



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 91 OF 2017

DENIS WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

Being an appeal from the original conviction and sentence in Criminal Case Number 5581 of 2015 in the Chief Magistrate's court at Eldoret – Hon. S. TELEWA (RM)

JUDGMENT

1. The appellant herein, Denis Wanyama, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences Act No 3 of 2006. He also faced the alternative charge of indecent act with a child contrary to section 11 (l) of the Sexual Offences Act.
2. The particulars of the offence were that on 27th September, 2015 at [particulars withheld] farm in Likuyani Sub County within Kakamega County unlawfully and intentionally caused his genital organ (penis) to penetrate into the genital organ (vagina) of MN (particulars withheld) a child aged 9 years.
3. The appellant pleaded not guilty to the charge and a trial was conducted in which the prosecution tendered the evidence of 5 witnesses. A summary of the prosecution's case was that PW1, the complainant herein who was at the time a minor aged 10 years old was at home with her brother one E (PW2) when the appellant sent PW2 to call the complainant while lying that his employer, a neighbor known as "mama L" was calling her to send her on an errand. The complainant heeded the call and went to the home of the said mama L but no sooner had she reached the home than the appellant seized her and dragged her into his house where he undressed her and defiled her. The appellant went back to her home after the ordeal and she reported the incident to her mother PW3 who escorted her to the hospital.
4. PW4, a clinical officer based at Matunda Sub County Hospital examined the complainant and noted that her hymen was freshly torn and was swollen and painful. He filled the P3 form which he produced as an exhibit during the trial. The complainant's treatment notes were also produced as exhibits.
5. When placed on his defence, the appellant denied having committed the offence and stated that he had nothing more to say.
6. After considering the evidence of both the prosecution's witnesses and the appellant, the trial court found that the prosecution had established its case against the appellant beyond reasonable doubt whereupon he was convicted on the main count of defilement and sentenced to life imprisonment.
7. Aggrieved by both the conviction and the sentence, the appellant filed the instant appeal and listed the following grounds of appeal in his petition of appeal:
8. At the hearing of the appeal, the appellant opted to rely on his written submissions filed on 30th August 2018. The appellant's case was that the prosecution did not tender sufficient evidence to prove the offence of defilement and that voire dire was not conducted to establish the competency of the complainant and PW2 to testify in the case. He also argued that the age of the complainant was not proved and that the sentence passed on him was unconstitutional.
9. Miss Mumu, learned counsel for the state submitted that all the ingredients of the offence of defilement were proved to the required standards.
10. As the first appellate court, the duty of this court is to reconsider the evidence presented before the trial court afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify.

11. I have carefully considered the evidence presented before the trial court and I note that the main issue for determination is whether the prosecution proved the offence of defilement against the appellant beyond reasonable doubt.

12. The law is now settled that the ingredients of defilement are; the minority age of the complainant, penetration and the identification of the appellant as the perpetrator of the offence.

13. On the first issue of age, the complainant testified that she was 10 years old and in class 5 at K (name withheld) academy. The P3 form which was produced as P Exhibit 2 showed that the complainant was 9 years old at the time she was defiled. The trial court noted that the complainant was not of tender age and could be sworn. I am therefore satisfied that the age of the complainant was proved beyond reasonable doubt.

14. On penetration, the complainant testified on how the appellant lured her to his house under the pretext that one mama L was calling her only to pounce on her and defile her. The complainant's evidence was corroborated by the testimony of PW4 the clinical officer who examined the complainant after her ordeal and confirmed that her hymen was freshly perforated and that her vagina was swollen and painful.

15. On the identification of the complainant, I find that the appellant was positively identified by the complainant as her attacker as the defilement took place in broad daylight and the appellant was well known to the complainant as an employee of their neighbor, the said mama L.

16. Having regard to the above findings, I am persuaded that the prosecution's case was proved to the required standards. The appellant raised the issue that voir dire examination was not conducted on the complainant so as to establish if she was competent to testify. On this point, I note that the trial court upon observing and questioning the complainant on her age noted that she was not of tender age and could therefore give a sworn statement. It then turns out that the complainant gave very consistent and compelling evidence that was not shaken even upon cross examination by the appellant.

17. On sentence, the complainant's age having been proved to be 9 years, I find that the sentence of life imprisonment imposed on the appellant was lawful because section 8(2) of the sexual offences Act provides for life imprisonment as the minimum sentence that can be passed upon conviction under the said section.

18. Having regard to the above findings and observations, I further find that the instant appeal is unmerited and I therefore dismiss it.

Dated and signed at Nairobi this 18th day of January 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:

Mrs Mumu for state

Appellant present

Court Assistant – Ouma