



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CRIMINAL APPEAL NO. 73 OF 2014

BETWEEN

MARTIN MWIRIGIAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgement of the High Court of Kenya at Meru

(Makau, J.) dated 9th March, 2013

in

H.C.C.R.A No. 99 of 2011)

JUDGEMENT OF THE COURT

1. **Martin Mwirigi**, the appellant was charged with the offence of attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offences Act** with an alternative count of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**.

2. The particulars of the offence of attempted defilement were that on 20th May, 2009, in Imenti South District within the then Eastern Province, the appellant attempted to commit an act which would cause penetration with his genital organ into the genital organ of NKM, a child aged 8 years. On the alternative count, the particulars were that on 20th May, 2009, in Imenti South District within the then Eastern Province, the appellant did an act of indecency with NKM, a child aged 15 (sic) years by touching her private parts namely the vagina and buttocks.

3. The appellant initially pleaded guilty to the main count before changing his plea on account of facts which he disputed. He pleaded not guilty to the alternative count setting the stage for a trial in which the prosecution called five witnesses. It was the prosecution’s case that on 20th May, 2009, at about 8 a.m.

PW 2, NKM (N), left her parents' home for her Grandfather's home which was about 300 meters from their home. N was accompanied on the trip by her brother VM (V), aged 6 years. The pair made it to and from their Grandfather's home before returning at about 4 p.m. Shortly after arrival, Norah's Mother-PW 1, PKM (P) instructed her daughter to go and clean the kitchen; whereupon her daughter started to cry and informed her that she was in pain. P asked MM(M) who was N's elder brother the source of the pain, to which he responded that he was not getting any response from his sister. P entered the house where N was and sought a response to the question which M had posed to her. There was silence at first. However, on being pressed further by her Mother to reveal which part of her body was aching, N pointed at her genitals. P asked her daughter whether there was a wound on her genitals, to which she replied in the negative and instead showed her Mother a small wound on her knee. Purity also made an inquiry as to what had transpired when V and N visited their Grandfather. Her daughter did not respond to the query.

4. P then turned to V for answers as to what had transpired during their visit to their Grandfather's home. He replied that he and N had visited an uncle namely: - Bilgen Mutugi and were at his home the whole day. P also sought to know whether there were any other persons who were present at their uncle's compound. V replied that there were two male youths namely: - Mwirigi and Bundi. At this juncture P turned to her daughter asked her whether she went into her uncle's house during her visit. N responded in the affirmative and informed her Mother that she went to the said house to take water. Upon being questioned to narrate what happened while she was in her uncle's house, N kept quiet. P changed tack by calling a woman who was nearby namely Scholarstica Paul to help her unravel what had happened to N. The said woman managed to get N to open up, whereupon she disclosed that when she went into her uncle's house, one Mwirigi was therein and he summoned her to the bedroom. When she reached the bedroom, he placed her on the bed, removed her pant, undressed and defiled her. It was also P's testimony that upon learning of what befell her daughter; she took her to a nearby clinic, but did not examine her private parts. Nonetheless, she noticed that her daughter's pant was wet. P also testified that she was advised to have a P3 Form prepared, which she obtained at the Igoji Police Post. Thereafter, P and N proceeded to Kanyakine Hospital for treatment.

5. After undergoing a *voire dire* examination, PW 2, (N) recounted the events of the material date affirming that the appellant had defiled her; with PW 3, APC Michael Cheptoo (APC Cheptoo), PW 4, Daniel Bilgen Mutugi (Mutugi) and PW5, PC Richard Ombui (PC Ombui) all tendering evidence repeating N's account. Their respective testimonies withstood the rigours of cross-examination. We note from the record that no medical evidence was tendered as the prosecution was unable to procure the attendance of the Clinical Officer who examined N by the close of its case.

6. In his defence the appellant gave a sworn statement. He testified that on 20th May, 2009, which was a Wednesday, he was at home and woke up early for breakfast. Thereafter, he took a sack and a panga and went to fetch grass for his parent's cows. At 9.30 a.m., the appellant returned and took a bath before leaving for the market at 10 a.m. to visit a carpenter by the name Mutugi who was teaching him how to make furniture. It was the appellant's testimony that by 11 a.m. the carpenter had not arrived. While still waiting, a lorry pulled in and its driver requested the appellant to accompany him on a mission to ferry firewood; a request which the appellant accepted. According to the appellant, the firewood in question was to be collected at a place called Keumbu. Upon arrival, the appellant and the driver loaded firewood in the Lorry, completing the exercise at 3 p.m. before driving back to the market. The appellant testified that he and the Lorry driver arrived at the market at 4p.m. whereupon he alighted and the Lorry drove off. It was also the appellant's testimony that he remained at the market in the company of other young men chewing *khat* and engaging in conversation; and that while there he saw N's father buying *khat* from one of the young men namely Mutwiri. He further testified that at about 5p.m. P called N's father then he left the market area. At about 7p.m. the appellant proceeded to the upper part of the market where he met Mutwiri accompanied by a fellow youth. Mutwiri's companion informed the appellant that he wanted to send him to his mother as she needed a goat. The appellant testified that the trio found a place to sit with Mutwiri's companion busy pressing the keys on his phone. Moments later the Police arrived and arrested the appellant as a mob of youth threatened to lynch him. The appellant was then taken to a nearby police camp. The appellant denied committing the offences he was charged with.

7. The trial court convicted the appellant on the main count and sentenced him to 10 years imprisonment.

Aggrieved by the decision of the trial court, the appellant lodged an appeal at the High Court which was dismissed vide its judgment dated 9th March, 2013. It is that decision that has provoked the present appeal before us on the following grounds:-

- ***The Learned Judge erred in Law in failing to find that the evidence of the minor was uncorroborated;***
- ***The Learned Judge erred in Law in failing to find that the contradictions and discrepancies of the evidence of the minor and other witnesses rendered the only evidence of the minor untruthful;***
- ***The Learned Judge erred in Law in failing to find that the Lower court Magistrate did not give the reasons for believing in the evidence of a single witness as per the provisions of Section 124 of the Evidence Act.***

8. At the hearing of this appeal, the appellant was represented by Mr Kiara, learned counsel, while Mr Mungai appeared for the State. Mr Kiara submitted that the Judge of the superior court erred in law by failing to find that the lower court had no reason to convict on a charge of attempted defilement; and that all evidence which was tendered pointed towards defilement. It was also his submission that no medical report was tendered in evidence and that the trial Magistrate relied on the evidence of the complainant alone. Learned counsel also submitted that the trial Magistrate did not warn himself or give reasons for believing the complainant. Furthermore, counsel submitted that the complainant's testimony was contradictory. Finally, Mr Kiara submitted that the neighbour, in whom the complainant confided about the events of the material date was not called to testify, neither was it clear which hospital the complainant was taken

9. In opposing the appeal, Mr Mungai submitted that the appellant was convicted for the offence of attempted defilement and that he had been positively identified. It was also his submission that the issue of recognition had been proved beyond reasonable doubt, and that the appellant's defence was a mere denial. The State further submitted that whereas a medical report was crucial in proving the charge in question, the evidence of the complainant was cogent. Counsel also submitted that the evidence of Mutugi and P corroborated that of N; that the contradiction in the date when the offences were committed was insignificant.

10. This is a second appeal and by dint of **Section 361** of the **Criminal Procedure Code** only matters of law fall for our determination. See ***Kaingo Vs R, (1982) KLR 214*** and ***David Njoroge Macharia vs R, [2011] eKLR.***

11. It is our considered opinion that the present appeal turns on the weight to be attached to the evidence of a victim of a Sexual Offences **Section 124** of the **Evidence Act-Cap 80**, states that:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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.”

We are able to discern from the appellant's Memorandum of Appeal that his main complaint is the weight which the trial court attached to N's evidence and failure to give reasons for doing so. We now pose the question: was corroboration necessary?

12. In ***Mohamed Vs Republic, [2005] 2 KLR***, this court held as follows with regard to corroboration:-

“By Legal Notice No 5 of 2005 which introduced the proviso to Section 124 of the Evidence Act, parliament drastically qualified Section 124 of the Evidence Act to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful”.

See also ***Robert Kabwere Kiti Vs Republic, [2012] eKLR - Criminal Appeal No 486 of 2010.***

Accordingly, we hold and find that there was no need for the complainant’s evidence to be corroborated. Even if the contrary were true, we note from the record of the trial court that upon conducting a *voire dire* examination the court came to the conclusion that N was intelligent enough to offer evidence and that she understood the nature and meaning of an oath.

13. Furthermore, the trial court took the trouble to find evidence which was supportive of the complainant’s case. The same was found in the evidence of Mutugi who testified that N and her brother had visited his homestead, and that at one point he left them alone in the company of the appellant giving him an opportunity to commit the alleged offence. This evidence remained unshaken during cross-examination. On the subject of the contradictory age of the complainant, we note from the record that the prosecution made an application to amend the particulars of the charge sheet during the course of the trial. In our considered opinion the correct age of the complainant is clearly indicated in the particulars of count 1 as 8 years. The error in question was also curable pursuant to the provisions of **Section 382** of the ***Criminal Procedure Code***.

14. Finally, we note that in its judgement, the trial court found N’s testimony to be *“realistic, factual and cogent”*. The law places a trial court at a hallowed place so to speak as it has the benefit of observing the demeanour of witnesses as they testify. Besides, the High Court concurred with the trial court having perused the record of the trial court and the High Court and noted their findings on the credibility of the evidence tendered by the complainant, we see no reason to disturb the same. The appeal stands dismissed.

Dated and delivered at Meru this 12th day of March, 2015

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR