



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL 53 OF 2012

DAVID KAMAU GICHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentencing in Criminal Case No. 744 of 2010 of Chief Magistrate's Court at Kiambu, Hon. C.Oluoch (P.M.) on 10th February 2012).

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the charge that on 6th May 2010 at *[particulars withheld]* Village in Kiambu District, within Central Province, he defiled one F.M.M a child under the age of 11 years.

In the alternative he was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on 6th May 2010 at *[particulars withheld]* Village in Kiambu District, within Central Province, he defiled F.M.M a child under the age of 11 years by touching her private parts.

He denied the offences but after the trial he was convicted of defilement and sentenced to life imprisonment. This is an appeal against both the conviction and sentence.

He filed amended supplementary grounds of appeal where he submitted on three grounds of appeal. In the first ground, he urged that the prosecution did not prove their case beyond reasonable doubt as they failed to conclusively establish the complainant's age as well as the origin of the spermatozoa. Secondly, he argued that there was material discrepancy between the evidence of the mother and child and finally he contended that there was no documentary medical evidence in the form of a P3 form produced in support of the prosecution case.

The learned trial magistrate conducted a *voire dire* and was satisfied that the child understood the solemnity of an oath and was intelligent enough to give evidence in court. She had her sworn and proceeded to record her account of what transpired on the said date of the alleged offence.

The complainant narrated how she was at home on 6th May 2010 at about 2.00pm with her one year old sister, when she heard her name being called out by the appellant who happened to be her cousin. She answered the call in response, went out and found him, only for him to hold her neck and make her lie down in the bathroom where he removed her blue jeans which she was wearing and defiled her. Shortly thereafter, a vehicle approaching their compound prompted the appellant to cease his heinous act. He quickly collected himself and PW1 and then threatened PW1 not to tell on him. By then, she had difficulty standing up due to the pain she felt.

PW 2 the mother to PW 1, narrated how she arrived home on the said date at 2.00pm and saw the appellant peeping from her bathroom window. She went there and found him with his trousers pulled down and his pant showing. PW 2 also found her daughter sitting down on her carpet in the house without clothes on the lower part of her body. She asked the appellant what he was doing in her bathroom and he alleged that he was ostensibly washing a panga.

Suspecting that something was amiss, PW 2 threatened to beat PW 1 with a cooking stick prompting her to narrate her ordeal to her. She examined her genitalia and noted she was bruised and that she bled slightly. PW 2 on realizing what had occurred, that her daughter had been defiled, started screaming, attracting the attention of members of the public who came in response and beat up the appellant.

They arrested and took him to the police station while they took PW1 to hospital where she was examined by the Doctor and issued with a P3 form. Later, PW1 recorded a statement with the police. It was her evidence that the appellant was a frequent visitor at their home. PW2 testified that the appellant was her cousin's son and therefore a close relation.

PW 3 a clinical officer at Karuri Health Centre examined PW1 and filled the P3 form. He found her to be in a fair general condition although he observed that she looked scared and was limping. Her neck was tender which was indicative of strangulation. Her hymen was broken and the specimen taken from her revealed presence of a bacterial infection and spermatozoa. He concluded that she had been defiled.

PW4 CPL Lucy Kanjiru who was stationed at Karuri police station recorded the report and referred PW1 and PW2 to hospital. She also issued them with a P3 form. She established that the appellant was an uncle of PW1 and charged him with the offence of defilement.

In his unsworn defense the appellant denied the offence and pleaded an alibi; that he was on his way to sell clothes when he passed by his aunt's house. While there, she claimed that he had defiled her daughter. It was his submission that he was being framed by his family members for fear that he would inherit their grandmother's property due to their proximate relationship.

As the first appellate court, it is my duty to examine the record and arrive at independent conclusions.

In her evidence PW 2 testified of her daughter's age saying she was in class 5, was 11 years old and was born on 18th March 1999. In support of this contention, she produced her baptismal card No. 11947 from Karuri Catholic parish which showed her date of birth as 18th March 1999. I note that the appellant did not dispute or raise any issue in that regard during cross examination. This baptismal card in my view falls in the category of "**other evidence**" in line with the authority cited by the appellant in support of this ground of appeal i.e the case of **JON CARDON WAGNER VS REPUBLIC (2010) K.L.R**

The origin of spermatozoa was also in issue as the appellant submitted that the spermatozoa and bacteria infection detected by PW3 from the vaginal swab he took from PW1, and reflected on the P3 form, was never officially produced in court as an exhibit. Further, he argued that he was not subjected to a medical examination without any reasonable explanation, thereby prejudicing his case.

There is sufficient evidence by PW3 to show that the appellant strangled and bruised the complainant around her neck area. He further testified that she had bruised labia minora, bruised introitus and a broken hymen. This evidence corroborated PW1's evidence that the appellant held her by the neck as he threatened her, and removed her clothes before defiling her. There is evidence on record by PW1's

showing her clothes including her panty had been removed. This was corroborated by PW 2 thereby confirming that the intention of the appellant was to have sexual intercourse with PW1.

In the case of ***KASSIM ALI VS REPUBLIC, Cr. App. No. 84 of 2005 (Mombasa)***, the Court of appeal observed the following:

“...The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

In the instant case there is both direct and circumstantial evidence.

Similar views were repeated in the case of ***GEOFFREY KIOJI VS REPUBLIC, Crim. App. No. 270 of 2010 (Nyeri)*** where the Court stated:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

In view of the above, I do not find any merit in this ground of appeal.

Secondly, the appellant argued that there was discrepancy between the evidence of the mother and that of the child in that, whereas the mother (PW2) testified that she found PW1 sitting on a carpet inside the house, PW1 on the other hand testified that her mother found her lying down in the bathroom. The trial court was alive to this discrepancy and observed that it was not as grave enough as to shake the credibility of the entire case. I agree with the trial court's finding on this, given the totality of the evidence that is unshaken and remains intact.

Finally, the appellant contended that there was no documentary medical evidence in the form of a P3 form produced in support of the prosecution case. I note that PW3 gave evidence having examined PW1 and even produced the P3 form. I see nothing unprocedural in its production save for the fact that it was not marked as an exhibit which omission is curable under Section 382 of the Criminal Procedure Code.

In the circumstances, I agree entirely with the assessment of evidence by the learned trial magistrate and find that, sufficient evidence was adduced to justify the conviction and sentence. This appeal therefore lacks merit both on conviction and sentence and is accordingly dismissed.

SIGNED DATED and DELIVERED in court this 17th day of July, 2014.

A.MBOGHOLI MSAGHA

JUDGE