



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.27 OF 2015

WILLY KIPKOECH KERICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of Hon. E. KINIALE (SRM)

in Kericho CMCC No.4 of 2012 delivered on 17/6/2015)

JUDGMENT

1. The Appellant was convicted with the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act (SOA) No.3 of 2006 and he was sentenced to life imprisonment.
2. The particulars of the charge were that on 26/12/2011 at [Particulars Withheld] Village in Kipkelion District within Kericho County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of DC, a child aged 4 years.
3. A summary of the prosecution evidence was that at the material time, the Complainant was sent by her mother (PW.2) to take a ball to Kipyegon who was herding cows near the home of the Appellant when the Appellant called her and took her to his house where he did bad manners to her.
4. PW.2 the mother of the Complainant said after the Complainant returned from taking a jerician of water to Kipyegon. She refused to bath. The following day, PW.2 noticed that the Complainant's panty had a white discharge and she also had a whitish discharge from her private parts.
5. PW.2 said she took the Complainant to Hospital where Investigations revealed that she had Gonorrhoea (STD). The Clinical Officer who examined the complainant who testified as PW.4 said the child's labia was inflamed and her hymen was torn.
6. PW.4 also said the Appellant was taken to him on 8/1/2012 and he examined him and he sent his urine specimen to the lab and he confirmed that the Appellant also had Gonorrhoea.
7. The Appellant said in his defence that he was arrested by some people on 5/1/2012 while he was working as a casual labourer weeding beans and he was told that he had defiled a child on 26/12/2011. He was beaten and taken to a private clinic where the Doctor examined him and said he did not have any problem.
8. The Trial Court found the Appellant guilty as charged and sentenced him to life imprisonment and also stated that the Appellant should be declared a dangerous sexual offender under Section 39 of the Sexual Offences Act.
9. The Appellant has now appealed to this Court on the following Amended Grounds of Appeal:-
 - (i) THAT he was not accorded an opportunity to cross-examine PW.1 (the complainant).
 - (ii) THAT crucial witnesses were not called to testify.
 - (iii) THAT penetration was not proved to the required standard.

(iv) THAT the medical evidence was inconclusive and could not corroborate the allegations in the case.

(v) THAT the sentence of life imprisonment is excessive since recent law developments have declared such mandatory sentences unconstitutional.

10. The parties filed written statements as follows:-

11. The Appellant submitted that he was not given an opportunity to cross examine the complainant and that the right to challenge evidence adduced against an accused person is one of the basic tenets of the right to a fair trial.

12. The Appellant submitted that the prosecution failed to call crucial witnesses and that the medical evidence tendered was inconclusive and did not corroborate the charge or allegations against him. He was of the view therefore that the conviction was unsafe and that the court ought to quash the conviction and sentence imposed.

13. The Appellant submitted that the life sentence was excessive, the trial magistrate imposed a severe sentence without considering that he was a first offender with no prior records.

14. The Respondent submitted that the prosecution witnesses' testimonies were consistent, corroborative and reliable based on direct evidence. The respondent urged the court to find that the conviction was safe, dismiss the appeal and uphold the decision of the trial court.

15. The first duty of the first Appellate Court is to re-evaluate the evidence adduced before the Trial Court and to come to its own conclusion whether to support the findings of the Trial Court while bearing in mind that the Trial Court had the opportunity to see the witnesses.

16. The issues for determination in this appeal are as follows:-

(i) Whether the Appellant was positively identified.

(ii) Whether the prosecution proved penetration.

(iii) Whether the age of the complainant was proved.

(iv) Whether the sentence meted was excessive.

17. On the issue of identification of the Appellant, I find that the Complainant knew the appellant who was an uncle and a neighbor. I find that the appellant was positively identified.

18. On the issue of penetration, the evidence of the complainant was corroborated by that of the Clinical Officer (PW.4) who said the child's labia was inflamed and her hymen was torn. The Sexual Offences Act, section 2 defines penetration as follows;

"...the partial or complete insertion of the genital organs of a person into the genital organ of another person."

19. Furthermore, the Appellant was subjected to a medical examination and he was found with Gonorrhoea and this linked him to the complainant who was also found to have contracted Gonorrhoea.

20. On the issue of age of the Complainant, there is evidence that the child was born on 1/3/2007 and a copy of the immunization card was produced in court.

21. The child was therefore 4 years at the time of the commission of the offence. The definition of a child is the one assigned in section 3 of the Children Act is follows;

"child" means any human being under the age of eighteen years

22. On the issue of the sentence meted, I find that the same is lawful. In defilement cases the sentence is determined by the age of the child.

23. I find that the appeal herein lacks in merit and I accordingly dismiss it and I uphold both the conviction and sentence.

Delivered, dated and signed at Kericho this 25th day of March 2022.

A. N. ONGERI

JUDGE