



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 13 OF 2018

BETWEEN

CP.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 30th May, 2018 by Hon P. Y. Kulecho in Kapenguria PMC Criminal (S.O.) Case No. 481 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, CP was charged with **defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence in Count I are that on the nights of 16th and 17th day of May, 2017 within West Pokot County intentionally caused his penis to penetrate into the vagina of DC, a child aged 14 years.
2. In the alternative to the main count, 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 thereof being that on the nights of 16th and 17th May, 2017 within West Pokot County intentionally touched the buttocks/breasts/vagina of DC, a child aged 14 years.
3. In Count II, the appellant was charged with **committing an act intended to cause grievous harm Contrary to Section 231(b) of the Penal Code**, the particulars being that on the night of 16th and 17th May, 2017 within West Pokot County, with intent to cause grievous harm to GCK unlawfully attempted to cut the said GCK with a panga.
4. The appellant denied all the charges, and during the ensuing trial, the prosecution called six witness to support its allegations against the appellant. When put on his defence, the appellant gave sworn evidence in which he denied committing the alleged offence. He did not call any witnesses.

Judgment of the Trial Court

5. After carefully analyzing all the evidence on record the Learned Trial Magistrate found the appellant guilty of the offence of **incest** with his niece **Contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The appellant was acquitted of Count II. He was sentenced to serve ten (10) years imprisonment.

The Appeal

6. The appellant, being dissatisfied with the entire judgment of the Trial Court, brought this appeal and set out eight home-made grounds which can be summarized as follows:-

1. THAT the Learned Trial Magistrate erred in both law and fact when she convicted the appellant without considering that the appellant was not given enough time to prepare for his defence.

2. THAT the Learned Trial Magistrate erred in both law and fact when she convicted the appellant on the basis of evidence that was contradictory and lacked merit to sustain a conviction.

3. THAT the Learned Trial Magistrate erred in law and fact when she failed to appreciate that the case against the appellant was poorly investigated.

4. THAT the Learned Trial Magistrate erred in law and fact by convicting the appellant without sufficient evidence to warrant a finding of guilty.

5. THAT the Learned Trial Magistrate erred in law and fact when she failed to give cogent reasons for dismissing the appellants submissions contrary to Section 161(1) of the Criminal Procedure Code.

6. THAT the Learned Trial Magistrate erred in both law and fact when she relied on unreliable witnesses to convict the appellant contrary to Section 124 of the Criminal Procedure Code.

7. It is the appellant's prayer that his appeal be allowed, conviction quashed and sentence set aside.

8. This is a first appeal which requires this court to carry out a fresh and exhaustive examination of all the evidence on record before reaching its own conclusions in the matter, only remembering that it has no opportunity of seeing and hearing the witnesses who gave evidence at the trial and to make an allowance for the same. Cases in the realm of *Okeno -vs- Republic (1972) EA 32* are relevant in this regard.

The Prosecution Case

9. From the record, the appellant is the younger brother to the complainant's father. On 16th May, 2017 GC, an auntie to the complainant, was asleep in her house at about 2.00 a.m. GC (PW1) was with her children as well as her deceased's brother's children among them the complainant, DC who testified as PW2. The appellant knocked on PW1's door and asked her to open, which she did. On entering the house the appellant asked PW1 for food and also informed PW1 that since he had brought back his wife, she should let him take PW2 with him.

10. Because it was late in the night PW1 asked the appellant to wait for daybreak so he could take PW1 but the appellant got angry at that suggestion and threatened to cut up PW1. Fearing for her life PW1 fled from her house leaving her four children in the house with the appellant. PW1 went to her father's house and woke him up because of what the appellant was doing. She also woke up her other brother and told him the same thing. PW1's father and other brother advised PW1 not to release DC to the appellant until daybreak.

11. When PW1 returned to her house at daybreak, she did not find PW2 in the house and on checking at the appellant's house she found PW2 who was crying. PW2 informed PW1 that the appellant had defiled her in the night. PW1 informed her father of the incident and when confronted about it the appellant turned violent threatening to assault PW1.

12. PW2 corroborated PW1's testimony and also stated that after PW1 fled from her house, the appellant who is her paternal uncle, ordered her out of PW1's house and asked her to accompany him to his own house. Once at the appellant's house, the appellant undressed her and defiled her until about 5.00 a.m. when she escaped from the appellant's house. PW2 narrated the ordeal to PW1 who took her back to the appellant's house but upon seeing PW1, the appellant fled. He was however chased by KPR officers and arrested and taken to the police station. PW2 was taken to the hospital.

13. During cross examination PW2 testified that when she escaped out of the appellant's house, she screamed for help, but since it was raining no one responded to the screams. PW2 also testified that the appellant who has sold all his land stays on his deceased's brother's land.

14. Morris Rotich Namele, of Kamatira village and a KPR officer testified as PW3. His testimony was that at about 6.00 a.m. on 16th May, 2017, he heard screams from nearby. He rushed to the scene and found PW1 screaming as she ran towards the river, chasing the appellant. He followed her in the company of other villagers. PW1 told the villagers the appellant had defiled PW2. The appellant hid himself in the bushes for a while but he finally surrendered before being escorted to the police station.

15. In cross examination PW3 told the court that his house is about 50 metres from the appellant's; that he bought land from the appellant's father; that PW2 is appellant's late brother's daughter and that he (PW3) has no land dispute with the appellant.

16. PW4 was SK father to both PW1 and the appellant. He was woken up by PW1 on 16th May, 2017 at around 2.00 a.m. and informed that the appellant was causing trouble at PW1's house. In the morning PW1 informed him that the appellant had defiled PW2. He was among the people who mounted a search for the appellant after the appellant fled from his house.

17. Number 95725 PC (W) Lilian Moraa of Gender Office Kapenguria Police Station testified as PW5. She was at the station on 16th May, 2017, when PW2 was escorted to the police station with a history of defilement. PW2 was taken to hospital while the appellant was taken to the police station and charged. Danson Litole, a clinical officer at Kapenguria County Hospital testified as PW6. On 16th May, 2017, he received and examined PW2 who had a history of having been defiled by a person who was known to her. PW2 presented with pains on the head and neck. Upon examination of the genital area it was established the hymen was broken. Laboratory tests revealed some pus cells in the urine with no other abnormality. On age assessment it was established PW2 was 14 years old. PW6 produced the P3 form – Pexhibit 2 – The PRC form – Pexhibit – 3 - Age assessment form – Pexhibit 4 and laboratory request form – Pexhibit 5.

18. During cross examination PW6 testified that no spermatozoa was seen during the laboratory tests.

Defence Case

19. The appellant gave sworn testimony. He denied committing the offence. He testified that he was lured to the police station where on arrival he was booked into the cells and taken to court on 17th May, 2017.

Submissions

20. I have considered the rival submissions in great detail together with all the authorities cited to the court by the appellant.

Issues, Analysis and Determination

21. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the three ingredients of the offence of defilement were proved, namely whether there was penetration, and secondly whether the appellant was the perpetrator and thirdly whether the age of the complainant was proved.

22. Regarding the first issue of penetration, PW6 testified that when he saw PW2 who had a history of defilement he found a missing hymen. On laboratory examination pus cells were found in PW2's urine. PW6 did not find any other abnormality on PW2's genitalia, and no spermatozoa was seen.

23. PW2 herself testified that when the appellant took her from PW1's house, he took her to his house, undressed her and also undressed himself and then as she lay naked on his bed, he put his male genital organ into her female genital organ and penetrated her. In my considered view the ingredient of penetration was proved beyond any doubt by the fact that there were pus cells in PW2's urine as well as a missing hymen.

24. The next issue for determination is whether the appellant was the perpetrator of the offence. Both PW1 and PW2 testified that when the appellant entered PW1's house, the tin lamp was on. They both saw him. He also spoke to both of them as he demanded to have PW2 go with him to his house. When PW1 failed to release PW2, the appellant became aggressive and threatened to cut her (PW1).

25. As soon as PW1 ran away for fear of her life the appellant turned to PW2 and woke her up, while threatening to cut her with a panga which he was holding in the hand after asking PW2 a few questions. PW2 said he dragged her to his house where he defiled her. I am satisfied that there was no mistaken identity in this case since the appellant is well known to PW2 being PW2's paternal uncle. PW2 also testified that the appellant "was a regular visitor to PW1's house. She added: "He is brother to my late father. It was him. He talked to me all the way into his house nearby. I know him very well. In my auntie's house, she had put on her tin lamp." The description as given by PW2 as to who her defiler was leaves no doubt in my mind that it was the appellant. I have considered this evidence against the appellant's allegations that the case against him was related to a family dispute over land, and find that the allegations did not in any way shake the prosecution's case.

26. The final issue for determination concerns the age of PW2, namely whether that age was proved as required by law. According to the age assessment form Pexh. 1, PW1 was found to be 14 years old, an age that was compatible with PW2's assertion during her evidence in chief that she was born in 2003. I note that according to the Trial Court, there was no age assessment for PW2 yet there is this Pexh. 1 which clearly assessed the age of PW2 to be 14 years. I am therefore satisfied that PW2 was proved to be 14 years old.

27. What about the conviction and sentence? The Learned Trial Magistrate applied the provisions of Section 179 of the Criminal Procedure Code, and acting on the mistaken assumption that the prosecution had not proved PW2's age, convicted the appellant of the lesser charge of incest contrary to Section 20 of the Sexual Offences Act. It is the considered view of this court that though the reasoning for reaching that conclusion was erroneous, the evidence on record clearly shows that PW2 was a paternal niece to the appellant. The conviction for the offence of incest was therefore proper, and the sentence of ten (10) years' imprisonment was in line with the law.

Conclusion

28. For all the above reasons, I find and hold that the appellant's appeal on both conviction and sentence lacks merit and ought to be dismissed. The same be and is hereby dismissed in its entirety.

29. Right of appeal to court of Appeal within 14 days from the date of this Judgment.

It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 27th day of February, 2019.

RUTH N. SITATI

JUDGE

In the Presence of

Present in person - Appellant

Miss J. Kiptoo present for Respondent

Mr. W. Juma - Court Assistant