mother, PW2's father PW4 stated that PW2 used to work for the appellant's mother and therefore they are people who knew each other. One wonders why PW2 was concealing the fact that he knew the appellant's mother and therefore the appellant. However, there is no disclosed reason why PW2 would have framed the appellant with this offence.

Even without going into all the issues that were raised on appeal, I am satisfied that the evidence on

identification of the appellant was not water tight and there is real likelihood of mistaken identity. There are strong suspicions against the appellant but a conviction on an offence of this magnitude cannot be based on suspicion. This is a case where the police failed to carry out any investigations and if they did they were shoddy. The offence should have been proven beyond any doubt which it was not. In the end, the doubt raised in my mind must be resolved in favour of the appellant. For the above reasons, the conviction is hereby quashed and sentence set aside. Appellant set free forthwith unless otherwise lawfully held.

DATED and DELIVERED this 14th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present in person

Mr. Chebii for the State

Kennedy – Court Assistant