



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 104 OF 2012

EMMANUEL KIBET LAGATAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in PMCRC No from a decision by C.Adhiambo (SRM))

JUDGMENT

1. The appellant (**EMMANUEL KIBET LAGAT**) was convicted on a charge of defilement contrary to **section 8 (1) as read with section 8 (2) of the Sexual Offences Act** and sentenced to serve **35 years** imprisonment. The particulars of the charge were that on **26th day of April 2011** within **NANDI** County, he intentionally and unlawfully caused his penis to come into contact with the vagina of **SJ[1]**, a girl aged 11 years. He was also convicted on a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to serve 6 years-imprisonment. The particulars being that on the 26th day of April 2011 in **NANDI** County he assaulted **MK** by biting his right thumb thereby occasioning him actual bodily harm.

He had pleaded not guilty to both counts. The sentences were to run concurrently.

2. The evidence presented at the trial was that on 26th April 2011, eleven-year-old **SJ** was sleeping in their house with her sister **FJ** in one room, while her two brothers **CK** and **AK** slept in a separate room. The appellant requested her to open the door to her brothers' room, and also asked for food. She passed food through the window to her brother **CK** to give to the appellant who after eating slept in the same room with her brothers. She testified that at about 3.00am, the appellant sneaked into the girls' room through a window, removed her underpants, lifted her dress, and unzipped his trousers before "inserting his thing into the thing I use to urinate after separating my legs. The accused did bad manners to me. It was painful and I cried. The accused closed my mouth with his palm. I bled from my vagina"

3. **SJ's** father (**MK**) arrived and just as he was opening the door, the appellant fled through the window and went to hide in the boys' room under **A's** bed. **SJ's** father pulled him out, and the appellant bit his hand. He was nonetheless apprehended and taken to Kapsabet Police station, while **SJ** was taken to hospital. She identified the appellant as the culprit saying he was their herdsman, and she had served him food that night

4. **15 year-old AK (PW2)** told the trial court that he had gone to sleep at the home of his friend **CK**.

Later the appellant joined them where they were sleeping and asked for supper, and **C** gave him some food, then they all slept. Later in the night at about 3.00am, **PW2** heard **PW1** screaming from an adjacent room. **C's** father came into the boys' room with a torch, and meanwhile the appellant got into the room through the window, and lay under the bed. The appellant tried to escape but was restrained by **C's** father. He bit the latter, but was eventually taken to the police station while **PW1** was taken to hospital. **PW2** also stated that the appellant worked as a herdsman for the complainant's father.

5. **CK (PW3)** confirmed that while sleeping in the same room with **PW2**, when the appellant woke them up and asked them for food. **PW2** went for the food which he gave the appellant, then the threesome slept on the same bed. At around 3.00am **PW3** heard the appellant falling onto their bed after jumping into their room through a window, and he got under the bed. **PW3's** father pulled the appellant from his hiding place, but the latter bit him.

6. **MKK (PW5)** told the trial court that on 26/04/2011 at about 3.00am, heard his daughter **SJ** crying, so he got out with a torch and went to the room where she was sleeping with her other sister, to find out what was happening.

He saw the appellant lying on **PW1** and upon noticing **PW5's** presence, he jumped out through the kitchen window. **PW5** observed that **SJ**

lay on a mattress, she did not have her panty on, and her dress had been pulled up. PW5 went to check where his sons were sleeping and realised that PW2 and PW3 were on the bed, and upon checking under the bed, he saw the appellant hiding. The appellant tried to run away, but PW5 held him with both hands. The appellant bit him on the right hand, ripping off the nail, but he held on to the appellant. He explained that the appellant had only started working for him as a herdsman on 1/04/2011.

7. **PAUL NGETICH BIRGEN (PW4)**, a clinical officer at **KABIYET HEALTH CENTRE** examined PW1 on 27th April 2011 and noted that her hymen was broken and she had a whitish discharge from the vagina with pus cells in the urine. She also had epithelial cells in the urine, and he established that PW1 had been defiled. The duly filled and signed P3 form was produced as Exhibit 1. He also examined **MK** and noted that he had scratch marks on the right hand and injuries which had been caused by a sharp object and he assessed the degree of injury as harm

8. The appellant was examined by **JOSEPHAT OMULE EMBEKO (PW6)**, a clinical officer at **KAPSABET** district hospital, and no abnormalities were noted.

9. In his unsworn defence the appellant confirmed that he was employed by PW5 as a cattle herder, and on 2/0/2011 his employer woke him up at 4.00am, and he went to plough with the oxen until 10.00am when he released the oxen and went to dig a hole. He was later sent on other errands to make purchases, and when he failed to give PW5 the change, the latter begun to assault him and eventually bound him with ropes, and took him to the health centre for treatment before depositing him at the police station.

10. In his judgment, the trial magistrate pointed out that the prosecution witnesses struck him as candid persons whose evidence was forthright and their respective testimonies was not shaken even on cross-examination. The evidence was described as water-tight and corroborated, with the immunization certificate confirming that the complainant was a minor, and, the evidence of a broken hymen demonstrated that there had been penetration. The appellant's evidence was a mere denial which could not stand in the face of such evidence and that his conduct was incompatible with his conscience, show that the appellant defiled the minor.

11. The appellant challenged the decision on grounds that:

- a. The charge sheet was defective
- b. He was not accorded a fair trial
- c. The circumstantial evidence did not support the charges and the prosecution did not prove its case beyond reasonable doubt.
- d. The witnesses' evidence was marred with contradiction on substantial issues
- e. The age of the complainant was not conclusively established
- f. The trial court failed to find that penetration as a vital ingredient of defilement was not conclusive
- g. Identification was not satisfactory

12. The appellant canvassed his appeal through written submissions where he argues that the trial court shifted the burden of proof onto the defence. It is his contention that the charge sheet is defective, and that at the time of trial he was aged 16 years, and no one even bothered to observe his physical appearance and realize that he was a young boy and have his age assessed. He also faulted the information recorded in the P3 form saying it did not contain some of what the clinical officer alluded to in her evidence.

13. He further submits that the age of the complainant was not conclusively proved, as she had told the trial court that she was 11 years old, but her birth certificate was not produced nor was an age assessment report presented, and on account of this, the sentence meted out was erroneous.

14. He also argues that the ingredients of the offence namely penetration, was not proved as the medical evidence did not support such finding, especially because there was no indication whether the hymen was freshly broken or otherwise, and that a ruptured hymen is not prima facie proof of defilement.

15. He also laments that PW 2 was not subjected to *voire dire* examination despite being a child of tender years, and that such omission was prejudicial to him. He seems to suggest that he prosecutor in seeking an adjournment so as to interview the children who were witnesses was infact out to conspire with the children against him, and their evidence was fabricated. He further submits that the prosecution was actuated by malice to the extent that the circumstantial evidence did not support the prosecution case, as PW1 did not raise any alarm. He maintains that he had a fight with PW5 and there is no evidence that the victim reported the incident that very night, and that infact the complainant had been willing to engage in sex. That PW1 contradicted PW4 as regards the date of the incident saying it was 26/4/2011 then later PW4 said it was on 25/4/2011 and that if the P3 form was filled on 26/04/2020, then what explanation is there for the evidence that PW1 was treated on 27/04/2011.

16. Further, that the scenario depicted by PW1 is improbable because if the appellant had told her to open the door (which she did), then he requested for food, then it beats logic why she would serve him food through the window instead of giving it to him directly. It is his contention that the only rational explanation is that the whole incident was fabricated.

17. The appellant also points out that according to PW2, he heard PW1 screaming from the adjacent road whereas PW5 claimed he found the appellant inside the room where the complainant was sleeping. The appellant wonders how it is that PW 2 and PW3 who were sleeping in the

same room as he was, did not hear him leave, and he maintains that he was convicted purely on suspicion. He urges the court to be guided by the decision in **JOAN CHEBICHI SAWE (Cr Appeal No 2 of 2002)** which held that suspicion no matter how strong cannot form a basis for inference of guilt, as such finding must be proved by evidence.

18. In opposing the appeal, Miss Okok on behalf of the DPP submits that PW1's evidence of the appellant defiling her was corroborated by the evidence of PW5 which placed the appellant at the scene after hearing her cries and upon going to the room to check what was happening, he found the appellant on top of his daughter. That this evidence is further corroborated by the medical evidence which established that she had and had been defiled and her hymen was broken.

19. It is also pointed out that there was evidence confirming that PW5 had a bite on his thumb thus confirming what was alleged that inflicted the injury in a bid to escape.

That on this, the evidence of the prosecution witnesses was well corroborated.

20. As regards the age of the complainant Miss Okok submitted that the same was proved by her biological father (PW5) who informed the trial court that the minor was born in the year 2001, so at the time of the incident she was about 10 – 11 years old.

21. As regards the defective charge sheet, the prosecutor notes that the appellant was charged with defilement contrary to section **8 (1) as read with section 8 (3) of the Sexual Offences Act**, but the evidence adduced showed that the complainant was aged between 10-11 years, so he should have been charged under section was **8 (2)** of the Act. That this defect is however curable under **section 382 of the Civil Procedure Code** and no injustice was occasioned to the appellant as he understood the offence, and the particulars revealed an offence known in law, so defect in the sentencing section did not occasion any injustice.

22. As regards claims that PW1 was coached by her parents, this court is urged to find that the same is an afterthought which the appellant never raised at the trial or even on cross examination of witnesses, and there was never any suggestion of bad blood between his family and that of the complainant, as that was the family which had provided him with a source of income

23. The prosecutor argues that count II was proper and the appellant was properly identified by the witnesses as he lived and worked with them, and he was caught hiding under the bed, so there was no opportunity for a mistake.

24. The court is urged not to interfere with the sentence since the offence for which he was convicted carries a life sentence and the 35 years meted out is commensurate with the offence

ANALYSIS

25. Defective Charge: The appellant was charged for the offence of defilement in violation of section 8 (1) as read with **section 8 (3) of the Sexual Offences Act No 3 of 2006**. That provision states as follows;

Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

Basically **Section 8 (1)** creates and defines the offence, while section **8 (3)** provides the sentence. Under the Act the sentences are categorized in a descending order depending on the age of the victim – the younger the victim the harsher the sentence. After analysing and evaluating the evidence, the trial magistrate came to the conclusion that the appellant ought to have been charged **under Section 8 (1) as read with Section 8 (2)** which provides as follows:

2) 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.

The particulars of the charge stated that: **On 26th day of April 2011 at Cheptiror village in Nandi County did cause his penis to penetrate the vagina of SJ a child aged 11 years in violation of section 8 (1) as read with section 8 (3) of the Sexual Offences Act No 3 of 2006**

I concur with Miss Okok that the anomaly was not a fatal one nor did it cause any injustice because the nature and particulars of the offence were well disclosed under section 8 (1) as well as in the particulars of the offence. Indeed, that was curable under section **382 of the CPC** which provides that:

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.

26. **Not accorded a fair trial:** The appellant did not elaborate what aspect of the trial was unfair, nor was he clear on what constituted unfairness.

27. **Evidence did not support the charges:** It was not disputed that the appellant worked for the complainants' family as a herdsman or that he slept in the same room with the sons of his employer whilst PW1 slept in another room with her sister. The trial magistrate took into account the evidence of PW1 which was corroborated by the evidence of PW5 who found the appellant lying on top of his daughter without her underpants, and her dress pulled up, as well as the appellant's conduct, including hiding under the bed, which evidence was corroborated by the evidence of PW2 and PW3. This was also confirmed by the medical evidence when PW1 was examined and found to have a broken hymen. Was this circumstantial evidence so weak as not to justify a conviction?

28. I am not unduly flustered by the sequence of event – whether the appellant was given food through the window or not, because the event occurred after he had eaten and even gone to sleep. Even if for argument's sake it was a deal between him and SJ, so that she opened the door for ease of access and served him food as part of the prelude to other nocturnal activities, that would still constitute an offence, for the simple reason that she lacked the capacity to consent.

29. The witnesses' evidence was marred with contradiction on substantial issues and this seems to revolve around the issue of the date the event took place. PW1 in her evidence in chief stated:

“On 26.4.2011 at around 3.00am I was sleeping in our house with Faith Jeptum who is my sister. That man Points at the accused) woke up two boys who were sleeping in a different room. The previous day I saw Kibet (accused identified). He claimed Cloja Kimutai and Asbel Kipruto who are my brothers. He asked me to open the door into their room. He asked for food, and I gave food to Clopha through the window to give the accused.... At 3.00am on the following day 26/4/2011 the accused sneaked into our room through the window...”

30. PW2 in his evidence stated:

“On 25/4/2011 at 6.00pm I had gone to sleep with Clopha Kimutai at their home ... We slept with Clopha at 7.00pm. Emmanuel (accused identified) came to the place I was sleeping with Clopha and asked for supper from Clopha. The accused ate the food and we slept with him... At night I heard PW1 screaming from an adjacent road. It was at around 3.00am on 26/04/2011...”

I have read through the handwritten record and the word road is actually room, it is a typing error by the person who typed the proceedings. As for the date, there is no contradiction whatsoever and I need not delve deeper. As for the date, all the witnesses are consistent as to when the incident occurred, and the historical background so as to build up on what eventually took place on 26th April 2020 does not alter that fact.

31. Age of the complainant and age of the appellant:

The appellant argues that the complainant's age was not conclusively established as no birth certificate was produced. The P3 form at page 3 records the age as approximately 11 years and SJ in her evidence to the court said she was 11 years old. This was also confirmed by her father who told the trial court that SJ was born in the year 2001. Indeed, the Child Immunization Card was produced as Ex 2 confirms but I have not traced it both in the original record and the record of appeal.

32. The case of **FRANCIS OMURONI VS UGANDA C.C no.2 of 2000** held that apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. Despite the lament by the appellant, he does not suggest that the complainant was older than the 11 years cited or that her father was so illiterate as not to even be aware of the concept of time, space, years and season. He does not dispute that an immunization card was produced which placed the complainant's age at the one referred to. Indeed, he does not even suggest that he was misled into believing that SJ was over 18 years due to her physical appearance. From the evidence presented and especially the trial court's reference to the immunization card, the father's evidence and the P3 form, I find no basis on which to fault the trial court's conclusion that the minor was indeed 11 years.

33. **Appellant's age?** The appellant claims that at the time of the incident he was 16 years old although to be fair to the trial court, this was never raised at the trial. On this limb I direct that the appellant be escorted to hospital for assessment of his current age and a report be filed in this court within 7 days hereof.

34. **Defilement not proved?** The trial court failed to find that penetration as a vital ingredient of defilement was not conclusive

35. **Identification was not satisfactory:** The trial magistrate noted that the appellant was well known to the witnesses as he worked for the family – a fact he did not deny. Of course there was no description regarding the source of light, but his conduct including climbing back into his sleeping quarters through the window, falling on a bed, then hiding under the bed, attempting to escape, and biting PW5 when he was being restrained led to the irresistible conclusion by the trial court that his conduct was incompatible with that of an innocent mind. I concur.

36. The upshot is that the conviction was safe and is upheld. As regards the sentence, the same will abide the age assessment report. Mention on 29/10/2020.

E-delivered and dated this 22nd day of October 2020 at Eldoret

H. A. OMONDI

JUDGE