



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.30 OF 2017

JULIUS OMONDI PAULO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon.

S. K. Ngetich (SRM) in Kericho CMCC No.9 of 2016 delivered on 15/9/2017)

JUDGEMENT

1. The Appellant sentenced to life imprisonment for the offence of Defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the charge were that on 24/9/2016 at [Particulars withheld] village, Kipkelion sub-county within Kericho County the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of JA a child aged 10 years.
3. The prosecution evidence in summary is that sometimes in September 2016, the complainant went to the home of one Akinyi for a sleep over with other girls. The Appellant who appeared drunk lured the complainant into his house by telling her to go and collect clothes for Akinyi to wash.
4. The complainant went with Lizzy Neema to collect clothes. When they got to the Appellant's house Lizzy remained outside the house while the complainant entered the house. The Appellant closed the door of his house.
5. It was a small mud walled house with one room. There was no bed or mattress in the room and the beddings were on the floor.
6. While inside the house, the Appellant undressed the complainant and defiled her. After the act the complainant dressed up and went back to the kitchen where Akinyi was cooking. The complainant said she told Lizzy and Akinyi what had happened and they told her mother.
7. The complainant was taken to Muhoroni Hospital and to Fort-tenan police station. PW5 who produced the P3 from on behalf of Dr. Victor Omondi said the hymen was broken and fully torn and she had small bruises on the labia minora.
8. PW5 also said no discharge was visible and on high vagina swap no spermatozoa was seen but red blood cells were noted.
9. The Appellant said in his defence that on the material day he arrived at home after work at the quarry and he was tired. He found his niece cooking supper and he requested her to wash clothes for him the following day. He then went to his room and rested. He slept till the following day. When he went and bought soap for his niece to wash his clothes.
10. At 2p.m he was arrested by community policing and taken to the AP Camp where he was told he had drunk and caused havoc. He denied that he committed the offence of defilement at all.
11. The court found the Appellant guilty as charged and convicted him with the charge of defilement and sentenced him to life imprisonment. The Appellant has now appealed against conviction and sentence on the following grounds;

i) THAT the trial court erred in law and fact by failing to note that no discharged was seen by the doctor who examined the complainant.

ii) THAT the testimonies of PW1, PW2, PW3 and PW4 were contradictory.

iii) **THAT the trial court shifted the burden of prove to the Appellant.**

iv) **THAT the immunization showed the complaint was born 9/7/2016 while the complainant gave a different date.**

12. The parties filed written submissions in the appeal. The Appellant submitted that there lack of cogent evidence that the Appellant committed the offence.

13. Further that no voire dire examination was conducted and the prosecution evidence was incredible and based on whims of individuals who were out to settle their vendetta which the prosecution condoned.

14. The Respondent opposed the appeal and submitted that voire dire was conducted and further under section 124 of the Evidence Act the court can rely on the testimony of the victim alone to convict the Appellant.

15. The Respondent further submitted that the prosecution called a total of (5) witnesses who gave cogent, consistent and corroborated evidence sufficient to warrant a conviction.

16. The first duty of the Appellate court is to re-evaluate the evidence before the trial court and arrive at its own independent conclusion bearing in mind that the trial court had an opportunity to see the witnesses.

17. 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.”

18. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. 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”.

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.

Even if it was only the complainant who testified on the issue of penetration, under section 124 of the Evidence Act the court can rely on the testimony of a minor in offences of a sexual nature to convict the Appellant provided the reasons for relying on the said testimony are on record. The trial court conducted voire dire and received the evidence of the complainant and it is on record that the court found the evidence **“convincing”**.

ii. The second element that the prosecution was required to establish is the identity of the perpetrator.

The Appellant was positively identified by PW1, PW2 and PW3 as the person who took the complainant to his house and the complainant returned later and told them that he had defiled her.

iii. The third element that the prosecution is required to prove is 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. In the present appeal, I find that the age of the complainant was proved by production of the immunization card which showed that the complainant was born on 19/10/2006 and therefore on 24/9/2016 she was 10 years old.

19. I find that the conviction herein is secure and the sentence lawful and I uphold both.

20. The Appeal herein is accordingly dismissed for want of merit.

Delivered, signed and dated at Kericho this 23rd day of October 2020.

A. N. ONGERI

JUDGE