



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR JJ,A)**

**CRIMINAL APPEAL NO. 9 OF 2013**

**BETWEEN**

**EZEKIEL OMWOYO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 31<sup>st</sup> July 2012*

in

**H.C.CR.A. NO. 95 OF 2010)**

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**JUDGMENT OF THE COURT**

The appellant, **Ezekiel Omwoyo**, was tried by the Chief Magistrate’s court on a charge of defilement of a girl contrary to **Section 8 (1)** as read with **section 8(2) the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 4<sup>th</sup> December 2009, at Nyatieko location in Kisii Central district within Nyanza Province, he unlawfully and intentionally penetrated the vagina of **EvG (PW 4), the complainant**, a girl aged 10 years with his penis.

There is an alternative charge of indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars are that on 4<sup>th</sup> December 2009, at Nyatieko location in Kisii Central District within Nyanza Province he committed an indecent act with **EvG (PW 4), the complainant**, a girl aged 10 years by rubbing his penis against her vagina.

The facts as can be ascertained from the record are that on 4<sup>th</sup> December 2009 at about 1.00pm as EvG was alone in the forest collecting firewood, the appellant who seemed drunk, staggered towards her. He pushed her onto the ground, pulled up her dress and removed her underpants. In the same motion, he unzipped his white jeans, removed his penis, spat on it and inserted into EvG’s vagina, and defiled her. EvG testified that she tried to scream out of pain but was unable to as the appellant had covered her mouth.

When he was finished, the appellant zipped up his trouser, took out Kshs. 10/- threw it at EvG and warned her not to tell anyone what had happened. EvG picked up the money and her panty and went

home. She did not inform her mother, who was at home, of what had happened for fear of reprisal from the appellant.

On 9<sup>th</sup> December 2009, noticing that she was looking unwell **M, PW2 (M)**, EvG's grandmother, following enquiry, was told by EvG that the appellant had defiled her on 4<sup>th</sup> December 2009. When she examined EvG's genitalia, M saw that they were bruised and had some discharge.

On 10<sup>th</sup> December 2009, M took EvG to Kisii Level 5 Hospital where she was examined by **Jackson Murauni (PW 1)**, a registered clinical officer, who observed that EvG's genitalia were bruised. A vaginal swab showed that there was blood due to a ruptured hymen. He concluded that there was penetration due to the ruptured hymen and bruises present on her genitalia. Jackson Murauni completed the P3 form which was produced in court. EvG was treated and discharged, and the incident was reported to the police.

A report was filed by **PC Cecilia Muthoni (PW 3)**, and the appellant was arrested by the area chief. PC Muthoni accompanied the appellant to the Kisii level 5 Hospital where he was examined by Jackson Murauni, who found that the appellant suffered from a sexually transmitted disease due to the presence of pus cell in his urine sample, though the HIV test carried out on the appellant was negative. Jackson Murauni also produced the appellant's P3 form in court.

In his defence, the appellant testified that on 4<sup>th</sup> December 2009 he was at work riding his boda boda from 5.00am to 8.00pm, and that he worked all day and then went home. After work he dropped his motor bike at a friend's house and went to have a drink. That while there he met with the complainant's father who shouted at him for not digging a pit latrine, but that they continued drinking until 9.00pm.

On 10<sup>th</sup> December 2009, he again met the complainant's father and they had a few drinks. He gave the complainant's father Kshs. 500/-, being part of Kshs. 4000/- amount advanced for digging the pit latrine which seemed to anger the complainant's father who threatened him as a result. The same night the complainant's father, and complainant's father's brother came to his house with 6 people, tied him up and beat him. He was taken to the complainant's home where he found the Assistant Chief who took him to his office and beat him. At 8.00am the complainant was taken to the Chief's office, after which he was taken to the police station, and to the hospital. It was his testimony that according to the complainant, it was the complainant's father's brother who had defiled the complainant.

When cross examined, the appellant stated that on 4<sup>th</sup> December 2009, he was at mama Noma's house having his lunch and was not near St. Judes, the scene of the alleged incident. He stated that he was being framed for failing to complete the digging of the pit latrine and refunding the Kshs. 4000/- owed to the complainant's father. The appellant denied defiling the complainant.

The trial court found the appellant guilty as charged, convicted him and sentenced him to life imprisonment as by law prescribed.

Being dissatisfied with the conviction and sentence of the trial court the appellant then filed an appeal at the High Court at Kisii, where upon re-evaluation of the evidence the appeal was dismissed by Sitati, J, on 31<sup>st</sup> July 2012, thus provoking this second appeal, which is before us.

The grounds of his appeal are that his rights under Article 50 of the Constitution were contravened; that there was no assessment of the complainant's age; that there were witnesses who were not called to testify; that the prosecution did not prove its case, as the complainant was not examined within a reasonable time; that the trial court did not appreciate that a grudge existed between the father of the complainant and the appellant; and that the High Court failed to evaluate the evidence.

In his written submissions that were presented in Court, it was the appellant's case that he was not provided with the witness statements, despite the trial court having ordered the prosecution to make them available to the appellant; that the charge sheet specified the complainant's age as 10 years, while the

complainant stated she was aged 11 years and M testified that she was 8 years old; that neither the Chief who arrested the appellant, nor the complainant's mother testified; that the prosecution did not prove its case as the complainant was examined 5 days after the incident; that a grudge existed between the complainant's father and the appellant over a soured land transaction, that the appellant's alibi was not considered by the courts below, and finally that had the High Court evaluated the evidence it would have found that the prosecution had not proved its case.

In her submissions, Ms. Kimani, learned prosecution counsel stated that, on the issue of whether there was penetration, Jackson Murauni, the clinical officer, produced the P3 form showing that there was penetration. Additionally, M had examined the complainant and found bruises on her genitalia. The complainant had also provided a detailed account on the manner in which she was defiled by the appellant, and stated that it was the appellant who had defiled her. The appellant was someone she recognized and knew. On the appellant's defence of alibi, counsel argued that this was not corroborated.

With regard to the sentence, counsel submitted that the trial court had handed down the correct sentence, as prescribed by law for a child aged 10 years. And from the P3 form, the complainant was 10 years old. On the contention that the appellant had not been provided with statements, counsel submitted that, the trial court had indeed issued an order for the statements to be supplied to the appellant, and at the next hearing the appellant when asked by the court, confirmed that he was ready to proceed without raising any question on whether or not he had been supplied with the statements. Once the order was made it was upon the appellant to ensure that the requisite documents were made available to him, and if they were not he ought to have informed the court. Counsel pointed out that the issue was raised in the High Court, and dismissed for this reason.

This being a second appeal and by dint of **section 361 (1) of the Criminal Procedure Code**, issues of fact do not fall within our remit. Therefore we shall only examine issues of law as stated by this Court in the case of ***Mwita v R. [2004] 2 KLR 60.***

We will begin with the issue that the appellant's rights were violated by the failure of the prosecution to provide the appellant with witness statements. An examination of the record does not show that any request for written statements was issued by the appellant or that a subsequent order for supply of the written statements was issued by the trial court, which was disobeyed by the prosecution. With this in mind, the question of breach of the appellant's rights cannot be said to arise, and we must find that this ground fails.

Turning to the assertion that the prosecution failed to prove its case, EvG testified that she was alone in the forest collecting firewood, when the appellant who seemed drunk, staggered towards her. He pushed her onto the ground pulled up her dress and removed her underpants, unzipped his white jeans, removed his penis, spat on it and inserted into EvG's vagina, and defiled her. This evidence was corroborated by M who examined her and saw bruises on her genitalia. A further examination by the clinical officer, found that there was penetration. According to EvG, she recognized the appellant who was a person known to her.

When both the trial Court and the High Court considered the EvG's evidence which was found to be cogent and reliable, in the light of the evidence of M and the clinical officer, they were satisfied that the prosecution had proved its case. On our part we can find no reason to interfere with this finding and conclude that this ground is without merit.

On the issue that EvG's age was not ascertained, this issue was raised in the High Court which found that the complainant's age was specified on the P3 form. Additionally, when the appellant cross examined the complainant, she testified that she was 11 years old. At no time during the proceedings did the appellant question or challenge her age. Since EvG's age remained unchallenged and uncontroverted, this Court is not at liberty to interfere with the concurrent finding of facts by the courts below, **see section 361(1)(a) of the Criminal Procedure Code.** For this reason, this ground therefore fails.

In re-evaluating the evidence with respect to the complainant's father, the High Court stated thus,

***“I have also carefully considered the record on the cross examination of the prosecution witnesses by the appellant. There is no suggestion to M for example that there was a grudge between the appellant and the complainant’s father over money or otherwise, nor did the appellant suggest to M that it was the complainant’s father’s brother who defiled the complainant. In my considered view, the appellant’s defence was a mere afterthought and did not shake the prosecution’s case against him.”***

In addition to this, the appellant has submitted that, the grudge was on account of a land dispute. From our consideration of the evidence, this was not at any time raised during the trial, and further fortifies the finding, that the contention of the existence of a grudge as an afterthought. In the circumstances, this ground is unfounded and must fail.

We turn to the issue that crucial witnesses were not called to testify, that is, the Chief who arrested the appellant, and the complainant’s mother. Neither of them were present during the incident, and it is evident that they would not have had anything further to add. In any event, **section 143** of the **Evidence Act** provides that no particular number of witnesses is required to prove a particular fact. As such, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case. As a consequence this ground fails.

On the contention that the courts below overlooked his alibi, it is evident from the record that this issue was not raised as a ground of appeal, but having said that, the appellant testified on cross examination that he was at mama Noma’s having lunch. We take the view that the issue being raised so late in the day on cross examination and at the close of the trial was an insipid afterthought which did not in any way displace the prosecution’s case.

On the final issue that the High Court failed to evaluate the evidence, there is no doubt from the judgment that the High Court properly analysed and re-evaluated the evidence, and found that EvG gave a vivid description of how the appellant, who she knew and recognized defiled her. The court also considered the medical evidence, and was satisfied that when this was considered together with the testimonies of EvG, the clinical officer and M there was no doubt that there had been penetration.

We consider that the High Court carefully reevaluated the evidence and reached a finding as did the trial court that the appellant defiled the complainant, and as a consequence, we do not find any concrete reason to interfere with the findings of the courts below.

For the aforesaid reasons, we find that the appellant’s appeal is without merit, and we order that the same be and is hereby dismissed.

We so order.

***DATED and delivered at Kisumu this 19<sup>th</sup> day of October, 2015.***

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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**