



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 72 OF 2009

ISAIAH MWENDA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT.

The Appellant, Isaiah Mwenda was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (SOA) No 3 of 2006. He is alleged to have defiled a girl aged 8 years.

In the alternative, the appellant faced a charge of indecent act on a child contrary to section 11(2) of the SOA. He was sentenced to serve life imprisonment. He is aggrieved by both conviction and sentence and preferred this appeal based on grounds found in the petition of appeal filed in court on 15.4.2009 and further grounds filed in court on 16.10.2014. A summary of the grounds is as follows.

- 1. That section 72 (3) of the constitution was breached;**
- 2. That several witnesses were not called by the prosecution;**
- 3. That the prosecution based its case on contradictory evidence;**
- 4. That there was no medical evidence in support of the prosecution case;**
- 5. That the court failed to consider the appellant's defence;**

The Appellant therefore prays that the conviction be quashed and sentence set aside.

The appeal was opposed and Learned Counsel for the State submitted that the evidence adduced by the prosecution was sufficient to found a conviction; that the court put into consideration the appellant's defence; that the said defence was an afterthought and the fact that there was no medical evidence to connect appellant with the offence does not rule out defilement.

This is the first appellant court. It is the duty of this court to review all the evidence tendered before the trial court, re-evaluate and analyse it and arrive at its own independent determinations on both facts and the law see **Okeno Vs Republic 1972.**

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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; it must make its own findings and draw its own 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, (See Peters v. Sunday Post, [1958] EA 424.)”

Briefly, the facts of the case before the trial court are as follows: PW1 V.K. the complainant, a child of tender age of 8 years was examined and found not to understand the meaning of the oath and was allowed to give an unsworn statement in her evidence. She explained that on 6.7.2008 about 7.00 pm she was playing near their veranda when Mwenda, the appellant, who is their neighbor chased the boys she was playing with, took hold of her and took her to his house and locked her inside. He took out her cloths, lowered his trouser and underwear and defiled her. He threatened to kill her if she screamed as she felt a lot of pain during the act. She said that Janet, Morris and Mbaabu broke the appellant’s door and got the appellant defiling her. PW2 M K, the mother of the complainant was away in Nanyuki on 6.7.2008 when Janet (PW5) called her and informed her that she had caught the appellant defiling the complainant. PW3 Dr. Isaac Macharia of Meru District Hospital examined the complainant and found bruises on her private parts and a whitish discharge. The doctor was of the view that the complainant had taken part in sexual intercourse. He filled the P3 form.

PW4 Niserio Mbaabu testified that on 6.7.2008, some children complained that one of the children was lost and he went in search of the child in company of other people. They called out the child’s name loudly and she opened the appellant’s door and on entering the house they found the appellant in bed and the child informed them that the appellant had defiled her and they took the appellant to the police station the same night.

Janet Mukomunene (PW5) recalled that she heard a neighbor saying that one of the neighbour’s children had gone missing and people started looking for the child; as they called out the child’s name, she responded from the appellant’s house and opened the door. They reported to the police station who came and arrested the appellant. PW5 said the complainant was in the appellant’s house was naked and walked with difficulty.

PW6 Cpl. Justus Githinji recalled that on 6.7.2008, the members of the public took the appellant and a young girl to Giaki Police Post on allegation that the appellant had defiled the girl. He escorted the girl to Meru Hospital on the same night. The child told him what had happened to her at the house of their neighbor the appellant.

The Appellant was called upon to defend himself. He denied defiling the complainant but said that on that day, his uncle sent him to go and ask PW2, the complainant’s mother, not to sell local brew. He went to tell PW2 about it. The appellant also told PW2 that it was alleged PW2 used to beat his uncles children for no reason. The appellants told PW2 to cease from her actions but she was annoyed and threatened to cause him to suffer. After a week, he was assaulted by PW2’s relative and Musaimo and when in his house PW2 and Musaimo locked the house from the outside. PW2 screamed, members of the public came and PW2 alleged they found him defiling the complainant. In cross examination, the appellant denied existence of any grudge between him and the complainant’s family.

I have considered all the evidence adduced before the trial court, the submissions made by both the appellant and respondent and the grounds of appeal. I do find that there is no doubt that the complainant was defiled. PW1’s evidence was corroborated by the findings of the doctor PW3 who examined the complainant and found bruises on her private parts with whitish discharge. He found that there was evidence of sexual intercourse. Defilement is committed once there is proof of penetration. There is no requirement that there must be presence of spermatozoa for defilement to be committed. The complainant

was defiled but the question is by who?

Another fact not in dispute is that the appellant is a neighbor of the complainant PW2, 4 and 5. They are people who knew each other. The appellant admitted it in his defence.

Whether there were contradictions in the prosecution evidence; it is the appellant's contention that whereas the complainant said that the people who rescued her broke the door to the house PW4 and 5 said she opened the door. The complainant gave unsworn evidence because she was said not to understand the meaning of the oath. She was said to be a child of tender age. Her evidence was not therefore tested on cross examination. Though she said that those who came for her broke the door, both PW4 and 5 said that as they shouted the complainant's name, the complainants opened the door and came out of the appellant's house. The evidence of PW4 and 5 is that they left the appellant locked in the house and went to report it to the police. It is not therefore clear whether the minor was talking about the first time PW4 and 5 went to the appellant house or the second. However, it is a fact the complainant was found in the appellant's house. The prosecution evidence is consistent that the complainant was found locked up in the appellant's house and the appellant was in the said house. Both PW4 and 5 said the child could not walk well and she was taken to hospital on the same evening and found to have been defiled. I am satisfied that the inconsistency in the prosecution evidence if any is not material to the case. Instead, I find that the complainant having been found locked up with the appellant in his house the only reasonable conclusion is that it is the appellant who defiled the complainant and that fact corroborates PW1's evidence as to what appellant did to her. The complainant also knew the appellant well and the appellant said the same.

In his defence, the appellant denied defiling the complainant and instead claimed to have been framed by PW2 because he had warned her about selling local brew and beating the uncle's children. Firstly, it is clear from the prosecution case that PW2 was not even home when the incident occurred. The evidence of PW2, 4 and 5 was never dislodged on that fact. The Appellant also alleged that he was assaulted by one Musaimo because PW2 was seeking revenge. The appellant had a chance to cross examine the witnesses and at no time did he make any allegations that PW2 had threatened him or that Musaimo beat him. The appellant's defence is an afterthought and is not believable I dismiss it as worthless.

The Appellant also complained that some relevant witnesses were not called. The prosecution is only required to call relevant witnesses to its case. In any event one witness can prove a fact (see section 143 of the Evidence Act). PW4 and 5 were among the people who arrested the appellant. The whole village was not necessary. The prosecution could only be faulted if it withheld relevant evidence that would hindered the court from arriving at a fair decision. In the instant case, the appellant did not even mention the relevant witnesses that should have been called or the evidence that they would have adduced that may have swayed the prosecution case and therefore changed the court's decision.

The Appellant also questioned the date of arrest. I do note that the charge sheet indicated that the arrest was on 5.7.2008. However the particulars of the charge were amended on the main charge to read that the appellant was arrested on 6.7.2008. All 4 date on the charge sheet at the bottom and alternative charge must be an error and should have been amended when the main charge was amended. That slight omission is not prejudicial to the appellant.

As regards the allegation of breach of S.72 (3) of the Constitution, no submission was made thereon. To prove a charge under section 8(1) and 8(2) of the SOA, the prosecution has to prove both penetration and the age of the complainant. Penetration has been proved. However, the prosecution never attempted to establish the age of the complainant either by way of production of an age assessment report, birth certificate or birth notification. The age of the complainant is material in determining the sentence to be meted by the court in the event of conviction (S 8(2)). Since the age of the complainant was not proved, I find that the offence of defilement was not proved as charged and the conviction against the appellant cannot be sustained and hereby quash the conviction and set aside the sentence.

However, having found that the appellant had unlawful sexual intercourse with the complainant, without complainants consent, I shall find the appellant guilty of the offence of rape contrary to section 3 of SOA as read with section 186 of the CPC and convict the appellant accordingly. I hereby sentence the

appellant to 20 years imprisonment.

DATED SIGNED AND DELIVERED ON 14TH NOVEMBER, 2014

R. P .V. WENDOH

JUDGE

N/A For Appellant

Mr. Mulochi for State

Jane/Kirimi Court Assistant

Present Appellant