



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 219 of 2007

ANTONY MWANGI GICHIMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[Being an appeal from original conviction and sentence in criminal case No. 76 of 2007 by Hon. H.M Nyagah SPM, Nakuru dated 19th October, 2007]

The appellant was charged that on 11th March 2007 at [particulars withheld] he attempted to defile SW a child of 4 years contrary to **Section 9 (1) of Sexual Offences Act, No. 3** of 2006 and in the alternative that he committed an indecent act with SW by touching her private parts contrary to **Section 11(1)** of the said Act.

The trial magistrate upon being satisfied that the evidence presented before her proved the main offence beyond reasonable doubt, convicted the appellant and sentenced him to serve twenty years imprisonment.

Aggrieved by the conviction and sentence the appellant has filed an appeal to this court on five (5) grounds that can be reduced to two as follows:-

1. That the conviction was against the weight of the evidence; and
2. That the trial court failed to find that the evidence of P.W.2, a child of tender years, was not corroborated.

In support of his appeal the appellant filed written submissions in which he contends that the trial court should not have relied on the evidence of the complainant without corroboration; that the complainant's semen-stained clothes were not subjected to forensic examination and because of that failure it was not possible to determine whether the stains were indeed semen and if so whether it could be linked to him; that the complainant did not specifically say that she was defiled or that there was an attempt to defile her. He further contended that the evidence adduced by P.W.3 (the clinical officer) was of no probative value as it neither indicated the approximate age of the injuries nor the nature of instrument used to inflict them; and that finally some key prosecution witnesses were not called to testify.

Learned counsel for the respondent conceded that the evidence was insufficient to sustain the main charge but submitted that it was enough to sustain the alternative charge. He also submitted that the offence was committed in broad day light; that because both the complainant and her mother knew the appellant before, they were able to identify the appellant as the offender and that the appellant admitted having committed the offence. He urged the court to set aside the sentence imposed in respect of the main

charge and substitute it with a sentence of ten years in respect of the alternative charge.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

The prosecution led evidence to the effect that shortly before the offence was committed, the appellant left the complainant's parent's home in the company of the complainant and Jimmy (a grandson of the complainant's mother); that he (the appellant) took the complainant to his grandmother's kitchen, and after laying her on a "gunia" committed an indecent act or attempted to defile her. After the incident, the complainant went home crying and told her mother that the appellant had laid her on a "gunia" and urinated on her. Upon examining the complainant, P.W.1 (the complainant's mother) noted some liquid on the complainant's clothes. When she asked the appellant what had happened he asked for forgiveness.

P.W.3, Gladys Ondieki, a clinical officer at Bahati Health Centre, examined the complainant a day after the incident, and noted that her vaginal area was inflamed but her hymen intact. There was also no discharge. Because of the inflammation, she concluded that there was attempted defilement. P.W.6, PC Facia Wanja, who investigated the offence arrested and charged the appellant.

In his defence the appellant denied having committed the offence. He stated that on the material day he was doing his work to earn a living and did not know why he was charged.

The foregoing constitutes the evidence upon which the trial court found the main charge proved beyond reasonable doubt and convicted the appellant.

Upon evaluation of the evidence presented before the trial court I have no doubt that the complainant and the appellant knew each other before the incident; that the appellant was with the complainant at the time of the alleged offence. But the complainant was unable to give comprehensible account of what the appellant did to her. The whole charge rested on the complainant's account. That account was that;

"This person (accused) is called Gichimo. He urinated on me ("*Thugumira*" is the word used by witness). I was with Jimmy. He removed my pant. I slept on a "gunia". He then urinated on me. Gichimo went with me to the house. He had done this many times. I told my mother."

The prosecution witnesses tried to give meaning to the word "*Nithugumire*". P.W.5 interpreted the words to mean sexual intercourse. P.W.3, who found the complainant's vaginal walls inflamed but the hymen intact thought that the inflammation was sustained in an attempt to defile the complainant.

Notwithstanding the above inadequacy in the evidence of the complainant, the trial court found that the evidence of the complainant's mother corroborated that of the complainant and accordingly convicted the appellant.

The issue for determination is whether or not there existed enough evidence to support the decision of the trial court.

From this evidence, it is clear that the complainant does not give a comprehensive description of what the appellant did before urinating on her. For instance, she does not allege that the appellant lay on her when he did so.

Although the offence was allegedly committed in the presence of another person, Jimmy, he was not called to testify likewise no explanation was given why the owner of the house in which the offence was allegedly committed was not called. Under section 124 of the Evidence Act, the evidence of the complainant required corroboration before it could be used as a basis of conviction. Although the trial court found that corroboration in the evidence of the complainant's mother, in my view, the evidence of the complainant's mother was incapable of corroborating the evidence of the complainant as the clothes

that the complainant wore were neither produced as evidence nor forensic examination conducted on them to determine what the liquid in them was.

Regarding the alleged admission of the offence by the appellant, I find the same to be inadmissible as it was not made in court as required under section 25A of the Evidence Act.

The upshot of the foregoing is that the appeal has merit. I allow it on both grounds and consequently, quash the conviction, set aside the sentence and set the appellant at liberty unless otherwise lawfully held.

Dated , Signed and Delivered at Nakuru this 8th day of October, 2012.

**W. OUKO
JUDGE**