



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 123 OF 2012

(From original conviction and sentence in Criminal Case No. 2289 of 2011 of the SPM'S Court at Nyahururu – L. M. Wachira, P. M.)

DAVID MARUKONG CHESANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

David Marukong Chesang, the Appellant, was a neighbour of the Complainant, (PW1) and PW2 and PW3, the mother and father of the complainant. 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, 2006 (*No. 3 of 2006*). He was also charged with the alternate charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The Appellant was on the evidence, found guilty on the principal charge of defilement, and was convicted, and sentenced to life imprisonment. Being aggrieved both with his conviction and sentence the Appellant came to this court on appeal, and in his substituted Petition of Appeal handed to the court on the date of the hearing of his appeal, cited four grounds of appeal.

In summary the grounds of appeal were -

- 1. failure by the Police to bring him to court within twenty-four hours contrary to the provisions of Article 49 of the Constitution of Kenya, 2010,***
- 2. reliance upon the evidence of a child of tender years who did not understand the effect of an oath; or the duty to speak truthfully,***
- 3. reliance upon medical evidence arising from an examination conducted one month after the incident,***
- 4. failure to consider his evidence as required under Section 169(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya).***

The Appellant relied upon his written submissions which accompanied the Amended Petition of Appeal, and reiterated the grounds of appeal. The Appeal was however opposed by the State.

I have considered both the Appellant's and the State Counsel's submissions. I will first dispose the Appellant's contention that his right guaranteed under the former and current Constitution (2010), to be

brought to court within twenty-four hours were contravened.

I have expressed the view, and I express it again here, that the forum for contesting the contravention of a person's constitutional right is not the criminal appeal court, but a Petition under the Constitution alleging such contravention and seeking damages. The reason is this, the Criminal Appeal concerns itself with whether the Appellant was subjected to due criminal process and whether there was evidence for the conviction whether the sentence was in law proper. The more fundamental reason is that neither the former nor the current constitution debars or prohibits the prosecution of an accused even if he is arraigned after the constitutional twenty-four period. For these reasons the first ground of the Petition of Appeal fails.

On the other grounds, I have perused and re-evaluated both the prosecution, as well as the Appellant's evidence. I find that the prosecution proved its case beyond reasonable doubt. These are my reasons. **Firstly** the child was three and half years. **Secondly**, there was penetration. Those are the requirements to prove defilement under Section 8(1) and 8(2) of the Sexual Offences Act, 2006.

The Appellant argued that the trial court relied on the evidence of a child of tender years which child did not understand the duty of telling the truth. The Appellant also argued that the trial court relied on the evidence of a Doctor (PW6) who examined the child on 16/12/2011, one month after the incident which occurred on 14/11/2011.

I think, with respect to the Appellant, that both he and the trial court failed to understand the finding of the trial court, that the child did not understand the significance of an oath, as opposed to telling the truth. Though she did not appreciate the significance of an oath, the child (PW1), certainly appreciated in her very simple and matter of fact way, how the appellant approached and asked her whether her parents were at home, and when he ascertained they were not present the Appellant -

“took me to the bushes and that is where he urinated on me here (shows her private parts). He had removed my clothes and he urinated on me. When he finished he dressed me up. I told my mother what Marukong had done when she came. My mother took me to Muchongoi Police Station.”

PW2 (*the mother*) reiterated the child's evidence as it had narrated it to her. PW2 confronted the Appellant with the accusation and asked him whether he had been to their home, and “he conceded” but denied having defiled the child. PW2 organized to take child to hospital in Muchongoi Health Centre and were referred to Rumuruti District Hospital where she was given both the attendance card and treatment notes which produced together with child's immunization card showing the child was 3^{1/2} years of age.

PW3, a Prison Warder once informed of the incident took leave and returned home, and the child reiterated to him the ordeal the Appellant had visited upon her once he had established that none of her parents were at home. The route to the Appellant's home is through the child's and PW2 and PW3 home.

PW5 a Police Officer interrogated the Appellant, and he told the officer that he was framed-up as he had been previously accused of a similar offence and PW2 was a witness. Again the Appellant conceded to having passed through the child's home, but denied having defiled the child.

Relying upon treatment cards, Post Rape Care Form and examination and treatment notes and tests done on 17/11/2011 some 3 days after the incident. PW6 who filled and produced the P3 Form testified that the examination had shown -

1. ***the hymen membrane was torn, but the tear was not fresh;***
2. ***the injuries were 8-10 days and the tear was healed;***
3. ***spermatozoa were seen;***
4. ***pus cells were seen.***

The conclusion was that the child had been defiled.

In our poor state of health care in rural areas, it is quite a feat to find that a child of tender years has been treated, and had Post Rape Care Form filled. It is also no mean feat that a high vaginal swab had been taken analysed, and results obtained. There is no reason to doubt these results. If an adult tries to coach a child of tender years, the answer upon examination is likely to be, **“my mum told me to say so...”** Children of that age are true innocents, and tell it as it is, or as they saw, was done to them. The evidence by the child PW1, was clear even without corroboration by PW6, the Doctor.

It is amazing, when confronted with this evidence, and put on his defence, all the Appellant would say - **“I wish to tell the court that I did not do anything. I want the court consider both sides of the case. That is all.”**

The Appellant contends in his grounds of appeal that his side of the case was not considered, that he was framed. I entirely agree with the trial court's finding that he did not say who framed him and the conclusion that -

“it is unlikely that a child of 3¹/₂ years can formulate such a version of events or give the status of her hymen or results produced by PW6”.

I think the Appellant is among those depraved men who prey upon lonely children and children in need of care and protection in the same way vultures and other birds, and animals of prey, such as hymens, prey upon carcasses of other dead birds and animals.

I see no merit in the Appellant's appeal and dismiss it. I confirm both the conviction and sentence by the lower court.

It is so ordered.

Dated, signed and delivered at Nakuru this 8th day of November, 2013.

M. J. ANYARA EMUKULE

JUDGE