



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 55 OF 2012

R K C.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Honourable J.R. Ndururi, Senior Resident Magistrate at Kericho in Sexual Offences No. 10 of 2010 on 9.8.2012)

J U D G M E N T

1. **R K C**, the appellant was charged with the offence of Defilement of a girl aged 7 years contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**.
2. The particulars as stated in the charge sheet were that the accused on the 30th day of January, 2012 at [particulars withheld] village in Kipkelion District within Kericho County, unlawfully and intentionally did an act which caused penetration of his penis into the vagina of **E C** a girl aged 7 years.
3. He faced an alternative count of indecent acts with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
4. He was convicted of the main count and sentenced to life imprisonment. Being aggrieved by the judgment he appealed against both conviction and sentence raising the following grounds:
 - a. *The learned Magistrate erred in law and in fact in that he erroneously admitted as evidence hearsay evidence. This prejudiced the appellant seriously and particularly as the learned magistrate relied on the same inadmissible evidence in his judgment thereby convicting the appellant on inadmissible evidence.*
 - b. *The learned magistrate erred in law and in fact in that he incorporated into his judgment matters not canvassed before him at all.*
 - c. *The judgment was bad in law and never considered the appellant's unsworn evidence at all. It was biased and never analyzed evidence before the court.*
 - d. *The learned magistrate erred in law in that he shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have*

- defiled the complainant if any.*
- e. *The evidence of the prosecution witnesses was so contradictory and full of discrepancies that it should not have been relied upon to convict the appellant.*
 - f. *The applicant was never taken for medical examination to rule out the possibility of any third party being the person who may have committed the offence in question.*
 - g. *The decision went against the weight of evidence before the court.*
 - h. *The Learned magistrate erred in law and in fact in convicting the appellant of the offence of defilement whereas there was no evidence to support the same charge and hence concluding that the appellant was the one who defiled the complainant was not proved beyond reasonable doubt and in any event the complainant's evidence was never corroborated and hence it was unsafe to convict on such evidence alone.*
 - i. *The sentence awarded was bad in law as no reasons were given for the same.*
 - j. *The sentence awarded was harsh and excessive in all circumstances of the appellant and of the case before the court.*
5. A summary of the prosecution's case is that PW2 who is the mother of the complainant (PW1) and wife of the appellant works as a house help. On **30th January, 2012** she arrived home in the evening and started preparing supper. The appellant arrived home at 8p.m appearing drunk and before the supper was ready. He came with **R**.
6. From the evidence of PW2 it appears the appellant suspected her to have an illicit relationship with **R**. The appellant asked R to leave after threatening him. He told PW2 to follow him but she did not.
7. The appellant told the children to leave the kitchen for the main house. PW1 and her younger brother **C L** went to the main house but he was later kicked out by the appellant when he started crying. PW2 put **L** and the younger child to bed and remained awake.
8. At around midnight she heard the appellant talking to PW1 asking her if it was painful. She also heard her answer in an abnormal voice saying it was not. It was then that she suspected that the appellant was defiling PW1. She alerted some neighbours like PW3 and PW4. By the time PW2 came with them they found PW1 in the kitchen with the other children. The appellant reappeared and threatened them while armed with EXB1, 2 and 3).
9. PW1, PW2 and the other children went to sleep at the home of PW4 that night. The next day PW1 was taken to **Soin Health Centre**. PW6 (*Weldon Mutai*) the Clinical officer produced the treatment notes in respect of PW1. He said PW1 was brought to their facility on 1st February, 2012 with complaints of having been defiled. (*Tests were carried out and he confirmed that the girl had been defiled (Filled P3-EXB7)*).
10. PW5 (*Kenneth Komen*) who was the investigating officer and stationed at Kipkelion police station confirmed that his station received the report on 31st January, 2012. He visited the scene of crime on 1st February, 2012 and recovered PW1's blood stained pants (EXB5), blood stained mattress cover (EXB8) plus the weapons the appellant had been armed with (EXB1-3).
11. When the appellant was placed on his defence he elected to make a sworn statement and denied the charges. He said he could not have defiled his own child. He did not call any witness.
12. When the appeal came before me for hearing **Mr. Motanya** for the appellant argued all the grounds of appeal simultaneously. He singled out ground 5 saying the evidence of the witnesses was contradictory and unreliable. He referred to the evidence on **R** who was never called as a witness. He questioned how PW2 could have heard the appellant and PW1 talking. To him failure to take the appellant for medical examination was fatal to the prosecution case.
13. The State through **Mr. Mutai** the Learned State Counsel did not oppose the Appeal on the following grounds:

- i. *The order made after the voire dire examination did not meet the required ingredients of such an order.*
- ii. *The contents of the judgment at page 3 line 10 were a contradiction of the courts findings after the voire dire examination.*
- iii. *As a result of (i) and (ii) it was unsafe to rely on the testimony of PW1.*
- iv. *PW2's evidence could not be used as corroboration owing to the circumstances of the case.*

14. This is a first appeal and this court is enjoined to reevaluate and reconsider the evidence that was adduced before the trial court and arrive at its own conclusion. See **MWANGI V R [2004] 2 KLR 28** where the Court of Appeal stated thus:

- 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 have the appellate court's own decision on the evidence.*
- ii. *The first appellate court must itself weight the conflicting evidence and draw its own conclusions.*
- iii. *It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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 had the advantage of hearing and seeing the witness.*

15. I have carefully reevaluated the evidence presented before the trial court. I have equally considered the grounds of appeal plus the submissions by **Mr. Motanya** for the appellant and Learned State Counsel for the State.

16. From the charge sheet and the evidence there is no doubt that the complainant (PW1) was a child of tender years and more specifically aged 7 years old. There is also no doubt that this minor was defiled as per the exhibits produced herein EXB 5, 7 and 8.

17. The issue is whether the appellant is the person who defiled the minor. This takes us to the weight of the evidence. The key witness here was the 7 years old girl who was defiled. She was therefore a child of tender years. An investigation through a *voire dire* examination would have to be carried out to determine two things:

- i. *Whether the child is intelligent enough to distinguish between speaking the truth and lying.*
- ii. *If the answer is yes, if she understands the seriousness of taking an oath.*

18. An investigation under the **Oaths and Statutory Declarations Act (CAP 15) Section 19(1)** into the capacity of a child of tender years to give evidence should precede the swearing and the evidence and it should be directed to the particular questions of whether the child understands the nature of an oath rather than to the question of the child's general intelligence.

19. A look at page 5 of the typed proceedings shows the conversation that took place in camera between the minor (PW1) and the Learned trial magistrate. There was no question on the nature of an oath or if she understood what an oath was that was put to her.

20. At page 6 lines 1-4 he states:

“ I find that the child is intelligent enough to testify. However she is too young to understand the meaning of telling the truth or take oath. She will give unsworn testimony”.

Age is not what determines whether a child understands an oath or not. That's why an investigation is called for. The Learned trial magistrate in this case omitted to ascertain and satisfy himself that the child did not understand the nature of an oath before preventing her from giving evidence on oath.

21. Failure by the Learned Trial Magistrate to fully comply with the requirements of **Section 19(1)** of

the **Oaths and Statutory Declaration Act** occasioned a miscarriage of justice.

22. The only other evidence that could have corroborated the evidence of PW1 was that of her mother (PW2). Given the background that she had quarrelled with her husband (the appellant) one had to be very careful while dealing with her evidence. For instance;

- i. *PW1 said PW2 was beaten by the appellant with a stick (EXB3) and she ran away while screaming. She even left the ugali she had been cooking on the ground. PW2 herself says she remained in the kitchen, with the two younger kids, meaning she never ran away.*
- ii. *PW2 further says while in the kitchen she over heard a conversation between PW1 and the appellant; its nowhere indicated in the evidence how far the kitchen was from the main house, nor what type of house this main house was. If she was able to clearly hear from the kitchen what was happening why did she have to go to the wall to hear instead of shouting for help? This casts doubt on the evidence of PW2.*

23. An issue was raised by **Mr. Motanya** on contradictions in the judgment and the evidence by the trial court. I have looked at the said record. At page 18 lines 12-15 of the judgment the Learned trial magistrate stated; thus:

“The child testified as PW1. Prior to allowing her to testify, the court conducted a *voire dire* on her, and was satisfied that she was intelligent enough to testify and that she understood the meaning of telling the truth. However the court found that she could not understand the meaning of oath and allowed her to give sworn testimony”

24. This statement contradicts what the Learned trial magistrate stated in his orders after the *voire dire* examination. Had what he has stated in his judgment been the position then he could have directed the minor to be affirmed. The truth of the matter is that he did not address the issue of truthfulness or nature of an oath in his *voire dire* examination.

25. Again in his judgment the Learned trial magistrate states at page 20 that the appellant gave unsworn testimony. The record does not bear him on this. It shows in both the original record and typed proceedings that the appellant gave sworn evidence and was even cross examined.

26. After reevaluating the evidence on record and considering all the issues, I have dealt with above, I do find that the appeal is merited. The State has rightly conceded the appeal. I therefore allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released unless otherwise lawfully held under a separate warrant.

Dated, signed and delivered in open court this 11th day of November, 2014

H.I. ONG'UDI

JUDGE

In the presence of:

M/S Kivali for State

Mr. Motanya for Appellant

Appellant

Rotich – Court Assistant

