



REPUBLIC OF KENYA

COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.25 OF 2019

DAVID KIPTOO NGENO.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence by Hon. E. KARANI (RM)

in CMCC Case No.32 OF 2018 delivered on 14/8/2019)

J U D G M E N T

1. The Appellant was convicted with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006 and he was sentenced to 25 years imprisonment.
2. The particulars of the charge were that on 31/5/2018 in Bureti Sub-County within Kericho County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of XX a girl aged Eight (8) years.
3. The Appellant was charged with an alternative count of indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that in the same material particulars as in Count 1 (above) the Appellant touched the vagina of XX a child aged 8 years with his penis.
4. The Prosecution evidence in brief was that on 31/5/2018, the Complainant, a child aged 8 years old said she was coming from school when the Appellant pulled her to a nappier grass field holding her mouth and he removed her pantie and lifted her dress, he unzipped his trouser and he removed his penis and inserted it in her place for urinating.
5. PW.1, a Nephew of the Complainant who is also a minor witnessed the incident. He said the Appellant again followed the Complainant to R's Kitchen where he again defiled the Complainant. PW.1 called his friend D and they screamed and the Accused ran away but was arrested.
6. PW.4, the Clinical Officer who examined the Complainant said there was tenderness on her labia majora, labia minora with mild laceration on her genitalia. Her biker was torn and there was blood but no discharge from her private parts.
7. On lab examination, the urinalysis showed blood and spermatozoa. PW.4 concluded that the Complainant had been defiled.
8. The Appellant in his defence denied committing the offence and said on the material day, he attended his business of buying and selling firewood and later he went to enjoy himself in a bar and on his way home, he had a fight with P and W when PW.1 went there and accused him of having defiled a young girl. The Appellant said he had a grudge with PW.1.
9. The Trial Court found the Appellant guilty as charged and convicted him with the offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006 and sentenced him to 25 years imprisonment
10. The Appellant has appealed against conviction and sentence on the following grounds:-

(i) THAT the Prosecution evidence was inconsistent, uncorroborated and insufficient to sustain a conviction.

(ii) THAT the Medical evidence was based on a forgery.

(iii) THAT Section 69 (1) and 163 of the Criminal Procedure Code and Section 165 of the Evidence Act were contravened by the

Trial Court.

11. The parties filed written submissions which I have duly considered. The Appellant submitted in writing that the Prosecution evidence was inconsistent and totally insufficient to convict him and that it was a fabrication.
12. Further, the Appellant submitted that the Prosecution evidence was uncorroborated Contrary to Section 165 of the Evidence Act Cap.80 Law of Kenya. He also submitted that the charge sheet was defective.
13. The Prosecution opposed the appeal and submitted in writing that PW.1 was an eye witness who saw the Appellant defiling the Complainant and he raised an alarm with his friend D.
14. Further, the Respondent submitted that the Medical evidence confirmed that the Complainant was defiled and there is no evidence that the Medical evidence was a forgery. The Respondent also submitted that the Trial Court considered the Appellant's defence and found it a mere denial on page 7 of paragraph 20 of the Judgment.
15. This being a first appellate Court, my duty is to re-evaluate the evidence adduced before the Trial Court and to arrive at my own independent conclusion as to whether or not to support the findings of the Trial Court while bearing in mind that the Trial court had the advantage of seeing the witnesses.
16. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”
17. The elements required in a case of defilement is as follows:-
 - (i) ***Whether there was penetration.***
 - (ii) ***Whether the Appellant was positively identified.***
 - (iii) ***Whether the age of the victim was proved.***
18. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as:-

“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.
19. I find that the evidence of PW1 was corroborated by that of PW4, the medical expert who produced the P3 form and I find that there was penetration.
20. PW.1 saw the Appellant defiling the minor and he gave graphic details which corroborated the testimony of the Complainant. The Appellant followed the Complainant and defiled her a second time.
21. The medical evidence also confirmed the minor had been defiled.
22. On the issue of identification of the Appellant, PW.1 knew the Appellant and he was able to identify him. The Complainant did not know the Appellant by name. She said used to see him pass by the road but the incident happened in broad daylight and she was also able to identify him.
23. On the issue of the age of the Complainant, under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the Children Act. This means any human being of less than eighteen (18) years.
24. The age of the Complainant was proved by production of the birth notification which confirms the Complainant was born on 05/12/2009 and she was 8 years and some months on 31/5/2018 when the incident happened.
25. The sentence meted by the Trial Court is lawful and I find no reason to tamper with it.
26. The appeal herein lacks in merit and I accordingly dismiss it and I uphold both the conviction and sentence.

Delivered, signed and dated at Kericho this 22nd day of January, 2021.

A. N. ONGERI

JUDGE