



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.30 OF 2020

LKM.....APPELLANT

- V E R S U S -

REPUBLICRESPONDENT

(Being an Appeal from the sentence imposed by Hon. B. R. KIPYEGON (SRM) in Kericho Magistrate's Court Criminal Case No.92 of 2019 delivered on 22/4/2020)

J U D G M E N T

1. The Appellant was sentenced to 20 years imprisonment for the offence of defilement Contrary to Section 8(10 as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars were that on 3/11/2019 at [Particulars withheld] Village Kaborok Location, Belgut Sub-Location within Kericho County, the Appellant caused his penis to penetrate the vagina of DC a child aged 13 years.
3. The Appellant was charged with an alternative Count of committing an Indecent Act with a child in that on the same material particulars as in Court 1 (above) the Appellant intentionally touched the vagina of DC a child aged 13 years.
4. The Prosecution evidence in summary was that on the material day, PW.1 (the complainant) was at her home when the Appellant went to her home and defiled her. PW.2 the mother of PW.1 had gone to the neighbour's house and when she returned, PW.1 told her what had happened. The Appellant had left his phone charging and when he came for it, PW.2 locked him in the Kitchen and called her father who called the village elder and the Appellant was arrested.
5. **PW.3 CC** said on the material day, she saw the Appellant enter into a bathroom at the home of PW.1 at 4 p.m. and he stayed for about 5 minutes and when he came out, she signaled to him but he ran away. After a while she saw the Complainant (PW.1) coming out of the same bathroom looking tense. PW.1 told her that the Appellant had done bad manners to her. PW.1 also told her mother about it.
6. **PW.6 NANCY WENDOT**, a Clinical Officer at Kericho Referral Hospital examined PW.1 on 5/11/2019 and said she had mild retardation. She said the minor had a normal genitalia but the hymen was missing. The Examination was done two days after the alleged incident and no blood stains were seen. The pregnancy test was negative. The child had been treated at Sosiot Hospital and she had treatment notes from Sosiot.
7. The Appellant said in his defence that he had differed with the mother of the child because she refused to pay him his wages after he worked for her. The grandmother of the child called him to work for her and he was arrested and asked what he had done to the child.
8. The Trial Court found the Appellant guilty as charged and sentenced him to 20 years imprisonment. The Appellant has now appealed to this Court on the following grounds:-

(i) THAT the charge sheet was defective.

(ii) THAT the Trial Court relying on the uncorroborated testimony of a single witness with questionable mental capacity.

(iii) THAT the Appellant was not positively identified and further the age of the Complainant was not proved.

(iv) THAT the Prosecution evidence was conflicting and further the medical evidence was conflicting as the P.3 form and lab technician had different opinions.

(v) THAT the court shifted the burden of proof to the Appellant and further that his alibi defence and mitigation were not considered.

9. The Appellant's Counsel filed submissions dated 19/10/2020 in which he submitted as follows:-

(i) THAT the Complainant testified that the Appellant did "tabia mbaya" to her at the Kitchen Area and she called the Appellant "Geo"

(ii) The mother (PW.2) said the Complainant told her "Cherongo" had defiled her.

(iii) PW.3 the Cousin to both the Complainant and the Appellant said she saw the Appellant enter a bathroom at the home of the Complainant.

(iv) The Appellant Counsel's submitted that the evidence is not credible and further the charge sheets states the offence was committed at 3.30 p.m. while PW.3 said it was 4 p.m.

(v) The Appellant's Counsel further submitted that the Prosecution did not prove the guilt of the Appellant to the required standard and further, that the Clinical Officer (PW.5) said in cross-examination that he did not examine the Appellant.

(vi) It was further submitted that the Trial Court erred in relying on the testimony of a single witness who was mentally retarded and further that the burden of proof was lowered and placed on the Appellant.

(vii) The Appellant further submitted that penetration and the age of the child were not proved and further, that the defence by the Appellant that he had a disagreement with the Appellant was not considered.

10. The Respondent opposed the Appeal and submitted as follows:-

(i) THAT the charge sheet was not defective as it contains the particulars of the charge and it complies with Section 137 (a) and (j) of the Criminal Procedure Code.

(ii) On the issue that the Court relied on a single witness with mental incapacity, the Respondent submitted that the Trial Court conducted voire dire and took the testimony of the Complainant and declared her to be vulnerable and noted that she was mentally challenged and she was allowed to testify through an intermediary (her mother).

(iii) It was further submitted that the evidence of the victim was corroborated by that of PW.3 who saw the Appellant coming out of a bathroom in the home of the Complainant. The Appellant ran away and when the Complainant came out of the same bathroom, she told PW.3 that the Appellant had defiled her. She later told PW.2 (the minor's mother) the same information.

(iv) The Respondent submitted that the Appellant was positively identified by PW.1, PW.2, PW.3 and PW.5 knew the Appellant as Geo. Further the Respondent submitted that the age of the Complainant was proved by the production of the birth certificate that showed she was 13 years old at the time the offence was committed.

(v) The Respondent submitted that there was no contradiction between the medical notes and the P.3 form. The P.3 indicated that there was medical proof that the Complainant had been defiled. Finally it was submitted that no alibi defence was raised.

(vi) The Respondent urged the Court to dismiss the Appeal and uphold both the sentence and conviction as the Prosecution proved the guilt of the Appellant to the required standard.

11. This being the first Appellate Court, it is the duty of the Court to re-evaluate the evidence before the Trial Court and to arrive at its own conclusion bearing in mind that the Trial Court had the advantage of seeing the witnesses.

12. In the case of *Kiilu & Another v. Republic [2005]1 KLR 174* the Court stated as follows;

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 findings and conclusions; 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."

13. There are three elements the Prosecution must establish to prove the offence of defilement. The 1st is penetration which is defined under Section 2(1)(d) of the Sexual Offences Act No.3 of 2006 as:-

"the partial or complete insertion of the genital organs of one person into the genital organs of another person".

14. In this case the testimony of the Complainant was corroborated by that of PW.3 who saw the Appellant come out of a bathroom at the home of the Complainant. The Complainant came out of the same bathroom and told PW3 she had been defiled by the Appellant. The Medical Expert said the hymen was missing and this was evidence of penetration.

15. The Second element was identification of the Appellant. The Complainant knew him as "Geo". The mother of the Complainant knew him as "C". Pw.3 saw the Appellant and there is no doubt that the three witnesses (PW.1, PW.2 and PW.3) were referring to the Appellant.

16. There is evidence that the Trial Court conducted voire dire and took the testimony of the Complainant and declared her to be vulnerable and noted that she was mentally challenged and she was allowed to testify through an intermediary (her mother).

17. The testimony of the Complainant was corroborated by that of PW3 and the medical evidence which confirmed that she had been defiled.

18. I find that differences in time (3.30 p.m. and 4 p.m.) and also the differences in the names do not change the fact that the Appellant was positively identified by the 3 witnesses and there is evidence that "Geo" and "C" refer to the Appellant.

19. The third element 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.

20. I find that the age of the Complainant was proved by production of the birth certificate which shows that she was born on 13/1/2006 and therefore at the time of the incident she was 13 years old.

21. I find that there is no contradiction between the medical notes from Sosit Hospital and the P.3 Form produced by PW.5. The fact that no bruises were seen is not proof that no penetration took place. The hymen was missing and therefore there is evidence of penetration.

22. I find that the Appeal herein lacks in merit and I accordingly dismiss it and uphold both the conviction and sentence.

Delivered, signed and dated at Kericho this 19th day of November, 2020.

A. N. ONGERI

JUDGE