REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 118 OF 2010

D M O…..…….....….....…APPLICANT

VERSUS

REPUBLIC……..…….....…….RESPONDENT

(Being an appeal from the original conviction and sentence in Kisii CMCr. Case No.2261 of 2009 dated 28th May 2010)

JUDGMENT

Introduction

1. The appellant herein D M O was the accused in CMC at Kisii Criminal Case No. 2261 of 2009. He was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual offences Act No. 3 of 2006**. The particulars of the offence were that on the 11th day of October, 2009 in Kisii Central District within Nyanza province he intentionally and unlawfully penetrated the genital organ of C B aged 4 years with his genital organ namely penis.
2. He also faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 11th day of October, 2009 in Kisii Central District within Nyanza Province he indecently assaulted C B by rubbing his penis against her vagina.

The Prosecution Case

3. The accused pleaded not guilty to the above charges and his trial ensued. PW1 was F M (Fared) the complainant's mother. She narrated to court how, on the material day 11th October, 2009 at about 11a.m she wanted to feed her children namely the complainant aged 5 years and her brother (F) aged 1 year. She started looking for them and calling out for them. F responded and came to her but the complainant who was dumb since she was born did not respond to her. She then heard the complainant crying with a loud voice from the appellant's house which was about 100 metres away).

4. She proceeded to the house and saw the appellant open the door to his house and throw the complainant out. She then inquired from the appellant why he had thrown the complainant and what he had done to the complainant. The appellant did not give any reason for his action. On picking up the complainant, F noticed that she was bleeding profusely from her genitalia.
5. F then got hold of the appellant and demanded to know what he had done to the complainant and

at that point she realized that he had not zipped up his shorts. The appellant in turn tried to run away but she got hold of him and started shouting. It was then that one F responded to her shouts. The complainant was then carried to Mosocho Mission Hospital where they were later directed to Kisii Level 5 hospital.

6. Later they proceeded to Nyakoe police post to record their statements. F identified the clothes the complainant was wearing that day namely dress marked as MFI.2 and skirt MFI-3. During the trial, the trial court noted that the dress had big blood stains, suggesting that at the time of the incident the complainant bled profusely. In concluding her evidence in chief F stated that the appellant was not only her neighbor but a cousin.

7. PW2 was Jackson Murauni a registered clinical officer based at Kisii Level 5 hospital. He narrated to the trial court that on 17th November, 2009 he examined and filled a p3 form belonging to the complainant. He said he used previous treatment notes which revealed that the complainant had a torn hymen, genitalia were swollen and there was a tear.
8. Furthermore, that at the time of initial treatment blood was seen oozing from the vaginal canal; there was also blood on her thighs and legs. An HIV test conducted on the complainant was negative. PW2 concluded that penetration took place due to the injuries he observed. PW2 produced the p3 form which was marked as **P. Exhibit.1**.

9. PW3 was No. 89072 PC Samuel Mwangi attached to the Nyakoe patrol Base under Rioma Police Station (the investigating officer). He told the court that on the material day at about 6p.m. he received a report from one M M (complainant's father) that complainant had been defiled.

10. Upon recording his statement, he proceeded with him to Kisii Level 5 hospital (where complainant was to establish the truth. He found the complainant unconscious and the bed she was lying on flooded with blood. He also recorded PW1's statement. At the same time he also got the dress the complainant was wearing the dress was marked as **exhibit.1** and a small inner pair of shorts which was marked as **Exhibit.2**.

11. Later, the appellant was arrested on the night of 11th /12th October, 2009 and escorted to Rioma Police Station for safe custody. He further confirmed that the complainant was in a critical condition and the clinical officer advised that the P3 form should be filled after the complainant recovered. On cross-examination by appellant, PW2 revealed that there was blood from the appellant's house after he defiled the complainant.

The Defence Case

12. The appellant gave an unsworn statement and called no witnesses. He told the court that on one Sunday whose date he could not remember, he met with his cousins, who accused him of stealing. They beat him up and took him to Mosocho police station. He further testified that his father and his cousins do not see eye to eye and that he was brought to court and charged with an offence he did not know.

Judgment of the Trial Court

13. After carefully analyzing all the evidence on record, the learned trial court found that the prosecution had proved its case beyond any reasonable doubt on the main count. It found the appellant guilty as charged, convicted him and sentenced him to imprisonment for life.

The Appeal

14. Being aggrieved by both conviction and sentence, the appellant is now before this court asking the court to allow his appeal, quash the conviction and set aside the sentence so that he can be set free. His appeal is premised on the following homemade grounds:-

1. *That the learned trial magistrate erred in law and fact in convicting the appellant without the evidence of the complainant being tendered in court, thus leading to a mistrial.*
2. *That the learned trial magistrate erred in law and fact on the face of the record by failing to observe that PW3 who arrested the appellant failed to inform him promptly and in a language he understood of the reason for the arrest contrary to* ***Article 49 (1) (g)*** *of the* ***Constitution of Kenya, 2010****.*
3. *That the learned trial magistrate misdirected herself by failing to observe that the whole investigation in this case was poor, shoddy paranoid and a hotchpotch and fabrication of a made up case thus resulting in a fetter of administrative justice.*
4. *That the learned trial magistrate erred in law and fact by failing to consider that the appellant was unrepresented during the trial and that the whole of the prosecution case fell short of establishing the case against the appellant.*
5. *That the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution onto the appellant.*

The Submissions

15. At the hearing of this appeal, the appellant put in his written submissions which reiterated the grounds of appeal. The appellant contended that after he changed his plea from guilty to one of not guilty, he was not provided with witness statements to enable him adequately prepare for his case. For these reasons, he wants his appeal allowed as prayed.

16. The appeal was opposed. The respondent was represented by Miss Mbelete, prosecution counsel. She submitted that the case against the appellant was proved beyond any reasonable doubt through the medical evidence produced by PW2, Jackson Murauni a registered clinical officer; and that because of the injuries sustained by the complainant, she was hospitalized for 4 days. Counsel also submitted that the medical evidence clearly showed there was penetration.

17. Regarding allegations that the trial court relied on hearsay evidence to convict the appellant, counsel submitted that all the three witnesses testified of things they saw with their eyes or heard with their ears. As to why the victim did not testify, counsel submitted that the trial court record shows clearly that the complainant was unable to talk during the trial and that she had to be heard through her mother, PW1.
18. Counsel also addressed the issue of language and submitted that the language used by the court was Ekegusii, a language that was understood by the appellant. She urged the court to find and to hold that the appeal as a whole lacks merit and to dismiss it altogether.

First Appellate Court

19. This appeal is before me as a first appeal. In this regard, this court is under an obligation to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering that it does not have the opportunity of seeing and hearing the witnesses who testified during the trial. The court is also under a duty to carefully consider and weigh the judgment of the trial court with a view to determining whether the conclusions reached by the trial court were well founded. See generally **Ngui –vs- Republic [1984] KLR 729**; **Koech & another –vs- Republic [2004] KLR 322** and **Kinyanjui –vs- Republic [2004] KLR 364**.

Analysis and Findings

20. I have now carefully reconsidered and evaluated the evidence afresh and have also considered and weighed the judgment of the trial court. From the above analysis, the only issue for determination by the court is whether the prosecution proved its case against the appellant beyond any reasonable doubt and whether failure to call the victim was fatal to the prosecution's case.

21. I shall start with the issue of whether the prosecution's failure to call the victim was fatal to its case. **Section 126 (1)** of the **Evidence Act** provides as follows:-

"A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as for example by writing or by signs, but such writing must be written, and the signs made in open court."

22. However, I must note that despite the fact that the complainant she was dumb is also a child of tender years that is to say according to the evidence of PW1 (the complainant's mother) she was only 5 years old and she was dumb. According to the **Sexual Offences Act** a child of tender years is a child aged 10 years and below. Even if the complainant were to talk a voire dire examination had to be conducted to establish that the complainant had sufficient knowledge and intelligence to understand the meaning of an oath. In the instant case the complainant being a child of tender years coupled with the fact that she was dumb was clearly not a child who possessed sufficient intelligence to understand the meaning of an oath. This then leads me to next point which is whether the prosecution proved the main charge against the appellant beyond all reasonable doubt.

23. According to the evidence of PW1 she stated during evidence in chief that:-

"I called and I heard her the child (C) crying from inside the house…….D opened the door and threw C out. She landed on the floor. I asked why he had thrown the child and he said it was for no reason. I raised the child and saw she was bleeding from her genitalia. In fact it was a lot of blood. I asked what have you done and he said I have done what you see I have done.

…….I realized that he had not zipped up his shorts."

PW1's testimony on her observations on the condition of the complainant was corroborated by PW2 the clinical officer who stated:-

"From the treatment notes the child had a torn hymen, genitalia were swollen and there was a tear. At the time of treatment, blood was oozing from the vaginal canal. There was blood on her thighs and legs…….I concluded penetration took place due to these injuries and I wish to produce P.3 form as an exhibit."

Further PW3 also corroborated PW1 and PW2's testimony when she found the complainant in hospital and observed:-

"I went to the ward where the child was admitted. She was unconscious, the bed was flooded with blood."

24. From the above evidence, it is not disputed that indeed the complainant was defiled. The identity of the person who defiled her was none other than the appellant who according to the evidence of PW1 had locked her up in his house, and when the complainant screamed he threw her out of his house. As he did so, PW1 also noticed that the appellants zip to his trouser shorts was opened. The investigating officer also stated he found blood in appellant's house as he conducted his investigations. It is worthy noting that even if there was no eye witness who saw the appellant defiling the complainant, it cannot be denied the evidence against the appellant directly points at him as the person who committed the heinous crime. According to the **Sexual Offences Act No. 3 of 2006** penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

25. Thirdly, the appellants allegation that the complainant's age was never proved can be answered by quoting the case of **Fausitne Mghanga v. Republic [2012] e KLR** where Nzioka J referring to **Mangungu v. Republic** where Hon. Justice W. Ouko quoting reference from **I.E. Collingwood's Criminal law of East and Central Africa (London Sweet and Maxwell) 1967 Ed. Of page 123**, observed:-

"Age may be proved by a birth certificate, or particularly in the case of Africans by

the evidence of a person present at the birth."

Relying on the above authority, the complainant's age was proved by her mother (PW1) who stated that the complainant was 5 years old and therefore she was a child of tender years as she was aged below 10 years.

26. The appellant also contended that the trial was conducted in a language he did not understand. I have perused the proceedings of the trial court and nothing seems to suggest this. Initially the appellant had pleaded guilty to the charges, he later changed plea to one of not guilty. He was given a chance to cross-examine each prosecution witness and even chose to give a defence by preferring to give an unsworn testimony with no witnesses. The language is shown interchangeably as Kiswahili, Kisii and Ekegusii. During the hearing sessions, the language used was Ekegusii or Kiswahili. At no point did the appellant complain that he did not understand the language or that he wanted the proceedings to be conducted in this or that language. During defence hearing, the appellant spoke in Ekegusii. In my considered view, the appellant's complaint about language is an afterthought and none of his rights under the Constitution were infringed.

27. Lastly regarding sentence, **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** states:-

"A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."

The Act has already dictated the sentence to be meted out on the appellant after it was proved that he indeed committed the offence.

28. In the premises, I find this appeal unwarranted as it lacks merit and dismiss it altogether. The Appellant still has a right of appeal to the Court of Appeal within the next 14 days.

Judgment dated and delivered at Kisii this 5th day of June, 2014.

R.N. SITATI,

JUDGE.

In the presence of:-

Present in person for the Applicant

Mr. Majale for the Respondent

Mr. Bibu - Court Assistant