



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR J.J.A)

CRIMINAL APPEAL NO. 15 OF 2017

BETWEEN

JACKSON WAMBUA KASIVA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi (B.T. Jaden, J) dated 18<sup>th</sup> February 2014 in HCCRA No. 206 of 2011)*

**JUDGMENT OF THE COURT**

*Jackson Wambua Kasiva, the appellant*, was charged with the offence of defilement contrary to **section 8 (1)** and (2) of the **Sexual Offences Act, 2006**. The particulars of the offence are that on the 9<sup>th</sup> May 2010 at 1.00pm at Ikombe Location, Yatta District within the Eastern Province, he intentionally and unlawfully did an act which caused penetration of his genital organ into the vagina of **the complainant, FW**, a girl aged 10 years.

In the alternative, he was charged with committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act** in that on that day he committed an indecent act with FW by touching her private parts.

The facts of the case are that, FW a girl aged 10 years recalled that on 9<sup>th</sup> May 2010 at about 6pm while she was at home in the kitchen, the appellant who lived in the same compound called out to her. On entering his house, the appellant laid her on his bed, and defiled her. Shortly thereafter, FW's mother who had been looking for her entered the appellant's house and found her under his bed, where the appellant had told her to hide. After she told her mother what had happened to her, she was taken to Matuu Hospital where she was examined, and the matter was reported to Matuu Police Station.

FW's mother testified that on the material day, she was looking for her daughter and called her name several times, but she did not respond. She asked the appellant who was in the compound, but he claimed that he had not seen her and entered his house. FW's mother followed him into the house, to search for her daughter. When she checked under the appellant's bed, she found FW hiding there. She reported the matter to the sub- Chief, and FW was taken to Matuu District Hospital.

Benjamin Maingi, a clinical officer at Matuu District Hospital, examined FW and prepared the P3 form. He concluded that the child had been defiled.

In his defence, the appellant stated that he was arrested by an administration policeman who had asked him for one of his goats. He claimed that he was also asked for a bribe of Kshs. 500.

He denied committing the offence.

Upon considering the evidence, the learned trial magistrate found that the offence had been proved to the required standard and, upon conviction sentenced the appellant to life imprisonment. The appellant appealed to the High Court, which upheld the conviction and sentence imposed by the trial court.

The appellant now prefers an appeal to this Court on the grounds that his conviction was based on an allegation that did not point to him; that the threshold of the prosecution's case was based on a deflected burden and an unsubstantiated burden of proof; that the appellant was not subjected to a fair trial and was deprived of his liberty without just cause; and that there were glaring gaps and inconsistencies in the evidence, and coaching of the witnesses.

In his written submission that were presented in court the appellant contended that the prosecution did not prove its case, and in fact shifted the burden of proof onto the appellant; that there was nothing that linked the appellant to the commission of the offence; that contrary to the complainant's evidence, the medical report indicated that there was no viable spermatozoa in the complainant, and therefore her evidence lacked any probative value. The appellant further argued that the offence may have been committed by another boyfriend or a relative, and therefore the evidence did not conclusively point to the appellant as the perpetrator.

Finally the appellant submitted that there were gaps and inconsistencies in the evidence; that the basis upon which the case was commenced was because the appellant had demanded compensation for damage done to his maize plantation by the complainant's mother's cows.

In response to the submissions, **Mr. Hassan Ali**, learned counsel for the State opposed the appeal and submitted that, the 1<sup>st</sup> appellate court considered the evidence and concluded that in his defence the appellant admitted committing the offence; that there was no reason as to why a child aged 10 years would tell untruths; that the child was found under the bed and her explanation as to how she came to be there was not shaken during cross examination. Counsel concluded that it was difficult to find any fault in the conclusions reached by the two courts below.

In his reply the appellant further stated that no DNA tests were conducted on him, and that the child had been coached; that a crucial witness, one Mrs. Maina was not called to testify, and that besides the complaint's mother and the complainant, no other independent witnesses were called to testify.

In this second appeal, the jurisdiction of this Court is confined to questions of law only. See **Joseph Njoroge vs Republic [1982] KLR 388**. In considering the appellant's grounds of appeal and the parties' submissions, it is apparent that the issues that require determination are; whether the prosecution proved its case beyond reasonable doubt; whether there were inconsistencies and contradictions in the evidence; and whether other independent witnesses should have been called to testify.

In concluding that the prosecution had proved its case, the High Court stated thus;

***“The trial court carried out a voire dire and was satisfied that the complainant was intelligent and understood the meaning of oath and the duty to tell the truth. The complainant narrated to the court what transpired between her and the Appellant. There is no doubt that the acts visited upon the appellant amounted to defilement. The complainant knew the Appellant as they lived in the same compound. The offence took place at 6.00pm in broad daylight. The complainant was fished out by the mother from under the bed of the Appellant. The Clinical Officer, PW3 Benjamin Mwangi examined the complainant and confirmed that she had been defiled”.***

As concerns the complainant's age, the court stated;

***“The complainant's Birth Certificate (Exh.3) confirmed the date of birth as 22/12/2000. The Birth Certificate was issued on 26/3/2001, long before the material date in the year 2010. The complainant was about 9½ years at the material time.”***

We have re-evaluated the evidence and are satisfied that both the courts below properly evaluated the evidence, and rightly arrived at the conclusion that the appellant committed the offence. In particular, the trial court considered FW's evidence which showed that the appellant had defiled her, and upon finding it to be truthful, believable, and credible, in accordance with, **section 124** of the **Evidence Act**, which allows a court to receive and convict an accused on the basis of the victim's evidence, relied on FW's evidence to convict the appellant. But that was not all, there was also the evidence of her mother who found FW under the appellant's bed, and the medical report, which indicated that she had been defiled and lent further support to her complaint that the appellant had defiled her. In reevaluating the evidence, the High Court concurred with the findings of the trial court, and for our part, we can find nothing in the evidence that would lead to a contrary finding.

We also do not agree that the courts below solely relied on the evidence of FW and her mother to reach a finding that the appellant committed the offence. This is because they also took into account the evidence of the clinical officer, Benjamin Maingi, who examined FW and concluded that she had been defiled. As regards the allegation that crucial witnesses were not called to testify, we find that the record does not disclose any other witnesses who saw or heard the appellant defiling FW. This ground therefore lacks foundation and therefore fails.

In view of the above, we find that the appeal is without merit and is accordingly dismissed.

***It is so ordered.***

***Dated and delivered at Nairobi this 28<sup>th</sup> day of June, 2019.***

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**