



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 64 OF 2013**

**From original conviction and sentence in Mwingi Principal Magistrate's Court Criminal Case No. 391 of 2011 (Mr. H.M.Nyaberi, Ag.SPM)**

**MBOYA MWANGANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction**

Mboya Mwangangi whom I will refer to in this judgement as the appellant, was charged, tried and convicted by the lower court at Mwingi for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence read that on 13<sup>th</sup> June 2011 at [particulars withheld] Location within Mwingi East District of Kitui County intentionally did an act that caused penetration with his male genital organ namely penis into the female genital organ namely vagina of K.P. a child aged 8 years.

After taking evidence of seven (7) prosecution witnesses and the appellant's defence, the trial court considered the same and found that the offence charged had been committed. He convicted the appellant and sentenced him to life imprisonment. The appellant is aggrieved by the conviction and sentence and has appealed to this court.

**Petition of appeal**

By a petition of appeal amended with leave of this court and filed on 10<sup>th</sup> April 2014, the appellant has raised six grounds of appeal. The appellant had filed a petition of appeal on 17<sup>th</sup> June 2013 in which he listed eight grounds of appeal. In the earlier petition, the appellant raised the main issue of appeal as lack of adequate evidence to prove that he committed this offence. He has brought out this issue in his amended petition of appeal in which I understand the appellant to be raising the following issues:

- i. That the prosecution has failed to prove the case beyond reasonable doubt.
- ii. That the trial magistrate sentenced the appellant to life imprisonment without considering that he is a minor.
- iii. That the prosecution case is contradictory and inconsistent.
- iv. That the appellant was not identified as the assailant.

- v. That the mode of arrest was not established.
- vi. That the crucial witnesses were not summoned to testify.

The appellant submitted in support of the grounds of appeal. He stated that the age of the complainant was not proved beyond reasonable doubt; that the children who were alleged to have been playing with the complainant before the appellant allegedly carried her away were not summoned to testify; that the woman who is alleged to have rescued the complainant was not summoned as a witness; that the rest of the witnesses were giving hearsay evidence and their evidence cannot be believed; that the evidence of PW2 should not be believed because she harboured a grudge with the family of the appellant; that the complainant's evidence could have been influenced by her parents; that the complainant did not identify the appellant because she could not remember the shirt he wore and that the doctor's findings were influenced by PW2.

The appellant further submitted that the evidence touching on the date of his arrest is contradictory; that he was a school going minor in class five; that the evidence that the appellant possessed an identity card is a creation of the prosecution and this was not proved beyond reasonable doubt and that he was given an identity card without his knowledge. The appellant seeks to have the conviction quashed, sentence set aside and that he is set free.

### **Respondent's submissions**

The respondent opposed the appeal and asked the court to uphold the conviction and sentence of the lower court and dismiss the appeal. By his written submissions learned state counsel submitted that the age of the complainant was confirmed through evidence of the mother to be 8 years; that the age of appellant was confirmed through his identity card to have been 21 years at the time the offence was committed; that before one is issued with an identity card there must be proof that he is over 18 years; that the fact that the appellant was in school did not automatically mean he is a minor; that under section 143 of the Evidence Act no particular number of witnesses are required to prove a case and that even though the prosecution did not call certain persons to testify this was not fatal to their case because there was evidence to prove that defilement took place; that the trial magistrate cautioned himself on the danger of relying on a single witness; that corroboration is no longer required in sexual offences where the victim is the only witness by dint of section 124 of the Evidence Act.

Learned counsel further submitted that the evidence of the prosecution witnesses did not contradict and that the dates when the defilement took place and the report made to the police as well as when the appellant was arrested and both appellant and complainant taken to hospital do not contradict and that the evidence is clear as to the manner the appellant was arrested. Learned counsel submitted that the prosecution proved the case beyond reasonable doubt and this appeal ought to be dismissed for lack of merit.

### **Facts**

Briefly, the complainant, **K.P** who testified as PW3, was playing with other children identified as **C.** and **K.** at the home of her aunt, **T.K**, who testified as PW2, on 13<sup>th</sup> June 2011 when the appellant went to where they were. He had with him some fruits identified as guavas. He told the children to escort him towards a farm belonging to PW3's aunt known as **S.** At the farm the appellant got hold of the complainant and the other two girls ran away. He took her to a river bank, removed her clothes and defiled her. They were found by a woman identified as **L.K** who took PW1 home.

On receiving the report, PW2 sent for PW3 who narrated to PW3 what had happened. PW3 reported the matter at Nguni Police Post and took PW3 to Mwingi District Hospital. The complainant's mother, **K.N**, PW5, who had been away in Garissa attending to her sick husband, was informed of the defilement. She went to see the complainant at Mwingi where she was being treated.

The report of defilement was also made to Josphat Musyimi Mbuko, the Assistant Chief, PW1, who visited the appellant's home on 13<sup>th</sup> June 2011 at 10.00pm intending to arrest the appellant. However, the

appellant escaped on seeing him. PW1 told the appellant's father, Mwangangi, to bring the appellant to PW1's office the following day. On 14<sup>th</sup> June 2011 the appellant was taken to PW1 who took him to Nuu AP Camp. On 15<sup>th</sup> June 2011 APC Evans Safari, PW4, escorted the appellant to Nguni Police where he was charged with this offence.

The appellant did not talk about 13<sup>th</sup> June 2011 in his defence in the lower court. He testified about 15<sup>th</sup> June 2011. He said he was at school on that day and arrived home at 6.30pm; that PW2 in company of other people went to the appellant's home and arrested him by tying his hands with a rope without telling him the reason for that arrest and that they took him to Nguni Police Post the following day.

### **Determination**

Section 8 (1) of the Sexual Offences Act state as follows:

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

For the prosecution to prove defilement under section 8 (1) and section 8 of the Sexual Offences Act generally, there must be evidence establishing beyond reasonable doubt the following:

- i. That the accused person before the court is the person who committed the offence of defilement.
- ii. That the victim of that defilement is a child.
- iii. That penetration occurred.
- iv. Age of the victim.

### **Identity of the appellant**

My careful reading and evaluation of the evidence reveals that PW3, the complainant is the only identifying witness. The appellant was someone known to her as a neighbour and school mate. At the time of defilement, the complainant was a pupil at (name withheld) Primary School. This is the same school attended by the appellant. The complainant testified that the appellant went to where she and the other two girls were playing and told them to escort him and he would give them guavas. These two girls, C. and K., did not testify. The woman, L.K, who is said to have found the complainant and the appellant, did not testify either. L.K told PW2 that she had heard a child crying when going to fetch water at (name withheld) river and that she saw the complainant. L.K further told PW2 that she also saw a young man running away and when she asked the complainant who the man was, the complainant told her that it was Mboya. L. K did not testify to confirm this evidence.

On her part, PW2 questioned the complainant as to what had happened and the complainant narrated to her the same story that Mboya had found them playing and had told them to escort him and he would give them guavas; that he had carried her and defiled her.

I have considered that this is evidence of a single witness and that I have to treat it with caution. The trial magistrate had conducted a *voire dire* examination on the complainant and had formed an opinion that the girl was intelligent. She was affirmed to testify. I have noted that the trial magistrate, though believing the evidence of the complainant failed to caution himself on relying on her evidence on the issue of identity. The trial magistrate took the evidence in totality to find the charge proved.

**Section 124 of the Evidence Act that:-**

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”***

I have considered that the trial magistrate recorded that the complainant was possessed of sufficient intelligence to testify and in his judgement found her evidence “tangible, consistent and precise”. He believed her evidence and after taking into account other evidence found that defilement was proved beyond reasonable doubt.

The law, as held in Chila vs. Republic (1967) EA 722 at 723, that:

**“The law of East Africa on corroboration in sexual cases is as follows. The judge should warn the assessors and himself of the danger of acting on the uncorroborated evidence testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice”.**

The record as I have stated shows that the trial magistrate, although having recorded the reasons for believing the evidence of the complainant believed her evidence, failed to warn himself of the dangers involved in relying on evidence of a single witness. In my view, even though the trial magistrate failed to caution himself, this did not, in my view, occasion any miscarriage of justice especially when there is other evidence to show that the appellant committed this offence.

On my own evaluation and being alive to findings of courts that recognition of a suspect is more reliable than identification of a stranger (see Abdalla bin Wendo vs. R [1989] 424 and R. vs. Turnbull (1976) 3 All ER 549) it is my view that the appellant was known to the complainant before the date of the offence; it was during the day; the appellant called the complainant from where she was playing with other girls and took her to the scene. She also gave his name to L.K who relayed the same name to PW2. Later PW2 questioned her and she repeated the name of the appellant to PW2. I find that there is no mistaken identity. I have also cautioned myself of the dangers involved in relying on the complainant’s evidence on identity of the appellant.

### **Crucial witnesses left out**

I have examined the evidence and found that C. and K. the girls who had been playing with the complainant were not called to testify. The same applies to L. K the woman who found the complainant and took her home. I however do not think failure to call them as witnesses prejudiced the appellant. Of importance to me is whether the available evidence proves beyond reasonable doubt that the appellant committed this offence.

### **Mode of arrest**

The appellant told the court lies. PW2 in company of other people did not arrest and tie him with ropes. The appellant was taken to the Assistant Chief by his father Mwangangi and the date was 14<sup>th</sup> June 2011. He was taken to Nuu AP Camp and the following day, 15<sup>th</sup> June 2011, he was escorted by PW4 to Nguni Police Post. There is nothing wrong with the manner in which he was arrested and besides there is no miscarriage of justice.

### **Proof beyond reasonable doubt**

I did not find the evidence contradictory as claimed by the appellant. It is clear that the appellant was taken to the Assistant Chief (PW1) by his father. This was on 14<sup>th</sup> June 2011. PW1 took the appellant to the AP Camp at Nuu on the same date. On the following day on 15<sup>th</sup> June 2011, PW4 escorted the appellant to Nguni Police Post. The charge sheet confirms the date of arrest as 15<sup>th</sup> June 2011 the date he was handed over to the police at Nguni Police Post.

The evidence of T.K is that she examined the complainant on 13<sup>th</sup> June 2011 and found her oozing blood from her genitalia. She also noticed bruises. PW5, the girl’s mother found the complainant having

arrived at Mwingi District Hospital. She said she also checked the girl's genitalia and saw lacerations. The evidence of Dr. Indumwa Edmond, PW6, lay to rest any doubts about the injuries suffered by the complainant. The doctor examined the complainant on 15<sup>th</sup> June 2011, two days after the offence. He found lacerations on both the labia majora and the perineum and the hymen was broken which in his opinion was evidence of forced penetration. I have no doubt in my mind, going by the available evidence that the complainant was defiled. The evidence is sufficient and proves beyond reasonable doubt that the appellant defiled the complainant.

### **Age of the complainant**

The complainant told the court that she was aged 8 years. Her mother, PW5, confirmed this age. The doctor also gave the complainant's age at the time he examined her as 8 years. I have given this issue due consideration and my view is that I have no reason to doubt that the complainant was aged 8 years especially after taking into account the evidence of the mother and that of the doctor who examined her.

### **Is the appellant a minor?**

The appellant says he is a minor. This is a matter handled conclusively by the lower court. The appellant seems to state that by virtue of the fact that he was attending primary school in class seven shows that he was a minor. This is what I deduce his submissions to mean.

After being convicted, the appellant told the court in mitigation that he was in class seven and the court ordered for age assessment. A report dated 12<sup>th</sup> April 2013 was filed showing the appellant was 17 years of age. The report does not show who assessed his age and what method was used although the report bears the stamp of the Medical Officer of Health at Mwingi District Hospital. This is the age he gave the lower court. The court called for a report from Probation Officer. When the report was filed it indicated that the appellant was an adult and he even possessed an identity card. This prompted the prosecution to seek time to forward appellant's fingerprints to the Registrar of Persons. On 7<sup>th</sup> June 2013, the prosecutor presented in court National Identity Card No. 29605680 bearing the name of Mboya Mwangangi. It was issued on 5<sup>th</sup> May 2011 and shows the date of birth is 2<sup>nd</sup> July 1990. The appellant admitted that the identity card belonged to him. In his submissions in this appeal, the appellant states that the identity card was given to him without his knowledge. I have considered this line of argument and find that it cannot be true. Obtaining an identity card is a rigorous affair and I doubt that the government could issue identity cards to persons even before they apply for them. Besides, the appellant was asked by the lower court to confirm whether the identity card belongs to him. He confirmed it did.

After due consideration of this matter, it is my view that the age of the appellant has been proved beyond reasonable doubt. He is not a minor and the fact that he was still in primary school does not make him a child as defined under our law.

My careful examination of the evidence both for the prosecution and the defence of the appellant has convinced me that the evidence, taken in totality, proves beyond reasonable doubt that the appellant committed this offence. There is evidence to prove age of the complainant to be 8 years thereby placing her as a child of tender years by dint of section 2 of the Children's Act. There is evidence from the doctor confirming and proving that penetration occurred. This satisfies the requirements of section 8 (1) of the Sexual Offences Act.

Finally, I wish to comment on the appellant's previous records. The prosecutor informed the court that the appellant could be treated as a first offender. However, when the probation report was presented to court, it reveals that this is not the case. The appellant had been convicted in Criminal Case No. 609 of 2009. In this case, the appellant had been charged with defilement. He had been found guilty and committed to Shimo La Tewa Borstal Institution for three years. The prosecutor took the easy way out by informing the court that the appellant could be treated as a first offender. He ought to have investigated a bit deeper. It is unfortunate that the appellant had committed a similar offence previously.

To conclude this matter it is my view that the appeal has no merit as reasoned out in this judgement. I

find all the ingredients of the offence of defilement proved beyond reasonable doubt. Consequently, the appeal filed by the appellant is hereby dismissed. I have no reason to interfere with the sentence imposed. The conviction and the sentence are hereby upheld. It is so ordered.

**Dated, signed and delivered this 26<sup>th</sup> June 2014.**

**S.N.MUTUKU**

**JUDGE**