IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.258 OF 2010

STEPHEN NYAAGA BITEKI……...……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(From original conviction and sentence Nakuru C.M.CR.C.NO.244 of 2009 by Hon. C. A. Otieno, Resident Magistrate, Nakuru, dated 31st August, 2010)

JUDGMENT

Before the trial court, the appellant, **Stephen Nyaaga Biteki** was charged and tried for **defilement** contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act.** In the alternative, he was charged with **committing an indecent act to a girl** contrary to **section ll(1)** of the **Sexual Offences Act.**

According to the charge sheet, the appellant was accused of unlawfully causing penetration with his genital organ, namely penis into the genital organ namely vagina of a girl, S.O., aged 12 years on 25th October, 2009 at E estate in Nakuru.

After a full trial, the learned magistrate found the appellant guilty of the main charge and upon conviction sentenced him to serve twenty
(20) years imprisonment. The appellant being dissatisfied has preferred this appeal against conviction on nine grounds (ground 5 having been abandoned). Those grounds may be distilled into six as follows:

i) the prosecution evidence was contradictory;

ii) the complainant's evidence was not corroborated;

iii) the appellant's defence was not considered;

iv) the appellant's counsel's submissions and authorities cited were not considered;

v) the medical evidence was inconclusive;

vi) the complainant's statement and the charge sheet are contradictory on the date of the alleged offence;

Learned counsel for the appellant further condensed and argued those ground as four, as follows:

i) that the learned magistrate shifted the burden to the appellant by finding that the appellant's witnesses failed to show where the appellant was;

ii) that the evidence of the complainant being a child, ought to have been corroborated;

iii) that the complainant told the police in her statement that the offence was on 25th November, 2009 yet the charge sheet is to the effect that it was on 25th October, 2009;

iv) that the appellant's *alibi* defence was ignored and the evidence of D.W.2 dismissed as false.

Learned counsel for the respondent conceded the appeal on the ground that the matter was reported 16 days after the alleged commission and that the appellant's *alibi* was not displaced.

I have considered these arguments, but being the first appellate court this court is enjoined to re-evaluate afresh the evidence on record so as to arrive at its own independent conclusion but bearing in mind that it lacks the advantage of the trial court where the witnesses were heard and seen.

According to the prosecution evidence, the complainant whose age was confirmed by a birth certificate as thirteen (13) years was sent by her mother, **P.W.2, JKO**, to a neighbour's house to buy avocado. The avocado she bought was rejected by her mother prompting her to return to the neighbour's house for a replacement. This time, she met the appellant who is a brother to the neighbour. She recalled how the appellant got hold of her hand, took her to bed and after removing her skirt and underwear, defiled her. The door was locked. She could not scream as the appellant had gagged her with socks.

Upon being released and as she was leaving the house crying, she met the appellant's niece, **D.W.2, (DK)** – eleven years old, to whom she narrated what had happened to her and asked her to tell her mother. Because of fear for her father, the complainant did not tell any adult member of her family about the incident until 10th November, 2009, about 16 days later.

The matter was reported to the police and the complainant examined by **P.W.4, Dr. Samuel Onchere**, who found on her private parts bruises on the vulva. He also noted that her hymen had recently been broken. Although there was no spermatozoa in the private parts, the doctor concluded that the bruises on the vulva and the broken hymen were indicative of defilement.

The appellant in his sworn defence maintained that on the material day after attending a church service in the morning, he went with a friend to Taidys Restaurant where they watched a football match only returning home at 8pm. He was, therefore, obviously surprised when he was arrested several days later on allegations of defilement. He denied committing the offence or even knowing the complainant's mother before this incident. He further maintained that his sister never sold avocados in her house. He was categorical that on the day of the alleged offence, he did not see the complainant. His witness, D.K. after reiterating the appellant's evidence that he went to church in the morning and returned home at 8p.m. denied that the complainant went to their house. She however, admitted that on the day in question, they played together.

I have considered this evidence, the submissions by the counsel as well as authorities cited. There is sufficient evidence from which to conclude that the appellant and the complainant knew each other being neighbours. There is medical evidence that the complainant was defiled as there was penetration. Her age (13 years) is also not in dispute. The sole question that fell for determination at the trial and which is the crux of this appeal is whether the complainant was defiled by the appellant. The only evidence against the appellant was that of the complainant. The complainant, I reiterate, was 13 years at the time of the offence.

The learned trial magistrate conducted a *voir dire* examination and concluded that the complainant understood the nature of an oath. The complainant then testified under oath. **Section 19(1)** of the **Oaths and Statutory Declarations Act** provides that the evidence of a child of tender years can be received in evidence, even though not given upon oath if in the opinion of the court the child is possessed of

sufficient intelligence and understands the duty of speaking the truth. Was the complainant a child of tender years? The **Oaths and Statutory Declarations Act** does not define the age bracket of a child of tender years.

The phrase is defined in the **Children Act, 2001** to mean a child under the age of ten years. It follows that it was not necessary to conduct *voir dire* on the complainant who was 13 years.

Section 124 of the **Evidence Act** provides that where the evidence of the alleged victim is admitted in accordance with **Section 19** of the **Oaths and Statutory Declarations Act**, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence. The proviso to this is relevant. It stipulates that:

"Provided that where 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."

The complainant was the alleged victim of the offence of defilement, a sexual offence. The learned trial magistrate received her evidence stating:

"P.W.1 the complainant herein was consistent, credible and convincing in her testimony on how the defilement took place, where and by whom. The complainant's testimony was elaborate and clear and her demeanor was not that of a coached witness. She appeared very traumatized as she recalled what had happened to her on 25th October, 2009."

I have already observed that the complainant knew the appellant, being a neighbour. The alleged defilement was at 4p.m. The only person she told of her ordeal was D.K., another child aged only 11 years. She explained why she did not report the defilement to her parents immediately. She feared her father.

There is no law or requirement that an offence be reported within a specific period, although in sexual offence cases, a report ought to be made without delay so as to ensure the accuracy of the results of medical examination. The learned magistrate found, despite the delay that the complainant was credible. That was a finding of a court that had the advantage of observing the demeanor of the complainant. This court will not interfere with such a finding unless it is not supported at all by evidence or is based on a perversion of evidence. But looking personally at the recorded evidence of the complainant, both in chief and in cross-examination I, with respect, agree with the trial court that it was credible. She denied framing up the appellant. The appellant himself confirmed that there was no bad blood between their two families. D.K. on her part stated that the complainant was her good friend.

The *alibi* defence of the appellant was displaced by the overwhelming prosecution evidence comprising the complainant's account of the events of 25th October, 2009 and as corroborated by Dr. Onchere, who confirmed that the hymen was probably broken fourteen (14) days before he examined the complainant.

Once again the trial magistrate observed the demeanour of D.K. and made the following conclusion:

"I was also able to observe the demeanour of D.W.2. She appeared uneasy and fidgety while in court. She did not strike me as an honest witness but one who had been coached on exactly what to say.....… It is my considered view that D.W.2's evidence was only intended at trying to assist the accused person who is her uncle in this case."

The contradictions on the dates are immaterial.

For these reasons, the appeal fails and is dismissed.

Dated, Delivered and Signed at Nakuru this 4th day of March, 2011.

W. OUKO
JUDGE