



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2017

RCC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 343 of 2012 in the Senior Principal Magistrate's court at Iten – Hon. H. M. NYABERI (SPM))

JUDGMENT

1. RCC, the appellant herein, was charged with 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 Laws of Kenya. The particulars of the offence were that on the 6th May, 2012 at about 6.00 pm at [particulars withheld] Sub-location of Kaptich Location in Elgeyo Marakwet County did cause his penis to penetrate the vagina of NJR (particulars withheld) a child aged 12 years old. He also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The appellant pleaded not guilty to both the main count and the alternative charge and a trial was conducted in which the prosecution presented the evidence of 5 witnesses. A summary of the prosecution's case was that PW1, the complainant herein, who is the appellant's cousin and neighbor, was on 6th May 2012 playing with the appellant's children at her home when the appellant asked her to accompany him to a nearby home so that he could buy her a present but that while on the way, the appellant got hold of her and defiled her before she was rescued by PW2.

3. PW2, TK, the complainants brother, testified that he heard screams from a nearby bush and ongoing closer to the scene, he found the appellant in the act of defiling the complainant after which he immediately reported the matter to their mother PW4 who rescued the complainant from the scene and escorted her to the hospital,

4. PW4 testified that the complainant was at the time of the incident aged 12 years. She produced the complainant's health immunization card as P exhibit 3. PW3, Shadrack Kimei Kirwa was the clinical officer who examined the complainant after the alleged defilement. He testified that upon examining the complainant he noted that her she had lacerations on her labia minora. He formed the opinion that she had been defiled. He completed a post rape care form and the P3 form which were produced in court as P. Exhibit 1 and 2.

5. PW5 Sgt. Joseph Asugo was the investigating officer. He testified that the appellant went into hiding soon after committing the offence and was arrested on 31st May 2012. He also stated that he visited the scene of the incident and noted that the appellant's home was about 20 meters from the home of the complainant's parents.

6. When placed on his defence, the appellant tendered an unsworn statement in which he denied committing the offence and attributed his tribulations to the grudge that PW4 had with him over land dispute.

7. After considering the evidence of the prosecution and the appellant, the trial court found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on the first count of defilement and sentenced him to life imprisonment thereby triggering the instant appeal in which the appellant challenges both the conviction and sentence. In the petition of appeal filed on 27th September, 2017, the appellant faulted the trial court for failing to take his evidence into account and for failing to note that the prosecution's case was not proved to the required standards.

8. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA

336. *Ruwala vs. R* (1957) EA 570.

9. At the hearing of the appeal, the appellant argued that penetration and the age of the complainant was not proved while Miss Mumu, learned counsel for the state maintained that all the ingredients of the offence of defilement were proved beyond reasonable doubt.

10. On penetration, I find that the testimony of the complainant on the circumstances under which the appellant attacked and defiled her was consistent and compelling. The complainant narrated, in great detail, how the appellant lured her and managed to separate her from her play mates while pretending that he was going to buy her a present for attaining number one position in her class, only for him to turn around and violently attack her, throw her to the ground and defile her. The complainant's testimony was corroborated by the testimony of PW2 who found the appellant red-handed in the act of defiling the complainant. That the complainant was defiled was also proved by the medical evidence presented by PW3. I am therefore satisfied that penetration was proved beyond reasonable doubt.

11. Turning to the age of the complainant, I note that the immunization card presented in court as P exhibit 3 showed that the complainant's date of birth was 25th December 2000. The offence in question was committed on 6th May 2012. A simple calculation of the complainant's age shows that she was 12 years old at the time she was defiled and I therefore find that the minority age of the complainant was proved.

12. Lastly on the identification of the appellant as the perpetrator of the offence, I note that it came out clearly from the evidence of both the appellant and the prosecution's witnesses that the appellant was not only a close neighbor of the complainant, but was also her cousin. In the exact words of the complainant, she stated;

“The accused is my relative, my father and his father are brothers.”

13. It is therefore clear to me that the appellant was well known to the complainant. The defilement incident took place in broad daylight at 6pm and I am therefore satisfied that the complainant was able to see and positively identify the appellant as her attacker.

14. I find that the appellant's testimony that he was implicated in the offence due to a family land dispute, in the face of cogent, corroborated and watertight evidence of the prosecution witness amounted to mere denial of the offence that did not impeach the prosecution's case.

15. On sentence, Section 8(3) of the Sexual Offences Act stipulates that:

“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”.

16. In the instant case, having found that it was proved that the complainant was 12 years old at the time of the sexual assault, I find that the sentence of life imprisonment imposed on the appellant is the maximum sentence applicable for such an offence. In this case, the appellant was reported to be a first offender. I do not find that there were aggravating circumstances so as to warrant the passing of the life sentence.

17. Consequently, while I uphold and affirm the appellant's conviction, I on the other hand, revise the sentence to 20 years imprisonment.

18. Accordingly, the appeal herein is allowed, albeit partly, only on the subject of sentence. I hereby substitute the sentence of life imprisonment with a 20 year imprisonment term. For the avoidance of doubt, the 20 year imprisonment term shall begin to run from the date of the judgment before the trial court being 19th September 2017.

Dated and signed at NAIROBI this 16th 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