



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 417 OF 2010

BETWEEN

N.K.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Eldoret (Mwilu, J.) dated 29th April, 2010

in

H.C.C.R.A. NO. 24 OF 2008)

JUDGMENT OF THE COURT

The appellant was convicted by Eldoret Resident Magistrate (Maisiba I.) for the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the Sexual Offences Act. Upon his conviction he was sentenced to serve life imprisonment which is the minimum sentence stipulated under the Act. His first appeal to the superior court (Mwilu J) was dismissed, hence this second and last appeal which may only lie on matters of law unless the findings of fact were based on no evidence at all or on a perversion of it.

It was proved beyond reasonable doubt before the trial court, as alleged in the charge sheet, that on diverse dates between 20th December, 2006 and 6th March, 2007 the appellant had defiled **E. W**, a nine year-old girl. The appellant was E's father, and her evidence was not challenged in cross-examination although she testified on oath, that she was residing with her parents in L Estate in Eldoret and was attending K Primary School in Standard 2. Her mother died on 20th December, 2006 and she was buried in Nakuru after which E returned to L with her father in January, 2007. It was suggested by one of her uncles that they return to Nakuru but her father refused. They were staying in single room in L. It was E's testimony that on several occasions the appellant sexually molested her after forcefully taking off her pants. He also beat her and forced her not to go to school. In March, 2007, E ran off to another home, Mama A's, where the good samaritan took her to Moi Teaching and Referral Hospital for examination and treatment. The medical examination was performed by **Dr. Paul Kipkorir Rono** who found several marks on E's left eye, an injury on her right hand on the thumb, an inflamed *Tibia minima* and a rugged hymen. He found no discharge from her genitalia and on conducting VDRL for syphilis, she found her "negative". He also testified she was HIV negative. Dr. Rono formed the opinion that there were "features of repeated sexual assault with actual penetration".

Two other witnesses confirmed the ordeals of E in the hands of her father. **Mrs. E. O. M** (PW2), a teacher and neighbour in L estate found the appellant outside Mama A's house on 4th March 2007 demanding the return of the child to his house. E told Mrs. M that she had been sexually molested by her father and was not willing to go back home. Mrs. M reported to E's head teacher **Mrs. J. O** (PW3) who also received confirmation of the same complaint from E and they reported to L Police Station whereupon **Pc. Yusuf Kibet** (PW5) commenced investigations. E was taken to hospital for examination and that is when Dr. Rono confirmed the commission of the offence.

The appellant was also medically examined by Dr. Rono and he confirmed that he was H.I.V positive. On being cross-

examined by the appellant as to why E was found H.I.V negative, the doctor stated that H.I.V appears after about three months. In his defence, the appellant simply denied the charges after admitting the child was his but complained that he was not given an opportunity to talk to her. He further blamed the woman, Mama A, where E had taken refuge, claiming that she had framed him with the offence because he had sold her bicycle and eaten all the money.

Upon examining all that evidence the trial magistrate stated: -

“There is no question of mistaken identity. The accused is the complainant’s own father. He took advantage of the demise of her mother and the fact that they lived in a one roomed house to severally defile her. There is medical evidence to show the girl was defiled. I am satisfied the prosecution have proved their case beyond reasonable doubt. I convict the accused person on the main charge.”

After analysing and re-evaluating the evidence on record, the superior court came to the same conclusion stating in part: -

“At the trial the appellant did not cross examine his daughter – the complainant on her evidence that the appellant started sexually molesting her in January, 2007 when her mother died. What she told the court about being sexually molested by her father then remained uncontroverted and the trial court was right in accepting that evidence. The complainant told PW2 of her ordeal at the hands of her own father. When PW2 narrated before the trial court how the complainant said she was molested by her father the appellant herein did not cross-examine PW2. PW3’s evidence that the complainant repeated to her that she was defiled by her father also went unshaken. All that the appellant was interested in appears to have been whether or not he had infected his daughter with the HIV virus for when the doctor gave evidence he questioned him on the HIV status of both himself and his daughter. And the doctor’s answer that HIV appears after about 3 months simply silenced appellant as he chose not to ask any further questions. The trial court was right in rejecting the empty and bare defence of the appellant.”

The appellant was aggrieved by those findings and he drew up some four “*Grounds of appeal*” in person as follows: -

1. *“1. That the learned Lady Justice erred in law by so being fully convinced that I was guilty yet not withstanding or having warned herself under the fact that the prosecutions side never availed all the necessary witnesses/vital, to prove the above case beyond any reasonable doubts.*
2. *2. That the learned Lady Justice fully erred law wise by so not realizing that the case was not done in a transparent manner leaving a lot of hurdles unsettled as to per law.*
3. *3. That the learned Lady Justice fully erred law wise by so being impressed by the doctor’s testimony, notwithstanding that if really I participated to the act in question, then even the minor could have been found to be positive because I am H.I.V positive.*
4. *4. My lordship I kindly pray for a re-trial to enable me face fair justice as to per law because I was fully prejudiced.”*

Those grounds are not easily decipherable and the fact that the appellant was not represented in urging the appeal before us did not help in identifying the legal issue or issues at stake. In his submissions he simply reiterated his denial that he committed the offence citing the doctor’s confirmation that he was H.I.V positive when the complainant was not, and reiterating that Mama A had made the false accusation to punish him for selling her bicycle.

We think for ourselves that the case rested on the credibility of the child E whose evidence the appellant did not challenge. The trial court had the advantage of seeing and hearing her in the witness box and was therefore a better judge on credibility. We have no reasonable basis for interfering with that assessment. Medical evidence further confirmed her complaint that there had been penetration in her private parts which was a finding of fact. The law does not require any number of witnesses to be called for proof of corroboration of the facts stated by the complainant and therefore the first ground of appeal has no legal basis. As to whether, as pleaded by the appellant, the commission of the offence was negated by medical evidence that at the time of their examination the appellant was H.I.V positive when the complainant was not, we think the essence of the offence under the Act is penetration of the female organ and this was established by the doctor and found as a fact by the two courts below. The doctor also explained why it was possible to have two different results of the examination.

On our own appraisal of the case we think there was sufficient basis for making the concurrent findings made by the two courts below and we have no reason to disturb them. The appeal is lacking in merit and is for dismissal.

It is so ordered.

Dated and delivered at Eldoret this 25th day of March, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR