Case Number:	Criminal Appeal 21 of 2017
Date Delivered:	28 Dec 2017
Case Class:	Criminal
Court:	High Court at Narok
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	Robert Chepkwony v State [2017] eKLR
Advocates:	Mr. Mukofu's for the Appellant, Mr. Mwangi for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Narok
Docket Number:	-
History Docket Number:	Criminal Case No. 736 of 2015
Case Outcome:	Appeal allowed
History County:	Narok
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 21 OF 2017

[From the original conviction and sentence in the Chief Magistrate's court at Narok in Criminal case No. 736 of 2015 R. v. Robert Chepkwony]

ROBERT CHEPKWONY.....APPELLANT

VERSUS

STATE.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. In this court, the appellant has raised seven grounds of appeal in his petition of appeal. In ground 1, the appellant has faulted the trial court both in law and fact in convicting him since the complainant did not identify him. In this regard, the unsworn evidence of the complainant (PW 2), was taken after being subjected to a *voire dire* examination. PW 3 was found to be average intelligence. The court also found that PW 2 did not understand the nature of the oath or telling the truth on oath. The reception of the unsworn testimony of a child of tender years is authorized by section 19(1) of the Oaths and Declarations Act [Cap. 150] Laws of Kenya. Before such evidence is received the court must be satisfied that the said child of tender years is possessed of sufficient intelligence and understands the duty of speaking the truth. The procedure was approved in *Kinyua v. R. (2002) 1KLR 256,* which is cited with approval in *Opicho v. R, (2009) KLR 369.*

4. PW 2 testified through her mother (PW 1) who was appointed by the court as her intermediary. The mother was appointed as intermediary after the four years old complainant was found to be a vulnerable witness in terms of section 31(1)(b) and (4) of the Sexual Offences Act. PW 2 testified that she did not know the appellant. She further testified that her mother took her to hospital. She went further to testify that she had not seen the appellant before. Thereafter the prosecutor is recorded to have told the court that "…. *The witness has proven in capable of giving testimony even when the accused has been made to take a concealed position out of her view. I have nothing further for the witness."*

5. As a result of the foregoing, PW 2 was not cross examined by the appellant's counsel. Cross examination is a fundamental aspect of a fair trial. Lack of cross examination renders the trial unfair.

6. In response to the foregoing evidence, Mr. Mukofu submitted that the complainant had positively identified the appellant, since the offence was committed during day time. This submission is supported by the evidence of PW 2 following her first *voire dire* examination. At the time she testified that she knew the appellant as Robert. She further testified that the appellant took her to the bush and removed her clothes. She declined to chew the piece of sugar cane given to her by the appellant.

7. Furthermore, PW 2 testified that she did not get injured and she did not know the name of the hospital where she had been taken for medical examination. The court then noted that "*witness keeps silent for an extended period.*

- *More than 10 minutes*
- *Despite intermediary putting her through questions."*

8. In view of the foregoing evidence, I find that PW 2 was unable to testify fully in court. She was not in a position to be cross

examined by counsel for the appellant. In the circumstances, I agree with the appellant that PW 2 was not in a position to identify him. I therefore do not agree with Mr. Mukofu's submission to the contrary. I therefore uphold the appellant's submission that PW 2 did not identify him.

9. In ground 2, the appellant has faulted the trial court both in law and fact for convicting him without considering the medical evidence that exonerated him from this defilement. The medical evidence of Chepkemoi Lily (PW 5), the clinical officer, is that on 19/5/2015, she examined PW 2. PW 2 complained to her that she was defiled on 19/5/2015 by a person known to her and had pain in her genitalia, painful and difficulty in walking. She also found her to be torn and laceration to her menorah labia. An HIV and VDRL proved negative. The urinalysis showed numerous blood cells and epithelial cells – indicative of bleeding and wearing out of the vaginal epithelial cells.

10. According to PW 5, penetration was evidenced by the torn hymen and laceration to the minora labia. She produced as exhibits the following

1. P3 form – Pex 3

2. Post rape care form – pex 4

3. Lab request form - pex 5

4. Treatment booklet – pex 2

5. Child health clinic card/book pex 1

The clinical officer testified in conclusion that she did not know who committed the offence. I therefore find from the medical evidence that it did not implicate the appellant. I therefore uphold the submission of the appellant in ground 2.

11. Furthermore, in ground 3, the appellant has faulted the trial court both in law and fact in convicting him, when the mother of PW 2, confessed that PW 2 reported the incident to her after three days. The evidence of the mother of PW 2 was that PW 2 disclosed to her on 20/5/2015 that it was the appellant who defiled her on 19/5/2015. It is therefore clear that PW 2 disclosed to her mother that the appellant defiled her one day after the incident.

12. I therefore find the appellant's 3rd ground of appeal that PW 2 disclosed the defilement to her mother after three days as lacking in merit and I dismiss it.

13. In ground 4, the appellant has faulted the trial court both in law and fact in relying on hearsay evidence to convict him. I find that there is merit in this ground in the light of the fact that the complainant was not cross examined.

14. I therefore allow the appellant's appeal. The conviction and sentence are hereby quashed. The appellant is hereby set free unless held on other lawful warrants.

Judgement delivered in open court this 28th day of December, 2017 in the presence of the appellant and in the presence of Mr. Mwangi for the state.

J. M. Bwonwonga

Judge

28/12/2017