



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 77 OF 2011

WILLIAM KIBET AYABEIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the judgment of the Resident Magistrate, Nakuru dated 14th March, 2011 in Criminal Case No. 35 of 2010)

JUDGMENT

1. The Appellant, **William Kibet Ayabei**, was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. The particulars of the charge were that on the 24th day of March 2010 at [particulars withheld] Farm, [particulars withheld] In Rongai District within the Rift Valley Province, the accused unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of J. N. a child aged 12 years which caused penetration.
2. In the alternative the Appellant was charged with the offence of **Indecent Act** with a girl contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the charge are that on the aforementioned dated and the aforementioned place the accused unlawfully and intentionally did an indecent act to J.N. a girl aged 12 years by touching her private parts (vagina).
3. The facts of the case as recorded by the trial court are that on 24th day of March, 2010 at about 1pm **PW1** and **PW2** both minors and pupils at [particulars withheld] Primary School left school and walked home. **PW1** and **PW2** sat by the roadside waiting for their mother, **E N N, (PW6)** a casual labourer in [particulars withheld] area, to return home. The Appellant who is a neighbour approached the minors and sent **PW2** to the shop to buy salt. He then proceeded to his house from where he called **PW1**. As she stood by his door, the Appellant pulled her inside the house and he threatened to stab her with a knife. The Appellant removed **PW1's** inner wear and defiled her. **PW1** screamed in pain. **R N (PW4)** was at **A N's (PW5)** homestead to borrow some firewood for preparing lunch. **PW5** and the Appellant were immediate neighbours. They testified to the effect that they observed as the Appellant lured the **PW1** into his house. They then moved closer to the house and peeped through a crack on the door. They witnessed **PW1's** inner garment being removed, the Appellant's unzipped trouser and the Appellant lying on top of **PW1**. They locked the house from outside and screamed for help. The Appellant tossed out the child from his house through an opening between the wall and the roof.
4. The Appellant was arrested by members of the public and taken to Solai Police Station. **Police Constable Caroline Too (PW7)** recorded a report from the Complainant. She arrested the Appellant and later escorted **PW1** to [particulars withheld] Health Centre. **Simon Njenga (PW3)** a clinical officer examined **PW1** and observed that the Complainant had been defiled and noted

her labia majora and minors were bruised.

5. The Appellant denied the offence and testified under oath. He stated that he used to cohabit with a certain woman and specified under cross-examination that the woman was **PW4**. Sometime in February 2010, the two differed and she moved out of the house. However, she subsequently made unsuccessful attempts to return to the house but the Appellant was adamant not to take her back. He demanded she returns the spare key to the house and that **PW4** swore to revenge for mistreatment.
6. On the material day, he saw two children playing outside his house. He sent them to a shop nearby to buy salt. Before they returned **PW4** came to his house and started screaming. The public gathered at his house and she informed them that the Appellant had defiled the girl. The mob started to beat him. He pleaded with the mob, was then arrested and taken to Solai Police Station where he was charged with the present offence.
7. After the trial, the Appellant was convicted at the Resident Magistrate's Court at Nakuru and was sentenced to life imprisonment.
8. Being aggrieved by the sentence, the Appellant filed a Petition of Appeal and Amended Grounds of Appeal which raise the following summarized grounds:

- which was
- a) **That the learned magistrate erred in law and fact in relying on evidence contradictory;**
 - b) **That the learned magistrate did not comply with provisions of Section 200 (3) of the Criminal Procedure Code;**
 - c) **That the learned magistrate erred in law and fact by relying on prosecution witness whose credibility is questionable;**
 - d) **That the learned magistrate erred in law and fact when he dismissed his defence.**

9. At the hearing hereof the Appellant relied on his written submissions in support of the appeal and Mr. Marete Learned Prosecuting Counsel for the State made oral submissions in response.
10. The Appellant's appeal was on conviction and sentence and his submission was that the evidence before the trial magistrate was based on a conspiracy between **PW1, PW2, PW4, and PW5**.
11. Further he submitted that during the *voire dire* examination conducted on 13th May, 2010 and 13th September 2010 on **PW1**, she gave varying information in respect to her age and the level of schooling. According to the Appellant this raises doubt on the credibility of the Complainant.
12. In Further submissions the Appellant contended that the learned magistrate erred by failing to inform him of his right as provided by **Section 200** of the **Criminal Procedure Code**. He reckoned that the trial magistrate did not inquire whether he preferred the case to commence afresh or the case continue from where it had reached. The Appellant contended that by recalling **PW1** to testify, **PW1** changed her initial testimony in respect of where the incident took place.
13. Finally, the Appellant submitted that the evidence before the court was insufficient to hold a safe conviction. He stated that the allegation that he tossed **PW1** from a hole between the wall and the roof was not proved by the prosecution nor did the investigating officer testify to that effect. The Appellant denied the allegations and submitted that the learned magistrate did not consider his defence. The Appellant urged the court to allow his appeal and to quash the conviction and set aside the sentence.
14. Learned Prosecuting Counsel for the State submitted that the Appellant had raised the issue of contradictions in the evidence of the prosecution witnesses but had failed to show such contradictions. Counsel submitted that there were eye witnesses to the defilement of the minor. An alarm was raised and neighbours came and the Appellant was apprehended.
15. It was Counsel's contention that the prosecution had proved its case beyond reasonable doubt.
16. On the issue of non compliance with **Section 200** of the **Criminal Procedure Code**, by the trial magistrate, Counsel opted not to make any submissions and left it to this court's discretion.
17. Counsel prayed that the appeal be dismissed and conviction and sentence be upheld.

ISSUES FOR DETERMINATION;

18. After taking into consideration the submissions of both the Appellant and Respondent, this court finds the following issues for determination;

- a) Whether the trial magistrate erred in law and in fact in disregarding the defence of conspiracy tendered by the Appellant?
- b) Whether there was non-compliance of **Section 200(3) of Criminal Procedure Code (CPC)** by the trial magistrate?
- c) The *voire dire* test and the age of the Complainant and her credibility as a witness?
- d) Whether the sentence passed was legal?

ANALYSIS

19. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno V. Republic, (1972) EA 32.**
20. From the evidence on record this court notes that the Appellant was a person known to the Complainant as he was an immediate neighbour and that identification is not an issue and this court is satisfied that he was positively identified by the complainant.
21. The Complainant gave a narrative of what transpired on that fateful day and this was corroborated by the evidence of **PW4** and **PW5** who testified on how they peeped through a crack in the door and witnessed the act of defilement by the appellant.
22. The Appellant in his defence contends that there was a conspiracy between **PW1, PW2, PW4 and PW5** as **PW4** with whom he had previously cohabited with, **PW4** had threatened him with dire consequences for breaking up the relationship.
23. At this juncture the court will make reference to the evidence of **PW3** the Clinical Officer who examined the Complainant and found that she had bruises on the labia minora and majora and formed an opinion that the Complainant had been defiled and also produced the exhibit marked as **P.**
24. This court opines that if there was any conspiracy, then the question that needs to be answered is why was the Clinical Officer (**PW3**) not included in the conspiracy plan? This court notes that there was corroboration of the injuries by **PW3**. Also in the Appellant's statement in defence, **PW3** is not mentioned by the Appellant as being part and parcel of the conspiracy.
25. On the issue of conspiracy, this court is satisfied that the evidence of the Clinical Officer corroborates the evidence of the Complainant in that she had been defiled and this evidence negates the allegations of conspiracy as P.W.3 confirmed the existence of injuries on the complainant. The Appellant did not prove the allegations of conspiracy and the trial magistrate was correct in disregarding the defence of the Appellant on a conspiracy by **PW1, PW2, PW4, and PW5** to fabricate the charges so as to punish him for breaking the relationship between him and **PW4**.
26. On the next issue which relates to Section 200(3) of the CPC this court notes that the court record shows the case was partly heard by Hon. C. A. Otieno. When Hon. H. O. Barasa, R.M took over, the record makes no mention as to whether or not the trial magistrate informed the Appellant of his rights under **Section 200(3) of the Criminal Procedure Code.**
27. The Section provides as follows:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by the predecessor, the accused person may demand that any witness be resummoned and heard and the succeeding magistrate shall inform the accused person of that right.”

28. The operative words are ‘.....**shall inform.....**’ and question in this court’s mind is whether this omission or failure by the trial magistrate to comply with **Section 200(3)** of the Criminal Procedure Code, was fatal to the extent that from the evidence tendered this court can conclude that the prosecution failed to prove its case beyond reasonable doubt.
29. The record shows that the trial magistrate gave directions that the case should start afresh upon being requested by the prosecution. The case then started *de novo* and all the prosecution witnesses who had testified were recalled.
30. The provisions of **Section 200(3)** are envisaged for the protection of the Accused, particularly, when the case is to continue from where it had reached but before another trial magistrate.
31. This court opines that the omission by the trial magistrate to comply with **Section 200(3)** of the **Criminal Procedure Code** did not render the subsequent proceedings as fatally defective as the case proceeded afresh and the trial magistrate did not have to rely on predecessor's notes and also that this trial magistrate had the opportunity to see for himself, hear, assess and gauge the demeanour and credibility of all the prosecution witnesses. All the prosecution witnesses were recalled and the Appellant was also able to cross-examine the prosecution witnesses afresh.
32. This court is satisfied that there is no evidence on record that shows that the non-compliance handicapped or caused prejudice to the Appellant, in any way so as to render the proceedings as defective.
33. This court has perused the court record and notes that the first trial magistrate conducted a ‘*voire dire*’ examination for **PW1** which examination was in the format of a question and answer format. When the Complainant was asked her age, the answer she gave was seven (7) years. The date of this first test was on the 13th May, 2010 and it was conducted by Hon. C. A. Otieno, R. M. The next examination was done by Hon. H. O. Barasa, R.M. on the 13th September, 2010 and when **PW1** was asked her age and her reply was that she was (11) years of age.
34. In her testimony **PW1** gave evidence and confirmed that she was eleven years of age. The Clinical Officer (**PW3**) who examined the Complainant testified that she was nine (9) years. The Complainant’s mother (**PW6**) testified that **PW1** was born on the 13th September, 1998 and produced Health Clinic Card **PMFI-3** in support. This court observes that the evidence of P.W.1 on her age is corroborated by the Document produced by her mother which shows that at the date of defilement was eleven (11) years of age.
35. From the questions posed by the trial magistrates, this court is satisfied that they both properly conducted the *voire dire* examination and ascertained and established the intelligence of the minor and her understanding of the need to tell the truth. The Complainant was then affirmed before giving her evidence.
36. Upon re-assessing and re-evaluating the evidence of the Complainant, her mother and the clinical officer on the issue of the age of the Complainant, this court finds that the age was correctly determined by the trial magistrate and proved by the production of **PExb 3**.
37. The trial court is found to have properly guided itself and the conviction is found to be safe and proper. On the issue of sentence, this court has perused the proceedings and notes that the Appellant was a first offender and opines that the sentence meted was the maximum sentence provided by **Section 8(2)** of the **Sexual Offences Act**.

FINDINGS

38. This court finds that the allegations of conspiracy were not proved by the Appellant and that the trial magistrate was correct in disregarding them.
39. This court finds that the trial started ‘*de novo*’ and that the prosecution proved its case beyond reasonable doubt.
40. This court finds that the trial magistrate properly conducted the *voire dire* test and correctly found the minor to be a credible witness and this court further finds that the age of the complainant was proved.
41. This court finds the conviction to be safe and proper but finds that the maximum sentence ought not have been meted out to a first offender.

CONCLUSION:

42.The Appeal is found to be lacking in merit on the issue of conviction and the conviction is hereby upheld.

43.The sentence is hereby set aside and substituted with a sentence of ten (10) years from the date of judgment.

Dated, Signed and Delivered at Nakuru this 11th day of July, 2014.

A. MSHILA

JUDGE