



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU, MURGOR JJ,A)

CRIMINAL APPEAL NO. 209 OF 2013

BETWEEN

BOAZ KIPLETING KEMBOI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (F. Ochieng, J) dated 20th November 2013

in

H.C.CR.A. NO. 74 OF 2012)

JUDGMENT OF THE COURT

The appellant, **Boaz Kipleting Kemboi**, was charged in the Chief Magistrates’ Court at Eldoret with the offence of defilement contrary to **section 8 (2)** as read with **section 8(3) the Sexual Offences Act No. 3 of 2006**, the particulars of which were that on 7th August 2010, within the former Rift Valley province the appellant did unlawfully and intentionally cause his genital organ (penis) to penetrate the genital organ (vagina) of the complainant, **MJ, PW1** a girl aged 5 years.

He also faced an alternative charge of indecent act contrary to **section 11(1)** of the **Sexual Offences Act**, the particulars of which were that on the same day and place he intentionally and unlawfully caused his penis to come into contact with her vagina.

By way of a brief outline of the facts, MJ testified that on 7th August 2010 the appellant had taken her in a maize plantation where after he removed her trousers and underpants laid on top of her and defiled her. On 9th August 2010 MJ’s mother noticed that MJ was walking with difficulty, and as she bathed her she noted a whitish discharge on the child’s genitalia. Her neighbor Nelly also examined the child and found that she had been defiled. They reported the matter to **PC Rosa Shikoki, PW 5** at Kesses police post and were referred to Moi Teaching and Referral Hospital where MJ was examined and treated by **Dr. Florence Jaguga, PW1** who completed and signed the P3 form. In her report Dr. Jaguga found that the child’s labia majora had abrasions and there was a white discharge in and around her genitalia. The hymen was torn which was proof of penile penetration.

The appellant denied the offence and claimed that he had not come into contact with MJ whom in any event he did not know. He instead accused MJ's uncle, one Kiptum of having been the culprit.

He was subsequently convicted on the main charge and sentenced to 30 years imprisonment by the Chief Magistrate's Court, and being dissatisfied with that decision, filed an appeal in the High Court at Eldoret, where upon re-evaluation of the evidence the appeal was dismissed by Ochieng J, in a judgment dated 20th November 2013.

The appellant now appeals to this Court on the grounds and written submissions he presented to this Court which were that, the complainant's age was not ascertained as the age assessment report was produced in court by a police officer who was unqualified; that the P3 form was inadmissible as the medical doctor did not examine the complainant, and nor were there any treatment notes upon which she could have relied on to complete it; that penetration was not proved as there was no evidence of blood stains on the complainant's garments; and that the charge sheet was at variance with the evidence as there were discrepancies as to the date the offence was committed.

Mr. Omwega, learned prosecution counsel for the State opposed the appeal and submitted that from the *viva voce* evidence of the complainant, the appellant was identified as the person who defiled her in a maize plantation. The medical doctor PW1 confirmed that the complainant had sustained injuries leading to the conclusion that there was penetration. In addition, a medical doctor properly ascertained the complainant's age. Counsel concluded by asserting that, the offence carries a life sentence, and that the sentence of 30 years imposed by the High Court was unlawful. Counsel urged this Court to substitute it with a life sentence which is by law prescribed.

We have considered the record of appeal and the submissions and find that the issues for our consideration are whether the complainant's age was admissible as the report was produced by an unqualified person; whether the P3 form was admissible; whether or not the presence of blood stains is necessary to prove penetration; and, whether the charge sheet was at variance with the evidence as a result of inconsistencies in the date when the offence was committed.

The jurisdiction of this Court, it is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388***.

Recognizing the parameters of our jurisdiction, we will begin with the appellant's assertion that the charge sheet and the evidence were at variance, because the charge sheet specified that the offence was committed on 7th August 2010, while the witnesses testified that the offence was committed on 9th August 2010.

According to PC Shikoki the offence was committed on 7th August 2010. On 9th August 2010 MJ's mother, A reported that her daughter had been defiled after she noticed she was walking with difficulty. Upon examination, she discovered that her daughter's genitalia were producing a white discharge. It was then that MJ informed her that the appellant had defiled her. Nelly, A neighbor examined MJ on the same day and confirmed that she had been defiled. Dr. Jaguga also carried out the medical examination on that day following a report made at Kesses Police Post.

What is apparent from this evidence is that the offence was reported on the 9th August 2010. Besides the evidence of PC Shikoki, it is true that none of the witnesses, including MJ testified as to date of defilement. A testified that MJ was 5 years old. The medical age assessment report estimated her age as being 7 years. She was therefore a child of tender age at the time, and we appreciate that, it would have been difficult for her to know the exact date she was defiled.

But having said that, this did not mean that the offence was not committed. The evidence pointed to the appellant as having defiled MJ. The two courts below considered all the evidence, and arrived at the conclusion that MJ was indeed defiled. We can find no reason to controvert these findings. Bearing this in mind, we take the view that the failure to testify as to the actual date of the offence was not fatal to the charge, and we find that this was curable by **section 382** of the **Evidence Act**. This ground therefore fails.

The next issue was whether penetration was proved without the presence of bloodstains on MJ's garments.

Proof of penetration is a key ingredient in a case of defilement. Both the courts below considered MJ's testimony, and though she was a child of tender age, they found her evidence to be cogent and believable. When this evidence was considered in the light of the medical evidence from Dr. Jaguga who examined MJ and, the testimonies of A, the complainant's mother and her neighbour Nelly, the two courts below were satisfied that penetration was proved.

We do not accept the appellant's argument that since there were no bloodstains in evidence, penetration was not proved. There is no requirement in law that blood stains or even spermatozoa are necessary ingredients to prove defilement.

We also find allegation that the P3 form was inadmissible as Dr. Jakuju did not treat the complainant and was not presented with any treatment notes upon which to base the medical report to be untenable. The evidence shows that it was Dr. Jaguga who conducted the medical examination on MJ and was the same medical doctor who prepared and signed the P3 form. As such she was competent to sign the P3 form, and we find this ground to be devoid of merit.

The appellant's other complaint is that age assessment report was inadmissible because PC Rosa Shikoki who produced it, being a police officer and not a medical examiner she was not qualified to produce the report.

Section 77 (1) of the *Evidence Act* provides;

“In criminal proceedings any document purported to be a report under the hand of a government analyst, medical practitioner, or ballistics expert document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in court.”

Section 77 (3) goes further to stipulate;

“When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner and medical practitioner, or geologist, as the case may be and examine him as the subject matter thereof.”

What this means is that if the appellant wanted the age assessment report to be produced by a medical doctor, he had only to apply to the court to have the medical doctor summoned. He did not do so, and did not at the time object to its production. This ground lacks merit and is also dismissed.

A final issue that we must address was raised by Mr. Omwega which was that the sentence of 30 years imposed by the trial court and upheld by the High Court was unlawful. **Section 8(2)** of the Act specifies life imprisonment for defilement of a child under 11 years. As seen earlier MJ's age was estimated at 7 years, meaning that she would be in the age bracket defined by **section 8 (2)** of the Act, where the lawful sentence should have been life imprisonment. In the circumstances, the sentence of 30 years imprisonment imposed upon the appellant was clearly illegal. As such, we substitute it with life imprisonment.

In sum, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed in its entirety. As stated, the sentence of thirty years imprisonment is hereby substituted with life imprisonment.

It is so ordered.

DATED and delivered at Eldoret this 29th day of April, 2016.

D. K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

*I certify that this is a true copy
of the original.*

DEPUTY REGISTRAR