



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 10 OF 2020

(From original Conviction and Sentence in Sexual Offence

Case No. 146 of 2018 of the Chief Magistrate's Court

at Kitale delivered by Hon. M.N. Osoro – RM)

PATRICK LUTEKA MANYUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant, **Patrick Luteka Msanyui**, was charged with **defilement** Contrary to **Section 8(1) and (2) of the Sexual Offences Act**. The particulars of the offence were that **on 1st September 2018 at [Particulars Withheld] village, Trans Nzoia County**, the Appellant intentionally caused his penis to penetrate the vagina of **MN**, a child aged five (5) years.

In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1) of the Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of **MN**, a child aged five (5) years, with his penis. When the Appellant was arraigned before the trial Magistrate's court, he pleaded not guilty to the charge. After a full trial, he was convicted of the alternative charge of Indecent assault and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his Petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of contradictory and inconsistent evidence of the prosecution witnesses. In particular, he faulted the trial magistrate for relying on evidence that was full of discrepancies to arrive at the impugned conviction. He was aggrieved that the investigating officer had failed to tell the court the truth hence resulting in his conviction. The Appellant was of the considered view that the prosecution had failed to establish the charge to the required standard of proof beyond any reasonable doubt. In the premised therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, both the Appellant and the Respondent presented to the court written submissions in supporting their respective opposing positions. This court has carefully read the said submissions. Before considering the same, it is important that the facts of the case as per the prosecution be brief set out.

The Complainant in this case was at the material time a girl aged five (5) years, though at the time she testified before court she said she was two (2) years old. She lived with her grandparents. It is not clear from the evidence where her parents were at the material time. Suffice for this court to state is that on 7th September 2018 she told her elder sister **PW2 EM** that the Appellant had lured her to his house after which he defiled her. The Complainant told **PW2**, that the incident took place on 1st September 2018, six (6) days prior thereto.

From **PW2's** testimony, it was evident that she had questioned the complainant when she saw that she was walking, according to **PW2**, **“funny, complained her thighs are hurting”**. It was this inquiry that led to the complainant pointing out to the Appellant as the perpetrator. The complainant referred to the appellant as **“Pati”**. According to **PW2**, she knew the **“Pati”** that the complainant was referring to. The **“Pati”** was the Appellant who was a neighbour. **PW2** immediately informed their grandfather who had the Appellant apprehended and taken to Masindani Administration Police Post.

On the same day, the grandfather took the complainant to hospital where she was examined, treated and later discharged. The grandfather **PW4 EW** testified that he got the information that the Appellant had defiled the complainant from **PW3**.

On being taken to hospital, the complainant was examined by **PW3 John Koima**, a clinical officer based at Kitale County Hospital. On

examination, this is what PW3 said:

“was a girl of tender years, coherent, on examining genital, hymen intact but had injuries on lateral walls and bruising. Did not give her PEP given antibiotics also filled the P3 form on 10/9/2018. I considered information in the treatment notes, my opinion there was attempted defilement/Sexual assault”.

He produced the treatment notes and P3 form as prosecution exhibits in the case.

PW5 Corporal Joseph Ngaira, the Investigating Officer, testified that he was the officer in charge of Kipsaina Police Post. He received information that the complainant had been defiled. This was on 7th September 2018. The Appellant was brought to the Police Post. The complainant grandfather was issued with a P3 form which he took to hospital. It was dully filled and returned to PW5. He concluded investigations and charged the Appellant.

When he was put on his defence, the Appellant denied that he committed the offence. He was surprised when he was arrested on 7th September 2018. He told the court that he knew nothing about the allegation that he had defiled the complainant.

This being a first appeal, it is the duty of this court to re considered and re-evaluate the evidence adduced before the trial court, in light of the grounds of appeal and the submissions made on appeal, with a view to reaching its own independent determination whether or not to uphold the conviction. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Kiilu & Another Vs Republic [2005] 1 KLR 174**). In the present appeal, the issue for determination is whether the prosecution established the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

In the present appeal, there are certain aspects of the case that raise disturbing issues. The complainant in this case is said to have been sexually assaulted on 1st September 2018. The complainant is a child of young and tender years. She was five (5) years old at the time. Is it possible that no member of her family saw her and assessed her situation the day the alleged sexual assault occurred?

PW2 testified that she questioned the complainant after she saw that she was walking with an awkward gait. This was on 7th September 2018, six days after the alleged sexual assault. Why didn't any member of the family observe that the complainant was walking ungainly in the six (6) days? Prior to PW2 questioning the complainant and taking action? Is it possible that no member of the family saw the complainant was not okay in the intervening period before PW2 made the report to the grandfather six (6) days after the alleged sexual assault?

This court agrees with the Appellant that there are many inconsistencies in the evidence adduced by the prosecution witnesses that raises doubt that the sexual assault occurred on the said 1st September 2018, and secondly, that it was perpetrated by the Appellant. The only evidence connecting the Appellant to the crime is that of the complainant herself. The court observed that she was not sufficiently intelligent to give evidence on oath. On re-evaluation of her testimony, it was clear to the court that she was too young to understand the import of what she was saying before the court. Her testimony is that of a single identifying witness. For this court to uphold such evidence, it must be satisfied that the identification was made in circumstances that precludes any doubt that indeed the identification was made free of any possibility of mistaken identity. Furthermore, the court must be satisfied that the witness was telling the truth.

In the present appeal, it was clear to the court that the circumstances in which it is said the complainant identified the Appellant is shaky. The evidence does not indicate what time the alleged incident took place. The evidence is short on material particulars, like what happened to “Anna” the girl she was with when the alleged sexual assault occurred. PW4 talks about the Appellant having a wife. Where the wife was at the time the sexual assault was alleged to have taken place?

The complainant told the court that after the alleged incident, she went home and told her mother who took her to hospital. Yet the testimony of PW2 and PW4 discounts this narrative. The Complainant's mother is nowhere in the picture from the evidence of PW2 and PW4. It was common ground that the Complainant was at the material time being taken care of by her grandparents. PW2 said that the complainant informed her about the incident six (6) days after the event.

This court is not satisfied that the complainant's identification of the Appellant as the perpetrator was foolproof. It cannot be ruled out that the complainant being an impressionable child may have been influenced by others to point out the Appellant as the perpetrator of the Sexual assault. The medical evidence adduced by the prosecution was inconclusive. PW3 noted that the hymen of the complainant intact. Although there were signs of bruising on the lateral walls, it was not clear from PW3's testimony the age and the nature of the bruises. Again, this court is not convinced that the complainant was a victim of sexual assault in the absence of further credible and cogent evidence.

In the premises therefore, this court finds the Appellant's appeal has merit. It is hereby allowed. The Appellant's conviction is quashed. The sentence of ten (10) years imprisonment imposed on him is set aside. He is ordered released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT KITALE THIS 16TH DAY OF DECEMBER, 2021.

L. KIMARU

JUDGE