



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 7 OF 2020

KATELO GUYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 48 of 2019 of Resident Magistrate's Court at Garissa of judgment delivered on 21st February, 2020 by Hon. D.W Mbuteti)

JUDGEMENT

1. The appellant was charged with Defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, 'On the 28th day of September 2019 at around 1200 hrs, at [Particulars Withheld] Area, Madogo Location Tana River North Sub County within Tana River County the appellant intentionally and unlawfully committed an act which caused his genital organ namely penis to penetrate the genital organs of namely vagina of AH a girl aged 11 years. The Appellant also faced the alternative charge of committing an indecent act with a child. The appellant was convicted on the main charge and sentenced to serve 25 years' imprisonment.

2. Dissatisfied with the said judgment, conviction and sentence, the Appellant filed this appeal on 2nd March, 2020, setting out 4 grounds of appeal namely:

- 1) **THAT** the learned trial magistrate erred by relying on irrelevant evidence
- 2) **THAT** the evidence adduced was contradictory and inconsistent
- 3) **THAT** the prosecution did not provide enough evidence to prove that he committed the offence
- 4) **THAT** the prosecution at much deeper level failed to investigate the cause or rather address the root issues of the matter as regards to the offence imposed on him.

3. The Appellant urged this court to allow his appeal in its entirety. The appellant filed written submissions which he wholly relied on during the hearing of the matter. The submissions were filed on 23rd July, 2020. The summary of the appellant submissions is that the charges facing him were as result of a fabrication and poor investigation which would have otherwise have unraveled the same.

4. He also submits that the charges were contributed by a dispute he had with the complainant family. In addition, he submitted that the witnesses' testimonies were contradictory and not sufficient to warrant his conviction and urged the court to allow the appeal and set aside the sentence.

5. In opposing the appeal, Mr. Mulati the Prosecution Counsel submitted that the Prosecution opposed the instant appeal, supported the conviction and sentence. He submitted that the prosecution proved the guilt of the Appellant beyond reasonable doubt; that the issue of age of the Complainant was settled by age assessment confirming that the victim was 10 years at the time of penetration.

6. In addition, he submitted that the evidence of PW4 the clinical officer confirmed that there was ruptured hymen and a scar in the vagina thus confirming penetration. Further, he submitted that the identification of the appellant as established by PW1 and by the complainant PW2. He urged the court to dismiss the appeal as it lacks merit.

7. This being a first appeal, this court is required to re-evaluate the evidence and come to its own independent conclusion as to whether to uphold the conviction bearing in mind that it neither saw nor heard the witnesses testify. (*See Okeno v Republic [1972] EA 32*). Therefore, in order for this court to proceed with the task of determining this appeal I must first set out the evidence as presented before the trial court.

8. The Prosecution called 4 witnesses to advance its case. **PW1 HM** testified that the appellant was her neighbor and the complainant PW2 is her brother's daughter and that on 28th September 2019 at 12.00pm while on her way to the shop saw a water jerry can belonging to the victim, and while passing near the appellant's fence she overheard her mother asking the appellant what she was doing with a child.

9. This she stated attracted her attention, she went to the appellant house where she found the victim and on enquiring what had happened the victim informed her that the appellant had slept with her. She subsequently took over the matter, reported it to police where she was refereed to hospital where the complainant was treated and issued with a P3 form culminating with the appellant being charged.

10. **PW2 the Complainant AYM** gave unsworn testimony after a voire dire exercise where she recalled that on 28th September, 2019 at around 12.pm she had gone to fetch water at the water tap when the appellant forcefully took her to his house removed her clothes and slept on her while holding his mouth to prevent her from screaming, the appellant mother came and the appellant stopped and screamed at the appellant attracting people and that is when PW1 came and took her away ending up at Madogo Police Station.

11. On cross examination, she confirmed that the appellant had defiled her on two other previous occasion, where he threatened her that he was a Kayole (a feared gang in the area) if he told anyone of what transpired. She identified the appellant from Dock.

12. **PW3 No. 111106 PC Baraka Mweu** attached to Madogo Police Station testified that he was the investigation officer assigned to the instant case and that he received in his office the complainant in the company of PW1 and the complainant father where he was told what had transpired. According to his account the appellant grabbed the complainant while fetching water on the water tap, took her to his room removed her clothes and slept on her.

13. He took her to PGH Garissa Hospital for examination and treatment where the doctor confirmed that the complainant had been defiled. And the following day he issued a P3 form. It was his testimony that the father informed him that the complainant was 11 years old.

14. **PW4 Geoffrey Okonda** testified that as a Psychiatrist Clinical officer based at Garissa Referral Hospital and told the court that the author of the P3 report before the court was one MC Donald Kithambi a former colleague who has since transferred and having worked him, he would identify his writings.

15. It was his evidence that from the P3 form dated 2nd October, 2019, the complainant age was estimated to be 11 years, and on examination of the genitalia, there was ruptured hymen and a fresh scar, the vagina opening was bruised and there were tears on the vagina opening and blood on the examining figure and slight bleeding. There were no spermatozoa, but a lot of red cells, epithelial cells present and concluded that the complainant was defiled. He produced the age assessment report, the P3 form and medical treatment notes.

16. At the close of the Prosecution case, the trial court found the Appellant with a case to answer and placed him on his defence. The Appellant gave sworn testimony as DW1 where the summary of his testimony was that he had some differences with the family of the complainant and more specifically PW1 and that the case before the court was a frame up. On cross examination, he told the court that they were neighbors with PW1 and that there is water fetching tap close to their home.

DETERMINATION:

17. I have carefully re-assessed and considered the evidence adduced by both the prosecution and the appellant before the trial court, the findings and the holding by the trial court and the grounds of appeal together with the submission for and against this appeal.

18. In my humble view, the issues that flow for determination are:

a) whether the age of the Complainant was conclusively determined?

b) whether the Appellant's conviction for the offence of defilement of a child aged 11 years was based on sound and consistent evidence proving his guilt beyond reasonable doubt?

Whether the age of the Complainant was conclusively determined?

19. From the charge sheet the age of the complainant is stated as 11 years. The P3 form also states 11 years and the dental age assessment produced indicates the approximate age as 10 years. The complainant PW2 in her testimony stated that she was a class one pupil. The appellant herein has not contested the age, Accordingly, I find and hold that the age of the Complainant was conclusively determined to be 11 years.

Whether the Appellant's conviction for the offence of defilement of a child aged 11 years was based on sound and consistent evidence proving his guilt beyond reasonable doubt?

20. In his petition of appeal, the Appellant alleges that the evidence adduced before the trial court was inconsistent and could not sustain a sound conviction. I have carefully considered the witnesses' testimonies and in my view there is no material inconsistencies. The complainant evidence was corroborated by the testimony of PW1 and PW3 the Clinical Officer who examined the complainant. The Clinical Officer confirmed injuries to the complainant genitalia consistent with defilement of a minor.

21. Having carefully reassessed the evidence of all the witnesses as tendered, it is my view that the inconsistencies alleged by the appellant in his submissions have no basis. There were no material inconsistencies worth this court attention. The story coming out from the witness is that the complainant had gone to fetch water from a water tap close to the appellant's home.

22. The appellant took the advantage and took the appellant to his room where he defiled her only to be found by his mother who out of shock shouted asking the appellant what he was doing with a child. This caught the attention of PW1 who was passing by; she came and found the complainant at the appellant's room. The complainant explained to PW1 what had transpired and the matter was reported to the police, the complainant was taken to hospital culminating with the charging of the appellant.

On Identity:

23. It is clear from the witnesses' testimonies that the identity of the appellant as the culprit herein is not in doubt. The complainant in her testimony was categorical that it was the appellant who defiled her. She confirmed that it was not the first time but the same had happened in two other occasions. PW1 evidence further buttresses the same and more notable the appellant has not contested his identity as the perpetrator.

24. On the ingredients of defilement being established and prove by the prosecution, I have found and held that PW1 was aged 11 years. On penetration, PW3 the Clinical Officer established this fact after examining the complainant genitalia.

25. Therefore, it is apparent to me that there was sufficient evidence that the Complainant was defiled which evidence was not displaced by the Appellant's defence, which is basically a mere denial. In the end, it is my finding that the conviction of the Appellant by the trial court was safe and sound and was based on evidence that proved the guilt of the Appellant beyond reasonable doubt. Thus the appeal on this basis has no merit.

Whether the sentence meted out on the Appellant was lawful and appropriate?

26. I have looked at the record; the appellant was sentenced to 25 years' imprisonment; this was after the court considered his mitigation and I find the same lawful. However, be as it may a 20-year sentence would be sufficient in my view as he was a first offender. Thus, the court makes the following orders;

i) The appeal on conviction is dismissed and same is upheld.

ii) The appeal on sentence is partially successful and thus sentence of 25 years is substituted with sentence of 20 years.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE