



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 91 OF 2013

BETWEEN

JOSEPH MUTINDA MWANZIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

(Ong’udi, J.)dated 7th November, 2013

in

H.C.CR.A No 149 of 2012

JUDGEMENT OF THE COURT

1. Joseph Mutinda Mwanzia, the appellant was charged with two counts of the offence of defilement contrary to **Section 8 (1) & (2)** of the **Sexual Offences Act** with two alternative counts of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**.

2. The particulars of the first count of defilement were that on 22nd April, 2007 in Mbeere District within the Eastern Province, the appellant defiled JMN, a child aged seven years. For the second count of defilement the particulars were that on 22nd April, 2007 in Mbeere District within the Eastern Province, the appellant defiled EWW, a child aged three years. The particulars of the first alternative charge were that on 22nd April, 2007 in Mbeere District within the Eastern Province, the appellant committed an act of indecency with JMN, a child aged seven years by touching her private parts. The particulars of the second alternative charge were that on 22nd April, 2007 in Mbeere District within the Eastern Province, the appellant committed an act of indecency with EWW, a child aged three years by touching her private parts.

3. The appellant pleaded not guilty to all the counts leading to a trial in which the prosecution called seven witnesses. It was the prosecution’s case that on Sunday 22nd April, 2007 at around 4p.m. PW 1, ASN (A) left her seven year old daughter PW2, JMN (J) with her Grandmother PW6, MW (M) before proceeding to the market at Gategi. A testified that it was the norm for her to leave J with her

Grandmother whenever she had errands to run; and that M resided two kilometers from A's house. At 6p.m. A returned from the market and picked her daughter for the journey home. On 26th April, 2007 A was summoned by M who told her that she had received information from another child-PW4, EWW (E), that the appellant had taken E and J, removed all their clothes and placed them on his bed. M and a person by the name Waweru went to report the matter to the Assistant chief on the said date; and were in turn referred to the Police. It was A's testimony that she went to the police on 27th April, 2007 accompanied by PW 3, Cecilia Muthoni Ngombo (Cecilia), J and E. Upon arrival they were referred to hospital where a doctor examined J and confirmed that she had been defiled. A P3 form was issued before the trio returned to the police station. On their part, the police issued a note to A with instructions directed at the police at Gategi to arrest the appellant. A further testified that both J and E informed her that the appellant had done 'bad things' to them. The appellant was subsequently arrested and taken to Karaba Police Station. A was able to identify the appellant positively during the trial and confirmed that he was a relative.

4. PW 2, (J) testified after being taken through a *voire dire* examination. In her unsworn statement she stated that she was seven years old and a student at [Particulars Withheld] Primary School. J was able to recall the events of the material day. She testified that she had been left at her Grandmother's house by her Mother who had gone to the market; and that she was in the company of W (E). As the pair played, the appellant called them to his house. Upon arrival, he showed them some pictures and proceeded to place them on a bed. It was J's testimony that the appellant then removed their respective panties and sent a third child to the shop to buy sweets. According to J, the appellant then did 'bad things' to her and E before asking them to go home. E informed their Grandmother what had transpired. J confirmed that she and E were taken to hospital accompanied by her Mother, and that the matter was reported to the police who in turn arrested the appellant.

5. PW3, (C) who is J's Aunt and E's Mother from what we gather from the record, testified that on 22nd April, 2007 she arrived home from church at 4a.m. (sic) and left for Gategi market. According to her, the family lives in a big homestead and the children (J & E) remained behind. Upon her return at 4p.m. her daughter was fine. However, E cried all night saying that she was feeling pain below her abdomen. Enquiries from M as to the cause of the pain did not yield any fruit. It was C's testimony that on 24th April, 2007 M summoned the appellant to come and assist with some work at the farm. When E saw the appellant, she became fearful and anxious and hid behind M. Upon inquiry by her Grandmother as to why she was afraid of the appellant, E said that the appellant had told her and J to remove their underpants before doing 'bad things' to them. According to C, the appellant retreated towards his home when he heard what E had said. On being asked to confirm what she had said, E repeated her statement and added that the appellant had warned them that should they reveal what had happened, he would kill them. C clarified that 'bad manners' meant the act of the appellant defiling the minors. C also testified that the incident in question was reported to the police and that both E and J were taken to hospital for examination; and that P3 Forms were prepared. She was able to identify the appellant positively.

6. PW4, (E) testified after being taken through a *voire dire* examination and corroborated J's account of events on the material date. PW 5, Edward Nyaga Thiaka (Mr. Thiaka), a clinical officer testified that he examined J and E and formed an opinion that the two children had been defiled. He made the following salient findings which he recorded in their respective P3 Forms: - He assessed E's age as three years at the time of examination and noted that her labia minora remained open with a torn hymen connoting penetration. On touch at examination the patient cried a lot from pain. According to Mr Thiaka this was also a sign of penetration. E's P3 Form was signed on 27th April, 2007. Mr Thiaka assessed J's age as seven years at the time of examination and noted that her labia minora remained open with a torn hymen connoting penetration. Her genitalia was tender on touch also confirming penetration. J's P3 Form was signed on 27th April, 2007. The evidence of PW 6 (M) and PW 7, PC David Kabutha (PC Kabutha) corroborated the accounts of A, J, C, E and Mr. Thiaka. It was the prosecution's case that E was three years while J was seven years.

7. In his defence the appellant gave an unsworn statement. He testified that on a date which he could not recall, which was a Sunday, he woke up, took breakfast and went to the shamba some distance away from home. It was the appellant's testimony that he worked at the shamba until 6p.m. before returning home.

According to the appellant he arrived home at 9p.m. took his dinner, had a bath and retired for the night. The next morning he returned to the shamba. While there, two people came and asked whether his name was Joseph Mutinda Mwanzia. He was then arrested and hand-cuffed before being taken to the Karaba Police Post.

8. It was the appellant's testimony that he spent a night in the police cells and was surprised to learn that it was on account of a complaint by his relatives to the effect that he had defiled two children. The appellant also testified that he was arraigned before court on a Monday having been charged with several counts of defilement. In conclusion, the appellant denied committing the offences he was charged with and testified that it was M, his Grandmother who was desirous of evicting him from the land which he resided upon on account of a grudge, hence the charges.

9. The trial court convicted the appellant on both counts and sentenced him to life imprisonment on each count. Aggrieved by the decision of the trial court, the appellant lodged an appeal at the High Court which was dismissed vide a judgement dated 7th November, 2013. It is that decision that has provoked the present appeal.

10. At the hearing of this appeal, the appellant appeared in person while the State was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant urged us to review his sentence. He had hitherto filed Supplementary Grounds of Appeal and written submissions whose gist was that the charges leveled against him were not proved beyond reasonable doubt, that the evidence in support thereof was uncorroborated and that the grudge which M allegedly had against him was not taken into account by the trial court and the first appellate court. Mr. Kaigai in opposing the appeal submitted that the case was proved to the required standard, that the appellant was a relative to the complainants hence this was a case of recognition.

11. The State also submitted that J and E were credible witnesses and that even though they delayed in reporting the incident of defilement, the medical report confirmed that they had been defiled. Counsel also submitted that **Section 124** of the **Evidence Act** allows conviction without corroboration in instances where sexual offences have been committed against children of tender years. Finally, the State submitted that there were two concurrent findings by the two courts below. In a brief rebuttal, the appellant submitted that the case was a frame up.

12. We have considered the record, submissions by counsel, the appellant and the law. By dint of **Section 361** of the **Criminal Procedure Code** only matters of law fall for our determination. See ***Chemagong – vs- Republic (1984) at page 219*** where this court held that:-

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did.(Reuben Karari s/o Karanja –vs- Republic 17 EACA 146).”

We find and hold that the findings of fact which were made by the two courts below; notably that the appellant had defiled the two minors were based on cogent evidence and the same should stand. See ***Kaingo V R (1982) KLR 213***.

13. We now turn to what has been the appellant's main complaint during the course of these proceedings; namely the lack of corroboration. Upper most in our minds is that the fact that the appellant was charged with the offence of defilement and that the complainants were two minors aged three years and seven years respectively. For the offence of defilement to be proved, all that the prosecution was required to establish was the act of penetration. The same was proved beyond reasonable doubt by Mr. Thiaka's testimony with the rest of the witnesses merely confirming the occurrence of events on the material date; and on the subsequent dates.

14. We have also noted the trial court's comments upon conducting a *voire dire* examination on J and E. The trial court found J to be seized of sufficient intelligence to understand questions put to her, and to

give rational answers thereto. A similar finding was made with regard to E. Having perused the evidence which was tendered by the minors at the trial court we are of the opinion that the same was cogent and a true account of the events of the material date.

15. Section 124 of the Evidence Act-Cap 80 provides that:-

“Corroboration required in criminal cases notwithstanding the provision 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 find and hold that even with the evidence of the minors alone, the trial magistrate lawfully convicted the appellant as she believed the victims. However, in this instance there was evidence from other witnesses which further supported the prosecution’s case. Accordingly, we find and hold that the prosecution case was proved beyond reasonable doubt. We are not persuaded by the appellant’s defence of a grudge against him by M. Accordingly, the appeal stands dismissed and we hereby uphold the sentence passed upon the appellant.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR