



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 30 OF 2019

(CORAM: F. GIKONYO J.)

PAUL RUKARIA GAITORIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in Meru CMCR No. 708 of 2013 (S.O 40 OF 2016) delivered on 15/3/2018 by Hon. S.N ABUYA SPM)

JUDGMENT

1. The appellant herein was charged with the offence of **Defilement Contrary to Section 8 (1) (3) of the Sexual offences Act No. 3 of 2006** and an alternative charge of **Committing an indecent Act with a child Contrary to Section 11 (1) of the Sexual offences Act No 3 of 2006**. The trial court convicted the appellant on the alternative charge and sentenced him to 10 years imprisonment.
2. The particulars of the offence were that on the 3rd day of February 2013 within Imenti North District in Meru County intentionally touched the vagina of JG a child aged 13 years.
3. Aggrieved by judgment of the trial court, the appellant filed a petition of appeal on 8th January 2019 raising six (6) grounds of appeal which may be summarised as follows;

- a. That the learned trial magistrate erred in law and fact by not observing that the evidence adduced by the prosecution witnesses were uncorroborated and inconsistent.
- b. That the learned magistrate erred in both law and fact in failing to note that the testimony of the complainant contradicted the evidence of the doctor.
- c. That the Learned magistrate erred in both law and fact by failing to note that no independent witness in this matter to clear the doubts.
- d. That the learned trial magistrate erred in law and in fact in rejecting the appellant defence without giving any cogent reasons.

Submissions

4. On 14/8/2019 upon request by the parties, this court directed the parties to file written submissions. The appellant submitted that there were inconsistencies in the prosecutions witness's testimonies. That Pw3 testified that the appellant attacked her with a pen knife but later retracted and stated that he attacked her with a panga. That Pw3 was also clear where she was found by her father. That the evidence of the prosecution witnesses was also contradictory as to where they met the complainant. In particular they stated they met the complainant at the appellant's gate. Pw5 was however categorical that the appellant's compound did not have a fence.

5. The Respondent on its part submitted that the main elements of the offence of committing an indecent act with a child were proven by the prosecution.

Analysis and Determination

6. As first Appellate court, I will re-evaluate the evidence and make own findings. Except, I am reminded that I should give allowance of the

fact that I did not have the advantage of observing the demeanour of witnesses. See the case of **Okeno vs. R (1977) EALR 32**.

7. **Pw1 ANM** testified that on the material date he had sent the complainant to the posho mill. That he was later called by David Gathukumi and informed to go and pick the complainant from the home of the appellant. That he proceeded to the home of the appellant and found the complainant on the road. That the complainant informed him what the appellant had done to her. He reported to Giaki Police station and on the next day the complainant was taken to the hospital by her mother Pw3. In cross-examination he stated that Penina Gacira, the owner of the posho mill and David Gathukumi refused to write their statements with the police.

8. **Pw2 Douglas Mureithi**, testified that he is an Area manager. That on 4/2/2013 he was with the Area chief when they were informed of a raping that had taken place in Kiangoju. That when they went to the appellant's house they did not find the complainant but found 20 litres of alcohol. That he arrested the appellant for the defilement of the complainant and being in possession of the 20 litres of alcohol.

9. **Pw3 JG** testified that she was sent to the Posho Mill by Pw1 but found it had been locked. That on her way back she started to pick mangoes near the appellant's home which was 15 metres from the posho mill. That the appellant later on summoned her to his compound to pick more mangoes. That when she approached the appellant's home the appellant covered her up and took him into his house. He informed her that if she screamed he would stab her with a pocket knife. That the appellant removed her skirt and blouse and raped her. That when he left she screamed and people came but she only knew two of them (Ndeere and Kanana). She stated that Nteere and Kanana had refused to come to court because they are neighbours to the appellant and had wished to avoid bad relations with the appellant.

10. **Pw4 JN** testified that she is the mother to the complainant. That on the material date she had sent Pw3 to the posho mill. She was later called by her husband and informed that Pw3 had been defiled. That when she arrived at the house of the appellant she found the appellant's door open and the complainant was outside. That when she asked the complainant what had happened the complainant informed her that the appellant had climbed on top of her. That she took the complainant to the police station and later to hospital where the complainant was examined. She told the court that the complainant was at the time aged 13 years. She produced the Immunization child hand book as **Pexh1**.

11. **Pw5 Corporal Edward Omwangu** the investigative officer in case testified that on 3/2/2013 they received a report at Giaki police station on defilement of Pw3. That they referred Pw3 to the hospital. He later visited the scene where he gathered information from witnesses. That the witnesses revealed that Pw3 had been at the posho mill which is near the appellants home. That the appellant summoned the complainant to his house to give her more mangoes. That when they entered the house the appellant locked themselves inside the house. The complainant screamed and members of the public came to her rescue. That the appellant disappeared only to be found days later when they were running an alcohol raid operation.

12. He stated that the next home to the appellant's house is 20 meters apart. That the appellant's home is not fenced and from the appellants home to the posho mill is about 50 metres. In cross examination he stated that from the doctor's report it is stated that there was no penetration. There was no tears but the hymen was absent.

13. The appellant testified as a sole witness in his defence. He testified that on the material date he went to his neighbour and borrowed a panga to cut grass. That he was assisted by a boy from the neighbouring shop. That he later on went to the port club for a meeting. On his way home he met with David Kathukumi who informed him that he was not aware that his wife Pw4 was complaining against him. That in June 2013 the area chief framed him with the alcohol related charges, he was kept in custody for four days.

14. That he has a grudge with the Pw4 and that this is the third case they have with her. That she framed him in this case because she was her employee and when he refused the job she started framing him with the small claims. That in the first case Pw4 claimed that she had stolen her cousins battery but it was found that he never stole anything. The second time she claimed the appellant was a witch but the same was found to be lies. That the area chief is the father to Pw4 and that is why he was framed for the alcohol charges which led to his arrest for the defilement case. He stated that he has no witnesses to call and that the person who he used to cut grass with has since passed on.

15. The trial Magistrate in his determination held as follows;

“ I find there is doubt that the complainant was defiled on the date in question as even though she stated that the accused person undressed her and put his stick into her vagina the prosecution closed their case without calling the doctor to prove the same and the I.O on being cross-examined by the accused stated that the doctor who examined the complainant stated that even though the complainants hymen was missing there was no penetration and no tears.....I find that here was no doubt that someone committed an indecent act with the complainant on the date in question as she stated that on the date in question one Paul undressed her and he also undressed then put his stick into her vagina. There is also no doubt that the accused person was the culprit as the incident occurred at 6pm in broad day light inside the accused persons house and the complainant knew the accused person before and also the accused talked to her before the incident.....On the other hand I find that he accused persons defence that Pw4 framed this case on him as he refused to work for her shamba boy and because he bought land from Pw4's grandfather is not a believable defence as the complainant was Pw3 who was a child not Pw4.

Indecent act

16. According to Section 11 of the Sexual Offences Act:

“Indecent act” means an unlawful intentional act which causes-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or display of any pornographic material to any person against his or her will.”

17. The penalty for indecent act with a child is prescribed under section 11(1) of the Sexual Offence Act as follows:

“11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

18. I will cite the case of **Paul Otieno Okello v Republic [2019] eKLR** that the main ingredients of the offence of committing an indecent act with a child are: -

(a) Proof that the victim is a child in law;

(b) Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;

(c) Proof that the act(s) in (b) was/were intentional;

(d) There should be no legal justification in the act(s) complained o

Age of victim

19. I have considered the testimonies of both the prosecution witnesses and that of the defence. PW4, the mother of the complainant stated that the complainant was at the time aged 13 years. She produced the Immunization child hand book as **Pexh1**. Accordingly, the age of the minor was proved by Pw4 and through the complainant's child immunization card.

Indecent Contact

20. Pw3 stated that the appellant removed her blouse and skirt and inserted his stick in her vagina. Pw1 and Pw4 were informed of the incident by Pw3 and immediately took her to hospital. Pw5 confirmed that he referred Pw3 to hospital. He later proceeded to the house of the appellant where he confirmed the testimonies of Pw1 Pw3 and Pw4. PW1 and PW4 were consistent that they had sent Pw3 to the posho Mill. Pw5 placed the residence of the appellant 50 metres from the posho mill. I do note that two witnesses who would have corroborated the evidence of the complainant were not called during the trial. The reasons afforded by the prosecution on the failure to call them were flimsy. Of great significance is whether the evidence of Pw3 satisfies the requirement of the law.

21. Section 124 of the Evidence Act provides as follows:

“124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

22. The Proviso to section 124 of the Evidence Act permits the court to convict on the evidence of a complainant minor if it finds that her evidence is truthful. See also; **Isaac Wafula v Republic [2017] eKLR**. The complainant stated that the appellant is a person she knew. This is identification by recognition. The offence took place at 6.00 pm during broad day light. The medical evidence however confirmed that there was no penetration. The evidence by the minor was that the appellant inserted his stick into her vagina. Therefore, this averment was not supported by medical evidence. I note however the defence of alibi by the appellant. Although it came in late, the prosecution always bears the burden of disproving the alibi either through further or separate evaluation thereof or evidence already adduced. This burden never leaves their backyard. It is notably significant that the prosecution did not call the two crucial witnesses who would have placed the appellant at the scene of crime. One other important thing I hve noted; that the defence made claims of sour relationship between the mother of the victim and him. He claimed that she has made up other earlier cases against him. These persons are neighbours and such claims are relevant. Despite all these, the evidence of indecent act with a child has been adduced. But the case is such a squirm.

23. When I place all these matters into the scales of justice, this case emerges quite uniquely that in the interest of justice, a re-trial should be held. Nothing suggests that witnesses cannot be found. Accordingly, I set aside the conviction and sentence imposed on the appellant and direct that the case be remitted back to the trial court for a re-trial by a magistrate of competent jurisdiction other than the trial magistrate herein. It is so ordered.

Dated, signed and delivered at Meru this 30th June 2020

F. GIKONYO

JUDGE

Representation

1. Appellant – in person
2. M/s Nandwa for respondent