



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 109 OF 2019

REPUBLIC.....STATE

VERSUS

HILLARY KIMUTAI.....APPELLANT

JUDGEMENT

HILLARY KIMUTAI, the appellant herein was charged in the lower Court with the main Count of attempted defilement, Contrary to *Section 9(1) (2) of the Sexual offences Act No. 3 of 2006*.

The particulars of this offence are that on the 12th day of May, 2017 at around 11.30p.m at [Particulars Withheld] village, [particulars withheld] Sub-location, Kabargoi Location within Elgeyo Marakwet County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of LK, a child aged 11 years.

In the alternative, the Appellant faced a charge of committing an indecent Act with a child Contrary to *Section 11(1) of the Sexual Offences Act No. 3 of 2006*.

The particulars of this offence being that on the 12th day of May, 2017 at around 11.30p.m at [Particulars Withheld] village, [Particulars Withheld] Sub-Location, Kibargoi Location within Elgeyo Marakwet County, the Appellant intentionally touched the vagina of LK a child aged 11 years with his penis.

The Prosecution case is that the complainant herein was aged 11 years old by the time of the alleged offence of which was on 12/5/2017. That day at about 11.00p.m PW3 who is the mother to the complainant who is PW2, were asleep at home in [particulars withheld] village. PW3 was sleeping on the floor with the children as one child namely J had a leg injury and the bed was left to her.

The complainant heard the door being opened. She thought it was her mother going outside. After about 5 minutes she heard someone behind her. She thought it was her sister and continued sleeping. She was then turned to face upward and the person went on her. He pressed on her chest. She only had her pant on. The person used his penis and by passing it on the side of her pant put it on her vagina. He was smelling of alcohol. She pushed him and he scratched her right hand. She called PW3. The assailant then opened the door and escaped.

When PW3 was called by PW2, PW2 said Baba Hillary had done bad things to her. PW-3 saw the assailant as he was struggling to put back his trouser. She identified him as he had a black shirt with white colour stripes on the sleeves. There was full moon which illuminated the house through the door. She saw him well. PW2 followed the assailant outside and was also able to identify him by the clothes he had. He used to wear them. It was a black shirt and arms had white stripes. As he escaped, they decided to call his wife to find out whether he was at home. They are neighbours. They called her and she did not respond.

The appellant responded and asked what it was about. PW-3 chased him away as PW-2 told him that he had sexually assaulted her. He denied the allegation. They called a neighbour and many other persons turned up including the village elder. The children were screaming as the Appellant had returned back to the home to get his panga of which he had allegedly left behind and had also a bag which had some shopping.

PW-2 was taken to Tambach Sub-County Hospital where she was examined by PW-1. She appeared depressed and worried then. She had no visible injury. She had normal external genitalia, normal labia and no signs of penetration. There was presence of dry whitish substance on the pant which looked like semen. The Doctor indicated someone wanted to take advantage of her. He thus signed the P3 form.

The matter was reported at Tambach Police Station. The Appellant had gone underground and was got on 31/7/2017. He was arrested and charged.

The Appellant gave sworn testimony in his defence and called one witness, his wife.

Their case is that on the material day the Appellant got home at 9.00p.m. The wife prepared food of which they ate and slept. At about 11.00p.m the wife was called by Kipkorir. She went outside and he asked her whether the Appellant was at home. She said yes. She called the Appellant and Kipkorir left. They went to the scene and it was not clear what the issue was about. They went back to sleep. In the morning the wife heard allegation that her husband had gone to the neighbouring home.

She was surprised as they had slept together. PW-3 returned to talk to her. When DW-2 asked PW-3, she told her the issue was under investigations. After 3 months the Appellant was arrested and charged.

The trial Court evaluated the evidence and found the Appellant guilty of the offence in the main count. He was convicted and sentenced to serve 10 years in jail.

The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that:-

1. The charge was defective.
2. He was not accorded a fair trial.
3. The offence was not proved beyond reasonable doubt.
4. Appellants intention was not conclusively determined.
5. The appellant's defence was ignored.

I have gone through the charges, re-evaluated the evidence on record, judgment passed, sentence meted, grounds of the appeal and submission by both sides. Having done so I do find that there is only one issue which the Court need consider on this appeal and that is of identification of the appellant as the culprit.

The incident took place at night in the house at about 11p.m. PW-2 and PW-3 alleged that they identified the appellant through the clothes he was wearing, a black shirt with white stripes on the sleeves. PW1 alleged he used to wear the shirt. Both witnesses allegedly used moonlight to identify the appellant. The incident took place in the house where no any other source of light is revealed. Though its alleged the moonlight luminated the house when the door was opened, such is doubtful as the layout of the house was not well described. There is no evidence that between the door and the assailant there was nothing to obstruct the light. The alleged black shirt with white stripe sleeves was not recovered and availed as an exhibit. The witnesses were also not able to describe anything else the suspect was wearing, like the colour of his trouser, and any other feature which they may have seen, which puts their claim of ability to see is doubt.

Its alleged on the complainant pant there was a substance that resembled male semen. Such should have been picked and subjected to DNA for certainty of what it was and the real culprit.

In Wamunga Vs. Republic (1989) eKlr 424 it was held that:-

“it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

In this case if the trial Court had examined the evidence of identification carefully, and weighed it against the appellants evidence that at the time of the offence he was asleep in his house, would have found existence of possibility of an error on the claimed identification. The conviction was not therefore safe. The appellant should have been accorded the benefit of doubt.

I therefore find the appeal merited. Its allowed as prayed. Conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of December, 2020.

In the presence of:-

The Appellant

Ms Limo for ODPP (State)

Gladys - Court Assistant