



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Criminal Appeal 95 of 2010**

**JASON KHAENGA ANENDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

This is an appeal against the Judgment of Hon. Grace M'masi Senior Resident Magistrate delivered on 14th 2010 in criminal case no. 551 of 2010.

**FACTS**

The Appellant was charged with the offence of defilement of a child Marion Cheruiyot aged 12 years.

On the 17th day of January 2012, at Kobil petrol station he intentionally and unlawfully cased his penis to penetrate the genital organ of the minor. He was convicted and sentenced to 20 years imprisonment.

The Appellant being dissatisfied with the conviction and sentence of the trial magistrate, filed an appeal and listed six grounds of appeal in his Petition of Appeal as set out hereunder;

- 1) That the arrest and detention of the Appellant in police cells from 20th January 2010 till 22nd January 2010 is contrary to law more particularly section 72 of the Constitution of the Republic of Kenya.
- 2) That the learned magistrate erred in law and facts when she based her conviction on contradictory evidence.
- 3) That the learned magistrate erred in law and facts when she failed to acknowledge that no identification parade was conducted to establish the identity of the Appellant owing to the fact that there was no mention of light by any of the witnesses.
- 4) That the learned magistrate erred in law and facts in finding that there were security lights at the Petrol Station when in fact not even the complainant mentioned the subject of light.
- 5) That the said conviction has no basis in law.
- 6) That the entire process was an abuse of the process of the court in that the court should have taken into account violation of the constitutional right to liberty of the Appellant and set him free.

At the hearing of the appeal, the Appellant was represented by learned Counsel Mr. Obwatinya and

the State was represented by learned Prosecuting Counsel for the State Mr. Kabaka.

Counsel for the Appellant argued that the evidence adduced by **PW1** and **PW2** was contradictory in that **PW1** stated that the incident occurred on the 17th January, 2011 where as **PW2** testified that the incident occurred on the 18th January, 2010.

On this ground of appeal, Counsel submitted that the trial magistrate failed to notice the contradictory evidence.

The second ground related to the issue of identification. Counsel submitted that the trial magistrate erred in her judgment in finding that there were security lights at the scene and yet **PW1** nor any other witness had not testified on the issue of lighting at the scene.

Counsel further submitted that no identification parade was carried out or conducted to establish the identify of the Appellant.

That **PW1** had not also testified on any special markings that had helped her identify the Appellant.

On the third ground of appeal, Counsel submitted that the conviction and sentence had no basis in law and that the child card "**PEXb 1**". That the prosecution relied upon could not be used in evidence as proof of age of **PW1**.

Counsel also submitted that the names appearing on the card, **MARION JEROTICH** were at variance with the names appearing on the Charge Sheet, **MARION CHERIOYOT**.

Counsel submitted on the remaining grounds of appeal that the investigations were not properly conducted.

That the Doctor (**PW4**) evidence was that **PW1** was sexually active and the P3 Form filled by **PW4** the Doctor was negative in every aspect.

Counsel submitted that the variance in evidence was fatal to the case before any court of law and prayed that the appeal be allowed and that conviction be quashed and the sentence set aside.

The Appeal was opposed and Counsel for the State submitted that the State had proved their case beyond reasonable doubt.

Counsel argued that the Appellant defiled **PW1** from 9.00 p.m. To midnight which gave **PW1** ample time to observe the Appellant and to enable her to easily identify the Appellant.

Counsel further submitted that **PW1** was able to point out and identify the Appellant by his mode of dressing, which was his security guard uniform.

On the issue of defilement it was Counsels contention that the evidence of **PW1** was corroborated by **PW4**. That **PW4** had found remnants of grass in **PW1**'s genitalia and had confirmed that **PW1** had been defiled. Counsel further submitted that the trial magistrate had believed the evidence of **PW1** and that was a sound basis for the court to proceed to convict the Appellant.

Counsel's submissions on the Clinic Card ("**PEXb 1**") was that it could be used as proof of age. That the different names appearing on the Clinic Card, the P3 Form and the Charge sheet referred to one and the same person, namely **PW1**.

Lastly, Counsel submitted that the discrepancies as to the dates the incident took place was not material. That the offence took place on the night of 17th January, 2010 at 9.00 p.m. to mid-night of that date and that any defect was curable.

In conclusion Counsel submitted that the appeal lacked merit and that it ought to be dismissed and conviction and sentence be upheld.

Upon hearing the arguments and submissions of both Counsel for the Appellant and the Respondent it is the duty of this court, being the first appellate court, to reassess, re-evaluate the evidence on record and to come up with an independent conclusion. Refer to the case of **LUCAS KERARIO SANGAI -VS- REPUBLIC (2011) Eklr.**

The court finds the following issues for determination;

(1) Identification

(2) Defilement of the minor.

On the first issue of identification, the incident occurred at night and no mention is made on the sufficiency of light that enabled the witness **PW1** to be able to see and observe the Appellant. It cannot be automatically assumed that all petrol stations are well lit and hence there was need to prove that indeed there was enough light at the station to enable the complainant to recognize the appellant easily.

In the case of **MAITANYI v REPUBLIC (1986) KLR** it was held that

*“ It is essential to ascertain the nature of light available.; what sort of light, its size, and its position relative to the suspect, are all important matters in helping to test the evidence with the greatest care.”*

Similarly, reference was made to the case of **WANG'OMBE v REPUBLIC(1976-80)1 KLR** where the circumstances of the light available must be found favorable especially where the incident occurs at night.

This court concurs with the submissions of Counsel for the Appellant that the witness made no mention of the issue of lights and or sufficiency. **PW1** states in her evidence that she identified the accused by his uniform.

This court finds that security guards uniforms are common place and cannot be a basis for identification. There were also contradictions as to whether the guard was from Kobil Petrol Station or National Oil Petrol Station and the Investigating Officer makes no mention as to whether investigations were carried out to ascertain the differences or similarities in the uniforms of the guards.

The court finds merit on the ground of appeal on identification and finds that the Appellant was not positively identified and conviction on this ground found to be unsafe.

On the issue of defilement, the court finds that the evidence of **PW1** is not supportive of penetration or any attempt. **PW1** states in her evidence that the assailant pulled down his trousers and that she screamed and ran away. The witness did not testify to any contact of both genitalia. **PW1's** evidence is not supportive of penetration as set out in the charge sheet and penetration is the key ingredient of the offence of defilement. **PW4** performed a high vaginal swab and makes a finding that there were no sperms present. **PW4** goes further to state that **PW1** was found to be sexually active and **PW4** made no finding on recent penetration.

This court concurs with Counsel for the Appellant that there are variance and contradictions in the evidence tendered into court by the prosecution and that investigations were not fully and properly carried out.

## **CONCLUSION**

For the reasons stated above, this court finds that based on the evidence tendered by the prosecution on identification and defilement, the conviction is unsafe.

The court finds that the appeal has merit and the same is hereby allowed.

The conviction is hereby quashed and sentence set aside.

The Appellant is at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Eldoret this 1st day of November 2012.

**A.MSHILA  
JUDGE**

Coram:

Before Hon. A Mshila J

CC; Andrew

Counsel for the Appellant: Moku holding brief Obwatinya

Counsel for the State: Wainaina

**A.MSHILA  
JUDGE**