



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 57 OF 2015

JOSEPHAT KIPTANUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 217 of 2015 in the Principal Magistrate's court at Kapsabet –Hon. G. Adhiambo (SRM))

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Penal Code. The particulars of the offence were that on 23rd January 2015, within Nandi County intentionally and unlawfully caused his penis to penetrate the vagina of SC (*Particulars Withheld*) a child aged 1 year and 3 months.
2. The appellant was also charged with the alternative offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The appellant pleaded not guilty to both the main count and the alternative charge.
3. PW1, the child's mother testified that on the morning of 23rd January 2015 she left her baby, the complainant herein, taking tea in the kitchen and went to the stream to fetch water. On returning home, she saw the appellant carrying the baby to the main house but no sooner had she reached her gate than she heard her baby, screaming from the main house. She rushed to the house only to find the appellant in the act of defiling her baby on the sofa and the appellant did not stop even after she asked him why he was destroying her baby. She dragged the appellant from the sofa where he was defiling the baby and saw sperms on the baby's vagina. She raised an alarm and the appellant escaped into the forest. A black, sperm-stained biker shorts that the baby had worn on the material day was produced as exhibit 1. Members of the public, who included PW2, PW4 and PW5 rushed to the scene to find out what had transpired.
4. The baby was taken to the hospital. PW7, Isaack Kipkorir, the clinical officer based at Chaptennai Sub- District Hospital examined the baby and noticed the presence of whitish discharge around the genitalia. He explained that the nature of the offence was defilement and said that there was partial penetration.
5. PW1 produced baby's immunization booklet which showed that she was born on 16th November 2013. The said booklet, treatment notes, and P3 form were produced as exhibits 3a, b and c respectively. She identified the appellant as a casual labourer whom she had hired to plough her farm and stated that she had known him for a period of 4 months prior to the incident.
6. PW3 RKK was the husband of PW1 and the baby's father. He was away from home on the fateful morning but while at the area Chief's home he heard screams emanating from his home. On returning home, he found many people gathered and he learnt that the appellant had defiled his baby. He identified the appellant as the casual labourer he had hired to work on his farm.
7. PW5, John Tuelly, also learnt about the defilement incident and managed to spot the appellant, who had disappeared soon after the incident, going into a hotel. He apprehended the appellant with the assistance of PW6, and escorted him to Kipkaren Police Post.
8. PW8 P.C. George Nyambega, a Police Officer based at Kipkaren Police Post investigated the case and charged the appellant with the offence of defilement and/or the alternative count of indecent act with a child.
9. At the close of the prosecution's case, the trial court found that the appellant had a case to answer and placed him on his defence. The appellant tendered a sworn statement in his defence in which he stated that he knew the charges filed against him and requested to be forgiven.
10. After considering the evidence of the prosecution witnesses and the appellant, the trial court found the appellant guilty of the alternative count of engaging in an indecent act with a child and he was consequently convicted and sentenced to 15 years imprisonment. Aggrieved by

both conviction and sentence, the appellant filed the instant appeal and set out the following grounds of appeal:

- 1. That, I did not understand the language which was used during the trial of the case contrary to Article 50(2)(a) (b)(c) (j) (k) (q).**
- 2. That I was not informed of the main charge of the penal code.**
- 3. That, the trial magistrate erred in law and fact by failing to evaluate the assessment of sentence as required by the law under Section 141(1) of the CPC.**
- 4. That there was no any medical proof of evidence in regard to the elements found, if it belonged to the appellant, hence I was not taken for medical examination for test.**
- 5. That I pray to be provided with trial court proceedings and that more grounds will be adduced during the hearing of appeal.**

11. The appellant filed written submissions in support of his appeal wherein he stated his right to a fair trial was violated during the trial court as he was not given the minimum mandatory sentence. He also stated that he did not understand the language used in recording plea when the charge was amended. He further stated that he was not represented by an advocate and neither was he supplied with the witness statements. He contended that the sentence meted on him was manifestly harsh and excessive.

12. Miss Mumu, learned counsel for the state, opposed the appeal. She submitted that all the ingredients of the offence of attempted defilement were proved. On age, she submitted that the immunization card showed that the complainant was born on 16th October 2013 and was therefore 1 year and 3 months at the time she was defiled. On penetration, she stated that the appellant was found in the act with his penis on the vagina of the baby and that PW7 testified that he found that the minor had been partially defiled.

13. On the identification of the appellant, counsel submitted that the appellant was well known to the child's mother (PW1) as he worked for them as a casual labourer.

14. As the first appellate court, the duty of this court is to reconsider and reanalyze the evidence tendered during the trial afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the prosecution witnesses testify. See **Okeno vs. Republic (1972) EA 32.**

Determination

15. Having considered the grounds cited in the petition of appeal, the record of appeal and the submissions of the state and the appellant, I find that the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. This Court is aware that the ingredients of defilement were highlighted in the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

16. In the instant case, the appellant was convicted of the alternative charge of indecent act with a child, in which case, I find that the ingredients of the main count are still relevant to the alternative count. It was not in dispute that the victim of the sexual assault was a baby aged 1 year and 3 months as shown in the immunization/clinic card that was produced as P exhibit 1.

17. PW1 found the appellant, whom he knew very well as her casual labourer, in the act of defiling her baby. She testified as follows on what she witnessed on the material day.

“I found the accused having placed his penis on the vagina of my baby. I asked him “why are you finishing my child” he did not stop. He continued. I pulled him. He left the child on the seat. I saw the discharge of the accused on my daughter’s vagina. I then screamed.”

18. The testimony of PW1 was corroborated by the testimony of PW7, a clinical officer who on examining the child made the following findings.

“I found a normal external genitalia. There were no tears or lacerations. The hymen was intact. I noted a presence of whitish discharge. There was no physical penetration but the presence of whitish stains suggestive of sperms may have confirmed the real motive of the person. There was partial penetration... it appears the person did some sort of friction on the thigh or external genitalia resulting in the release of sperms.”

19. From the above extract of the testimonies of PW1 and PW7 am satisfied that the offence of indecent act with a child was proved beyond reasonable doubt. I find that the testimony of PW1 was compelling, consistent and was not impeached by the appellant who did not ask her any questions on cross examination. The trial court noted that PW1 wept bitterly in court as she narrated the circumstances under which she caught the appellant red-handed in the act of defiling her baby.

20. Turning to the appellants submissions that he was not accorded a fair hearing I find that the record of the proceedings taken before the

trial court shows that the language used during the trial was Kiswahili which the appellant confirmed that he understood before the trial commenced. I also find that immediately after the plea was taken and when granting the appellant bond, the trial court also ordered that he be supplied with copies of the charge sheet and witness statements and informed him his right to engage a counsel. I therefore find that the appellants claim that his right to a fair trial was violated was not proved. I have also considered the evidence tendered by the appellant in his defence and I find that it did not dislodge the otherwise watertight evidence presented by the prosecution witnesses.

21. On sentence, I find that Section 11(1) of the Sexual Offences Act under which the appellant was convicted stipulates as follows on sentence:-

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

22. An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another , but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

23. Considering the totality of the circumstances of this case, I find that the trial court was justified in finding that the appellant is guilty of the alternative count of indecent act with a child as he was found in the act of placing his penis on the vagina of the child. I therefore find that the sentence of 15 years passed on the appellant was lawful and I find no reason to interfere with it. I note that the minimum mandatory sentence for indecent act with a child is 10 years which means that the trial had the discretion to mete out sentence of 10 years and above based on his own assessment of the circumstances of the case and the aggravating circumstances, if any.

24. Having regard to my findings and observations in this judgment, I find that the instant appeal is unmerited and I therefore dismiss it.

Dated and signed in 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 Mumo for state

Appellant present

Court Assistant – Ouma