



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 186 OF 2011

J M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

J M K was initially charged with two others, namely, S M W (1st accused) and J M N (2nd accused). The charges against the 1st accused were withdrawn because he was too unwell to proceed with the hearing. The case proceeded as against the appellant who was 3rd accused and the 2nd accused. The appellant was charged with the following offences:- Count I he was jointly charged with offence of defilement contrary to **Section 8(1) and 8(2) of the Sexual Offences Act No.3 of 2006**. They were alleged to have defiled AN, a child aged 8 years, at L Village in Laikipia West District on adverse dates and 8/7/2010; On count V the appellant was charged with the offence of incest contrary to **Section 20(1) of the Sexual Offences Act No.3 of 2006**. It was alleged that on diverse dates upto 8/7/2010 at L Village in Laikipia District, he intentionally touched the vagina of AN with his penis who he knew was his daughter. In the alternative, he faced a charge of indecent act contrary to **Section 11(1) of the Sexual Offences Act**; On count VI he faced a charge of deliberate transmission of HIV contrary to **Section 26(1)(b) of Sexual Offences Act**. It was charged that on diverse dates upto 8/7/2010 at L Village, having knowledge that he was infected with HIV, intentionally and willfully defiled AN aged 8 years which he knew was likely to lead AN to be injected with the said virus.

After a full trial, the 2nd accused and the appellant were convicted. The appellant was sentenced to life imprisonment on Count v and vi and the sentences were ordered to run concurrently. He appeals against both the conviction and sentence on the grounds which are contained in his submissions, filed in court on 25/2/2014:-

- 1. That the sentences meted against the appellant contradict Articles 24 and 51 of the Constitution;**
- 2. That the court erred by not finding that the charges were fabricated by police;**
- 3. That the prosecution case was full of contradictions;**
- 4. That the medical evidence was at variance with the charges;**
- 5. That material witnesses were not called to testify;**
- 6. That the appellant's defence was not considered;**

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.

The appeal was opposed by Mr. Chirchir, Learned State Counsel, who submitted that the complainant identified the culprit as the appellant who is her father; that the Doctor (PW6) confirmed that the

complainant had been defiled and infected with HIV; that the appellant was also found to be HIV positive and that the trial court found the defence to be unconvincing and lastly, that the sentence is lawful.

The case before the trial court was as follows:- AN (PW1) who was aged 10 years at the time she testified on oath recognized the appellant as the father who she lived with at L. She recalled that on two occasions, her father came home, removed her pant and put his thing for urinating in her thing for urinating and she cried and told Mama W who was their friend. Another person by name Mwangi also did that '**tabia mbaya**' to her. Another by name Kirisui tried to do that but she managed to ran and escape. Mama W took her to Nyahururu District Hospital and then reported to police.

J W (PW2), a neighbour to the complainant, recalled that on 23/6/2010, PW1 came from school and claimed to have a stomach ache. PW2 said she had been staying with the child (PW1) since January 2010 because the father lived with the children alone and would come from work late. When the girl continued to complain of stomach ache next morning, PW2 removed her clothes and examined her body only to find a big wound across her abdomen which looked like a burn. She took the girl to hospital and when they returned for the results, the child was found to be HIV positive and she disclosed that one Mwangi had defiled her. It is then they reported to the police. PW1 was taken to St. Martin for counselling on 8/7/2010, where she disclosed that the appellant, her father, one Kiriso and 2 other boys had defiled her while at home; that later PW1 identified the three people who were arrested by police and charged.

PW3, M N M, a teacher at L School recalled that on 7/7/2010, when in school, a parent, JM, a guardian to the complainant, AN, informed the Head teacher of what she had done in respect of JN and requested to be accompanied to St. Martin. PW3 accompanied the complainant and the said guardian to St. Martin where PW3 was shown the statement given by the complainant to the effect that PW1 had been defiled by the father, Mwangi and Kurisui. She later learnt of the arrest of the three people.

PW4, S M N, Head teacher of L Primary School said that he received a report from PW2 about PW1 having been found to be HIV positive on being examined at hospital. He later saw the three men and 2 boys who had been arrested for defiling the complainant.

PW5, PC Linus Lotulya testified that on 26/6/2010, a lady took the complainant to the police station at Nyahururu and complained that the child had been defiled by several people. He recalled that JM, the father of the child had made a similar complaint earlier but PW5 suspected that it was a cover up by the father because the father did not want the child to be interrogated in his absence. He referred them to St. Martin where she was counselled and she named the father, two other men and two boys as having defiled her. On 8/7/2010, he arrested the three men and two boys named by the complainant for allegedly defiling her. He said that it was confirmed at Nyahruru District Hospital that the complainant was HIV positive, and she was sent to St. Martin for counseling. He produced the card issued to PW1 as PEx.2 and the one for the appellant as PEx.3 and the one for accused 1 as PEx.4. The complainant was examined by Dr. Kamau of Nyahururu District Hospital who was said to be attending further studies at Nairobi and the P3 Form filled by him was produced by Dr. Wati Kariuki. He found that she had a healing herpes zoster scar on the left side of the body, hymen was not intact which was evidence of penetration and P3 was filled on 16/7/2010.

When called upon to defend himself, the appellant denied any knowledge of the offence and said that he was working in the farm when his young son called him. He found police officers and PW2 in the vehicle and was told there was a suspect to be arrested from L and he was required to record a statement.

After taking into account both the prosecution and defence cases, there is no doubt in my mind that the complainant was defiled. She was found to have contracted HIV and her hymen was missing. There was evidence of penetration. The only question is who was involved in the a sexual act with the complainant.

It is not known when exactly, the sexual acts took place because the complainant's involvement in the sexual acts only came to light when PW2 discovered that she had a wound and it was found to be herpes Zoster and she was sent for treatment counseling.

In court, PW1, in her testimony said that it is the father, the appellant, who defiled her. She first revealed this to the counselors. In cross examination, she told the court that he had not done it once but twice. The complainant's mother was not at home, as she was said to be mentally ill. There was really nobody that could have influenced the minor to frame the appellant, her own father. Under Section 124 of the Evidence Act, there is no requirement that the evidence of a minor be corroborated provided that the court believes that the child is truthful and states the reasons for such belief. The child was tested in cross examination but did not waver. I am satisfied beyond any doubt that the appellant is the culprit. He had been living with the complainant alone with her small brother till PW2 took her in. There was no reason at all for PW2 or the police to frame the appellant using the complainant.

I have not found any contradiction in the prosecution evidence as alleged by the appellant. PW5 admitted that earlier on, the appellant had been to the police station alleging that the complainant was defiled but upon examining his demeanor, suspected him because he did not want the complainant to be left alone with the police officer or asked any questions. It is PW2 who reported to the police, took the complainant to hospital and then escorted her to L School to get the head teacher. Although it was not clearly disclosed, I believe JW and JM refer to one and the same person, who was a guardian to the complainant. PW1 referred to her as **“mama Wambui”**

There is no requirement in law that a certain number of witnesses are required to prove a fact. One witness can suffice depending on **Section 143** of the **Evidence Act**. In this case, the appellant contends that the statement from St. Martin and the maker were not called as witnesses. It is during counseling that the complainant revealed who had defiled her, her father and his friends, and the police acted on that report. In her testimony on oath, the complainant maintains that the appellant, her own father, defiled her. Even if the people from St. Martin's came to testify, it would amount to hearsay because they would only repeat what the complainant told them said as nobody had witnessed the acts. PW1 has told the court with her own mouth, her testimony was tested in cross examination and was not shaken. There is no material witness that was not called upon to testify upon which the court can make an inference that such evidence would have been adverse to the prosecution case..

The appellant also complained that his rights under **Article 49(1)** of the **Constitution** requiring that he should be arraigned in court within 24 hours of arrest were breached. He was arrested on 8/7/2010 and arraigned in court 5 days later on 13/7/2010. The charge sheet does indeed confirm that the appellant was arrested on 8/7/2010 and arraigned in court on 13/7/2010. However, he never raised this complaint before the trial magistrate. It is trite law that anyone alleging breach of constitutional rights must raise them at the earliest opportunity possible. (see **Mwalimu v Rep [2008] KLR**). This would enable the prosecution to launch an investigation into the allegation and why the delay was occasioned and offer an explanation, if any. This complaint cannot be addressed on appeal and besides that is a different cause of action all together. If at all there was a delay in bringing the appellant to the court, it may have been caused by the police. This court cannot just let the appellant off the hook because there is a complainant in this case whose rights have also been violated and have to be addressed. If the appellant is truly aggrieved, then he should file a constitutional case before the proper forum.

From the court record, it is apparent that the prosecution did not invoke the provisions of Section 77 of the Evidence Act before allowing Dr. Waiti Kariuki (PW6) to testify. However, I find that failure to do that did not prejudice the appellant's case because the doctor explained that Dr. Kamau who had examined the appellant was away pursuing further studies at the University of Nairobi and to await the said doctor would have caused a delay in prosecution of the case. PW6 had worked with the said doctor for 6 months and was therefore competent to produce the P3 Form in evidence. The findings of the doctor were that the hymen was missing, which was evidence of penetration, and she had a healing herpes zoster scar on the left side of the body. An offence of defilement is committed when penetration is proved. Section 2 of the Sexual Offences Act 3 of 2006 defines **“penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”** In my view, the medical evidence totally supported the charge as framed.

After the magistrate had found that the appellant and his friends had defiled the complainant, she observed:-

“It is so sad that such a young child had to go through such an ordeal and the persons who took her through that can only be described as beasts. The accused persons each simply denied the offence. However, the evidence on record is overwhelming against each of the accused.”

The appellant contends that by the above statement, the magistrate allowed herself to be controlled by emotions which was prejudicial to him. In **Burinyi & Another v Uganda** (1969) EA 123, the court did observe that the court cannot enter into the arena of the case and the duty of the court is to hold the scale to see that justice is done according to the law on the evidence before it. It was indeed unfortunate for the trial court to express its feelings about the offence and the accused persons before it made its decision but the court merely called the perpetrators of the offence as beasts after making a determination that the offence was indeed committed. The comment did not go to affect the court’s views on the evidence. For that reason the appellant was not prejudiced in any way by the said comment.

The appellant’s other complaint is that his defence was not considered. The appellant’s defence was a bare denial. He only talked of having been arrested when working in his shamba. He never alluded to the allegations leveled against him. The offences were committed prior to the date of arrest and he should have addressed himself to that. In the closing paragraph of the judgment, the trial court addressed itself to the defences of the accused and rejected them. The appellant’s defence was considered.

As the first appellate court, I have evaluated and analysed the evidence afresh and I have come to the conclusion that the trial court arrived at the correct decision that the prosecution had proved its case beyond any reasonable doubt. I am satisfied that the appellant defiled his own daughter the complainant, and infected her with HIV. I hereby dismiss the appeal and I accordingly confirm the conviction on Count V and VI. Charging the appellant with Count I was duplication and he is acquitted of that charge. As regards sentence, the trial court erred by sentencing the appellant to life imprisonment on Counts V and VI since the appellant has only one life. I confirm life imprisonment on Count V and the sentence on Count VI is left in abeyance. It is so ordered.

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