REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO.125 OF 2009

WILSON MUCHIRI NGOCHI…….....APPELLANT

VERSUS

REPUBLIC……..…….....RESPONDENT

From original conviction and sentence in Cr. Case No. 1033 of 2007 at the Senior Resident Magistrate's Court at Siakago by HON. S.M. MOKUA – PM on 9/6/2009

J U D G M E N T

WILSON MUCHIRI NGOCHI the Appellant herein was convicted of the offence of indecent act with a child contrary to section 11(1) Sexual Offences Act No.3/06 and sentenced to ten (10) years imprisonment. He was dissatisfied with the Judgment and has appealed against both conviction and sentence. He raised the following grounds;

1. **The Appellant's constitution rights were violated for he was retained in police custody for a period exceeding 24 hours and no genuine reason was explained to Court as to why Appellant was retained in police custody for 8 days from 20/6/2007 to 28/6/2007 without apprehending him to Court.**
2. **That there was no any formal report like birth certificate or medical age assessment was produced in Court to prove the age of the complainant.**
3. **That the evidence testified by PW1 and PW2 was inconsistent and uncorroborative for they mentioned different time of arrival from school and date when the incident happened also that evidence of PW3 and PW5 who were both medical officers who tested complainant and recorded different report.**
4. **That there was grudge between the complainant's mother JMM (PW2) and the Appellant over the allegation that Appellant goats that he was grazing had entered to PW2's shamba and damaged her crops therefore she framed on Appellant to revenge. The same was confirmed to Court by PW2 during cross examination. (page 8 line 16-17).**
5. **That the learned trial Magistrate erred in law and fact when he failed to consider evidence of PW5 Dr. Moses Maina from Consolata hospital Kyeni who clearly confirmed to Court that there was no evidence of vaginal penetration and hymen was intact (page 20 line 22-23).**
6. **That the learned trial Magistrate erred in law and fact when he relied on single minor complainant evidence without any other supporting evidence to prove incident occurred.**
7. **That the learned trial Magistrate erred in law and fact when he relied on evidence of defect P3 form which was filled by PW3 clinical officer who never informed Court of his academic qualification and some important information was missing like Doctor's signature on second page, approximate date of injuries and probable type of weapon which caused injuries if**

they were indicated could clearly prove how and when offence occurred.

The Appellant had been charged with the main count of defilement which the learned trial Magistrate found not to have been proved. The complainant (PW1) was examined by the Court and found fit to give evidence upon being affirmed. Her evidence was that as she came from school she was accosted by the Appellant whom she knew as a herder. He took her to the bush and removed her clothes and had sex with her. Her pant got blood stains (EXB1). She went home and reported to her parents what had happened. He had threatened her with a panga so she could not scream. PW2 took her to hospital and she was treated but later hospitalized at Kyeni Mission Hospital for a week. The medical evidence by PW3's evidence showed that the child had been defiled. She further said she carried out HIV tests on both PW1 and the Appellant. PW1 tested negative while the Appellant tested positive. Dr. Maina further screened PW1 for HIV and was found to be negative. He also found that there had been no penetration of PW1's vagina.

The Appellant in his unsworn defence denied the charge. He said he left home on 8/5/2007 and returned on 20/6/2007 from Ishiara. He was arrested because of this offence. And that PW1 failed to identify him on an identification parade. He also said there was a grudge between him and the complainant as his goats had strayed to PW2's land.

When the appeal came for hearing the Appellant presented the Court with written submissions. In them he has expounded on his grounds of appeal. He challenges his identification. Mr. Miiri for the State opposed the appeal saying there was ample evidence which the learned trial Magistrate based his conviction. He further submitted that the learned trial Magistrate lawfully relied on the evidence of a single witness.

This being a first appeal this Court is enjoined to reconsider and reevaluate the evidence on record and come to its own conclusion. This Court is also alive to the fact that it did not have the benefit of having or seeing the witnesses testify. I stand guided by the case of ***KIILU –V- REPUBLIC [2005]1 KLR 174*** where the Court of Appeal stated as follows;

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

I have considered the submissions by both the Appellant and the State. I have equally considered the evidence on record and the grounds of appeal.

The Appellant was charged with the offence of defilement as the principal count. The fact that the charge of defilement did not succeed did not in itself mean the alternative count succeeds. The evidence has to support the charge before one is convicted. The evidence of PW1 was that she was defiled. These are her words at page 7 lines 19 – page 8 lines 1-3

"He held me and pulled me to a thicket nearby and reached for my pant. He removed my pant and made me lie down. He also opened his trouser before carnally knowing me. It is accused – identified- who did this to me. Accused is known to me as a herder. Accused lay on me after opening my legs – apart. I did not scream as he threatened to cut me with a panga. This is the pant I had worn on this day. After knowing me carnally accused took me to his house. He ordered me not to scream or cry otherwise he was to cut me with the panga. I felt a lot of pain and I was bleeding from the vagina. When accused took me to his house, he told me not to escape but when he entered the house I decided to go away. This pant is blood-stained – seen stains. I managed to go away with the pant."

And this is what her mother PW2 stated at page 8 lines 30 – page 9 lines 1-4;

"I then called the child to my side and looked at her private part. She had indeed been defiled. She was then not wearing her pant. She had the pant in her bag that she cries her books with. I checked her and her vagina had a tear with blood stains. The pant is this one – MFI 1- blood stained identified – I brought the child to Siakago Police Station and reported".

And in cross-examination by Appellant at page 9 line17 she states;

"I have lied to Court".

It's not clear what she had lied to Court about. However if the above evidence by PW1 and PW2 was true then it was a case of defilement. After these happenings PW1 was taken to hospital the same day of 5/6/2007. The finding of PW3 shows that there was inflammation of the genitalia. The hymen was missing but there was no discharge nor bleeding and there was no spermatozoa. She was HIV negative. The Appellant was examined on 31/8/2007 with all tests being negative (EXB3) save for the H.I.V. test which was positive.

PW5 Dr. Maina also examined PW1 and found her to be suffering from an STD but found no evidence of vaginal penetration and her hymen was intact. It is clear that the evidence of Dr. Maina (PW5) clearly dislodged the evidence of PW1 and PW2 about the defilement. And if indeed the Appellant was HIV positive as stated by the clinical officer PW3 then the same results should have reflected in the examination of PW1. It's nowhere indicated that she had been placed on any treatment to prevent infection.

PW5's evidence also dislodges that of PW3 who stated that PW1's hymen had been freshly perforated. PW3 did not note any discharge or bleeding from PW7's vagina. So how did she conclude that the hymen had been freshly perforated? It is therefore based on these contradictions that the Court found that there was no proof of the principal count. I agree with him on this finding. As stated earlier when a principal Court fails the alternative count does not automatically succeed. The Court has to go back to the alternative charge, particulars and examine the evidence adduced to satisfy itself that the alternative count has been established.

In this case the particulars of the alternative count were as follows;

ALTERNATIVE COUNT

Indecent acts with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006

WILSON MUCHIRI NGOCHI: On 5th day of June 2007 at Siakago sub-location in Mbeere District within Eastern Province committed an act of indecency with AWN a child aged seven (7) years by touching her private parts.

In his Judgment the learned trial Magistrate states as follows at page 29 lines 24- page 30 lines 1-2;

"PW2, the complainant's mother stated that the complainant went home not putting on her pantie that was due to the fact that the accused removed it. The act of the accused throwing the complainant's pant amounted into indecency. The accused exposed the complainant to shameful act. The sexual privacy of the complainant was interfered with by the accused holding the complainant to a point he removed her pant amounted indecency".

The drafters of the charge sheet indicated the indecent act as ***"by touching her private parts".***

It was not indicated as ***"removing and throwing away her pant"***. The particulars must always be supported by evidence from the charge to stand. In this case that is not the position. Secondly the only witness to what may have happened to this minor is the minor herself. And this evidence of the minor

and her mother (PW2) was completely the opposite of the medical evidence. Was it evidence that could be relied on without corroboration? Yes in Sexual Offences the Court may rely on the evidence of the victim only to convict by virtue of the provisions of section 124 Evidence Act. The Court has however a duty to record reasons for believing that the victim is telling the truth. This is what the learned trial Magistrate stated on this at page 30 lines 9-10;

"Though there was no eye witness to the incident, the circumstances herein discloses that it was the accused who is guilty of the incident".

It is clear from the evidence that PW1 and PW2 lied about the defilement. Who could then wholly believe PW1 on the rest?

The Appellant in his defence denied the charge. He raised an *alibi*. He also states he was framed because of a grudge over his goats which strayed into PW2's land. In cross-examination at page 9, PW2 had admitted that the Appellant's goats had damaged her crops. PW4 received this report on 5/6/2007 and he did not visit the Appellant's home. On 6/6/2007 he recorded statements. He then states that by then the Appellant was at large. I find this to be very strange because if indeed PW1 told them who had done this to her why did PW4 and other officers not go for the culprit? How did he know that the Appellant was at large? Who had told him? He returned on 20/6/2007 and that's when he was arrested. The Appellant's defence was that he had been away from home from 8/5/2007 – 20/6/2007. There was no evidence led to show that the Appellant was at his home on 5th June 2007 save for PW1's word. This analysis of the evidence has taken into account all the grounds of appeal and I do find that the grounds all rotate around the evidence on record. PW1 and PW2 having lied on serious elements of the principal count would not be found to be reliable witnesses to confirm the alternative count. In the same case of ***KIILU –V- REPUBLIC (Supra)*** the Court of Appeal had this to say of such witnesses;

i. ***The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence.***

I find PW1 and PW2 to be such witnesses. Their evidence required corroboration for the Court to rely on it to found a conviction. I find merit in the appeal. I allow it. The conviction is quashed and sentence set aside. The Appellant to be released unless otherwise held under separate lawful warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF MAY 2014

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Mbae for State

Appellant

Kirong/Mutero – C/c