



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH CRIMINAL APPEAL NO 23B OF 2020

DENNIS IMBOSA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from conviction and sentence in Iten SOC No. 20 OF 2019 by Hon C. Ateya (SRM))

JUDGMENT

1. DENNIS IMBOSA (the appellant was faced a charge of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No 3 of 2006 the particulars being that on 12th June 2019 at **[Particulars Withheld] Village** in **RIMOI** location, he intentionally caused his penis to penetrate the vagina of **VJ11**, aged 8 years.

2. He faced an alternative charge of indecent act with a child, contrary to **section 11 (1) of the Sexual Offences Act**, that on the same date and place, he intentionally touched the vagina of **VJ** with his penis.

3. The appellant denied both counts, and after a trial in which 4 witnesses testified on behalf of the prosecution, and the appellant was the only defence witness, he was convicted on the main charge and sentenced to serve life imprisonment.

4. VJ told the trial court that she did not know the appellant by name, but identified him as the person she usually saw within Rimoi area, tilling land for Mama Griffin, and as the one who did wrong to her. While sleeping in their home at night with her older brother K (their father had gone to the trading centre), she suddenly realised that the appellant was inside the house, and had removed her clothes. She was lying on her back facing up, and the appellant did what she referred to as **“tabia mbaya here”** (she gestured to this meaning by touching her groin area) after he had also removed his clothes. Although she did not know what was used to perform the tabia mbaya, she felt a lot of pain.

5. Her brother **K**, screamed and went to call one G, who came and found the pair in a ditch. She explained that the appellant also did tabia mbaya to her in the ditch, and G found them in the ditch, called her name, then screamed

On cross examination, PW1 said **“K told me it is the accused who did that to me...”**

6. CK aka K aged 10 years old testified that while they were sleeping on the floor of their house in the company of his sister, the appellant got into the house. He did not hear him enter, but noticed his presence in the room, and recognized him as **DENO**, the one who usually works for **Mama G**.

The appellant held him by the neck and pulled him, then warned him to be quiet or else he would slaughter him.

7. According to PW2 the appellant left with PW1 and that is when he ran out to inform their neighbour (**G T**). They returned to the house but did not find the appellant nor PW1, so G screamed, and people came out, and a search begun for the pair. Eventually the appellant was found hiding among some bricks, and PW1 who was found standing in a ditch fully dressed, ran to her rescuers.

On cross examination, PW2 stated that although they ordinarily use Okoa light, their father had gone with it.

8. SR(PW3), the father to the minors confirmed that he had left his children sleeping at about 8pm, and went on his own frolics within the neighbourhood. He stayed for a while because it was raining, and got jolted by screams he heard coming from the direction of his home. He rushed home and found an old lady with a group of people saying they were following footprints. He was informed that someone had entered his house and molested his child. He rushed to make a report at the GSU camp, and upon return found that the appellant had been beaten and

apprehended.

On cross examination, PW3 stated that the appellant lived 100 metres away from him, and was found at his place of work.

9. The minor was examined by **LUKA KIPROP (PW4)** a clinical officer at Tambach sub-county hospital noted that her clothes had dirt, soiled with mud, dust but no blood stains. The vaginal opening was bruised and labia minora and majora were slightly swollen, and the hymen was missing. The appellant was also medically examined and found to have injuries sustained as a result of beatings inflicted by a mob.

10. In his defence, the appellant opted to remain silent.

The trial magistrate in her judgment found that the chain of events as explained by the minor plus the medical evidence proved that she had been defiled. The court noted that the minor's age was confirmed by her birth certificate which was presented at the trial, and the appellant was arrested the same day hiding among some bricks.

11. Being aggrieved by the outcome, the appellant filed this appeal through **Magal and Co advocates** on grounds that the evidence did not support the charge, and the witnesses' evidence was not corroborated. He also questioned the opportunity for identification saying it was not favourable for positive identification.

12. **Penetration:** In opposing the appeal, Miss Okok on behalf of the prosecution submitted that penetration was adequately proved not only by the minor's evidence, but also the medical findings which confirmed that there was penetration.

13. **Age:** That her age was also established by the evidence of her father and birth certificate which showed her date of birth as 06/05/2012, meaning that at the time of the incident she was 7 years old, and not 8 years as stated in the charge sheet. Counsel submits that this is not a fatal defect and is curable under section 382 of the Criminal Procedure Code, and the appellant was not prejudiced as the victim still fell within the age bracket envisaged by section 8 (2) of the Sexual Offences Act.

14. **Identification:** As regards identification, the DPP argued that PW1, PW2, PW3 all identified the appellant as their neighbour who worked for Mama Griffin, and in fact PW2 and PW3 knew him as DENO (a popular name he used in the village). Further, that PW2's evidence placed the appellant at the scene, as he'd held him by the neck and strangled him while threatening him with dire consequences if he did not keep quiet. It is contended that evidence on identification was solid, and was by recognition.

15. **Sentence:** This court is urged not to interfere with the sentence and take into account the age of the victim, and the accompanying physical and psychological trauma.

Analysis and determination

16. From the evidence of PW1 as well as the doctor's findings which established that the minor had injuries on her genitalia, including the absence of the hymen, which were only a few hours old, I have no doubt that the incident did take place, and the minor was defiled.

17. It is also apparent that whereas the charge sheet indicated that the minor was 7 years old, the evidence presented, including the birth certificate established that she was 7 years old at the time of the incident. Is this a fatal defect that would cause injustice or prejudice to the appellant? I take note that **section 8 (2) of the Sexual Offences Act** provides that:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

18. This means that so long as the victim is below 11 years old, then the offence falls under the said provision, and no prejudice would be occasioned as the penalty remains the same, and the key ingredient in the offence is penetration and being below 11 years. That defect is indeed curable under section **382 of the Criminal Procedure Code** which provides that:

Finding or sentence when reversible by reason of error or omission in charge or other proceedings

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

19. The most critical aspect in this matter is who defiled the minor? PW1 in her evidence claimed that they had electricity in the house. However, PW2 clarified that it was an Okoa light which their father had carried away with him. This would suggest that there was no other source of light in the room- so how did PW2 get to see and identify the intruder? He did not tell the court that he had interacted with the appellant so often as to be able to identify him by his voice. Indeed, it is significant that PW1 in cross-examination stated that it was PW2 who told her the person who defiled her was the appellant.

20. The trial court believed the appellant was the culprit because he was found hiding among some bricks. Just where the bricks were located,

is not disclosed in the evidence. And this in the face of PW1's evidence that when Gogo arrived, she found the appellant defiling her inside a ditch, contradicting PW2's evidence that the appellant was found hiding in between some bricks, while PW1 was standing in a ditch fully clothed. Again the question arises, what was the source of light which enabled him to see the person who was hiding between the bricks? PW2 did not disclose to the trial court what enabled him to see and identify the intruder, whether inside or outside the house.

21. Indeed, according to PW3, the appellant was apprehended/found at his place of work, which was 100metres from the residence of the victim. PW3 was not present when the appellant was found, nor is it clear who gave him the information. Perhaps a way out of this quagmire would have been found by calling Gogo or the other persons who responded to her alarm and helped apprehend the appellant, to shed light on the circumstances surrounding apprehension of the appellant. I find that the circumstances for favourable identification were not established at all and it was unsafe to convict on that nature of evidence.

22. Consequently, the conviction is quashed, and the sentence is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Virtually Delivered and dated this 24th day of March 2021

H. A. OMONDI

JUDGE
