HARRISON NGUGI KINYANJUI .....APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.2279 of 2007 of the Chief Magistrate's Court at Kibera by C. Maundu – Senior Resident Magistrate)

JUDGMENT

The appellant, **HARRISON NGUGI KINYANJUI**, was convicted for the offence of Defilement contrary to **section 8 (1) (2) of the Sexual Offences Act.** Thereafter, the learned trial magistrate sentenced him to life imprisonment.

In his appeal to the High Court, the appellant has canvassed four (4) issues, which can be summarized as follows;

(i) It was wrong to convict the appellant on only the evidence of the complainant, who was a minor aged 8 years.

(ii) The prosecution failed to prove the case beyond any reasonable doubt.

(iii) Pursuant to *Section 122 (a) (1) and (2) of the Penal Code,* ***and*** *Section 36 (1) of the Sexual Offences Act,* ***the prosecution should have provided DNA evidence, so as to link the appellant to the offence.***

(iv) The conviction was against the weight of evidence. It was harsh and excessive.

Whilst arguing the appeal, the appellant submitted that evidence tendered by children of tender years ought not to be acted upon unless the same was corroborated by other material evidence.

In support of that preposition, the appellant cited **section 124 of the Evidence Act.**

Another issue that was raised by the appellant was that essential witnesses did not testify. One such potential witness was said to have been the appellant's wife, who was mentioned by the complainant **(PW 1).**

According to the appellant, his wife was an essential witness because **PW 1** testified that she **(PW 1)** had reported to her about several instances when the complainant was defiled by the appellant.

Another person who the appellant asserted was an essential witness, was his daughter, J. That girl had also been said to have been a victim of defilement visited upon her by her own father. She confided in **PW 1** and **PW 1** confided in her. Therefore, the appellant submitted that J. was an essential witness, who could have confirmed the allegations of **PW 1.**

The original Investigating Officer in the case was also described as an essential witness.

The failure by the prosecution to call them, coupled with the failure by the trial court to summon the said essential witness is said to have deprived the court of the necessary material upon which a fair and impartial decision would have been founded.

As regards the medical evidence produced, the appellant contends that the doctors did not link him to the alleged defilement. It was his submission that DNA evidence was necessary, if he was to be linked to the defilement of **PW 1**.

The appellant submitted that in the event that DNA evidence was not provided by the prosecution, the evidence purporting to link him to the act of defilement remained as an assertion only.

In answer to the appeal, Ms Maina, learned state counsel submitted that the evidence on record was sufficient to prove the charge against the appellant.

The Respondent summarized the evidence, emphasizing that the evidence of the complainant was duly corroborated by the medical evidence.

Being the first appellate court, I have re-evaluated all the evidence on record.

First, it is noted that the particulars of the charge sheet were that the offence was committed between the month of January 2007 and 17th March, 2007.

It was the prosecution case that during that period of time, the appellant committed a sexual offence by inserting his male genital organ into the complainant's female genital organ. Such insertion is said to have caused penetration.

The complainant **(PW 1)** testified that she was eight (8) years old. She also said that she used to work at the home of the accused at the material time. She had dropped out of nursery school because her mother had no money to pay fees.

Whilst **PW 1** was working at the home of the accused, the wife to the accused used to go to cultivate a shamba at Kimondo. Meanwhile, the appellant used to carry "sukuma wiki" from Kimondo.

PW 1 testified that when the accused returned home in the absence of his wife, he would cause her to undress. He would then address himself, as well, and then proceed to do "bad manners" to **PW 1**.

It was the evidence of **PW 1** that the appellant did so several times. He would then tell **PW 1** not to tell anybody about what he had done to her.

On one day, J., who is a daughter of the appellant, returned from school and told **PW 1** that her father (the appellant) used to do "bad manners" to her.

J. and **PW 1** then proceeded to inform the wife of the appellant.

When **PW 1** told J's mother that the appellant used to defile her, J's mother screamed. She then took both J. and **PW 1** to a hospital in Ongata Rongai.

After the medical personnel confirmed that **PW 1** had been defiled, **PW 1** was escorted to the police station. From the police station, **PW 1** returned to her mother's home. Thereafter, **PW 1** was taken to the Goal Kenya Rescue Centre based in Kilimani, Nairobi.

During cross-examination **PW 1** said that the appellant did defile her both during the day, and occasionally at night. He did so on a seat with covers, after he had undressed. He did so at night, after coming from bedroom where he had left his wife sleeping. He even tried to do it when **PW 1** was washing clothes near the tank: on that occasion he simply lifted up **PW 1's** dress, but his wife arrived at the scene before he defiled **PW 1**.

PW 2 is a medical doctor. He examined **PW 1** on 26th March 2007. Her external genitals were normal. There was no injury to **PW 1's** vulva and vagina. But her hymen was absent.

Although there was no spermatozoa, the doctor noted numerous pus cells.

PW 3 is the police officer who was at the police station when the wife of the appellant reported that her husband had defiled their own daughter.

PW 3 accompanied the wife of the accused to Oletepes Village where the family was living. They met the appellant as he was on his way to the shops. The police stopped and then arrested the appellant.

Thereafter, PC Charles Letaiban was assigned the responsibility of carrying out further investigations into the case. However the said officer was later transferred from Kiserian Police Station to Homa Bay Police Station.

PW 4 is the doctor who examined **PW 1** at the Nairobi Women's Hospital. She found that the **PW 1** had extreme redness on the left side of the inside of her genitalia. The hymen had been broken at 12.00 o'clock position.

PW 4 noted no discharge, and the swab also failed to reveal anything more.

According to **PW 4**, although **PW 1** had gone to the doctor late, she (the doctor) was still able to form the professional opinion that **PW 1** had been defiled.

During cross-examination, the doctor said that her professional opinion was informed by the fact that the complainant's hymen was torn.

After the appellant was put to his defence, he told the trial court that he would give sworn evidence, and that he would also call four witnesses.

However, when he was due to give his defence, the appellant changed his mind. He decided to give an unsworn defence. He also decided that he would call no witnesses.

He blamed his arrest on a disagreement between himself and his wife. Apparently, his wife was erroneously accusing him of having an affair. She then threatened to do something bad to him.

The appellant told the pastor and church elders about the dispute with his wife and they convened a reconciliation meeting for 19th March 2007. Regrettably, he was arrested on 18th March 2007, after his wife reported that he had defiled both **PW 1** and his daughter, J.

The appellant blamed his arrest on his wife, who had been looking for an excuse to leave him.

After his arrest, the appellant learnt that his wife had left their matrimonial home together with **PW 1** and J, as well as with all the household goods.

Having re-evaluated the evidence on record, I find that there is clear evidence that **PW 1** was defiled. The proof is in the testimony of the complainant, which is amply corroborated by two doctors.

The fact that the complainant had been defiled is not just an assertion. It is a proven fact, backed with medical evidence.

It is thus not evidence that was fabricated by a wife who simply wanted to leave her husband.

But if **PW 1** reported the facts to both the wife and the daughter of the appellant, why did not those two persons testify? It would have been expected that the two would have corroborated the complainant's evidence, if they had testified.

On 16th May 2007 the prosecution informed the court that;

"The other witnesses were not traced for bonding. Accused's wife and her daughter, J, left the matrimonial home after the incident."

Later, on 28th June 2007, the prosecution informed the learned trial magistrate that the Investigating Officer had been transferred to Homa Bay, whilst the other witnesses were not traced for bonding.

Ultimately, the prosecution closed its case before J, her mother and the Investigating Officer had given evidence.

And in his defence, the appellant also confirmed that his wife had indeed left their matrimonial home, together with J. and **PW 1**. From the evidence of **PW 1**, she first went back home, and then was taken to Goal Kenya Rescue Centre, in Kilimani, Nairobi. But there is no evidence about where the wife of the appellant went with J.

Therefore, the failure to produce J. and her mother as witnesses at the trial was not due to a default on the part of the prosecution. It was because those two witnesses were not found.

As for the Investigating Officer, there is no clear explanation about why he did not testify. A transfer from Kiserian to Homa Bay Police Station cannot, of itself, be a bar to a police officer testifying in a case which he had investigated.

Be that as it may, the absence of the investigating officer and of J. and her mother, would only have been prejudicial to the interests of justice if the evidence already on record was barely sufficient.

When evidence adduced by the prosecution is barely sufficient, and the prosecution then fails to call some vital witnesses, the court is entitled to presume that if the evidence was received from the witnesses who had not been called, such evidence would have tended to weaken the case for the prosecution.

However, I hold the considered view that this is not such a case. I say so because the fact that **PW 1** had been defiled was proved through medical evidence.

Secondly, this was a case of recognition. And the appellant confirmed that **PW 1** was staying at his house at the material time.

Because the wife of the appellant left home after the appellant was arrested, I do concur with the learned trial magistrate that **PW 1** could not have been coached by the wife of the accused. The complainant was staying at a rescue centre. She had no reason to want to implicate the appellant falsely.

I therefore find no reason to doubt the decision by the learned trial magistrate to believe the complainant's evidence. It was not only consistent but also corroborative of the findings made by the 2 doctors who examined her.

In effect, the evidence on record was sufficient to sustain conviction.

PW 1 may have been the only "eye-witness" to the incident, as she was the victim. But it is not right to argue, as did the appellant, that a conviction cannot stand on the strength of the sole evidence of a minor. **Section 124 of the Evidence Act,** which was cited by the appellant, reads as follows;

"Notwithstanding the provisions of *section 19 of the Oaths and Statutory Declarations Act,* ***where the evidence of alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

Provided that when in a criminal case involving a sexual offence the only evidence is that of the

alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

As the offence for which the appellant was convicted is a sexual one, it clearly falls within the scope of the proviso.

And as the learned trial magistrate gave good reason why he believed the evidence of the complainant, it was open to the court to convict the appellant even on the evidence of the victim alone.

However, in this instance, the said evidence was duly corroborated by the medical doctors. That was all the more reason why the conviction was properly founded.

On the issue of **section 122 of the Penal Code**, the same sets out the procedure to be followed by a police officer of or above the rank of Inspector, when he wishes to order a suspect to undergo a DNA sampling. The section does not say that when a sexual offence has been committed, the suspect can only be conclusively linked to the offence through a DNA sampling.

Similarly, **section 36 (1) of the Sexual Offences Act** does not stipulate that an accused person charged with committing a sexual offence can only be convicted if he is linked to the said offence through DNA sampling. That section enables the court to order that an appropriate sample or samples be taken from the accused for the purpose of forensic and other scientific testing, including a DNA test.

In the result, I find no merit in the appeal. It is therefore dismissed. I uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 5th day of July, 2012.

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FRED A. OCHIENG

JUDGE