



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 16 OF 2018

BETWEEN

EVANS MWAURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of Hon. P. Y. Kulecho, Resident Magistrate

dated 3rd July, 2018 in Kapenguria PMCr Case (S.O.) No. 32 of 2017

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, EVANS MWAURA was charged with **defilement Contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**, the particulars of the offence being that on the 12th day of September, 2017 at [Particulars withheld] township within West Pokot county intentionally caused his penis to penetrate the vagina of MK, a child aged 5 years old. The appellant also faced an alternative count of committing an **indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the 12th day of September, 2017 at [Particulars withheld] township, within West Pokot County [he] intentionally touched [the] buttocks/breasts/vagina of MK, a child aged 5 years old. The appellant pleaded not guilty to both the main and alternative charges. The prosecution called 4 witnesses in its effort to prove the case against the appellant.

2. At the close of the prosecution case, the appellant was found to have a case to answer and put him on his defence. The appellant gave sworn evidence but called no witnesses.

Judgment of the Learned Trial court

3. Upon consideration of the whole of the evidence laid before the court, the Learned Trial magistrate was satisfied that the prosecution had proved its case against the appellant as by law required and proceeded to convict him on the main count. The appellant was sentenced to life imprisonment.

The Appeal

4. The appellant being aggrieved by the whole of the Learned Trial Court's judgment brought this appeal on the following amended homemade grounds:-

1. THAT the Trial Magistrate erred in law and fact in affirming conviction and sentence of the appellant by failing to hold that the age of the complainant was not proved beyond reasonable doubt.

2. THAT the Learned Magistrate erred in law and fact in affirming conviction and sentence of the appellant by failing to find that the perception of PW3 and evidence of PW1 did not validate proof of penetration and further the documentary evidence was

not produced in court.

3. THAT the Pundit Magistrate fell into error in considering the appellant by failing to hold that the appellant was not identified at the locus in quo as the name, description and residence was not mentioned instantly after the commission of the alleged offence and further the dates of the commission [of the offence] are at variance.

4. THAT the Learned Magistrate equally fell into error in failing to consider the credible defence put forth by the appellant as per Section 108 of the Evidence Act.

5. The appellants original grounds of appeal filed on 5th July, 2018 were subsumed in the amended grounds.

6. This being a first appeal means that this court reconsiders and evaluates the whole of the evidence afresh with a view to reaching its own conclusions in the matter save to remember and make allowance for the fact that it has no opportunity of seeing and hearing any of the witnesses who testified during the trial. This was the holding in, among other cases ***Pandya -vs- Rex [1957] EA 336***, where the court of Appeal for Eastern Africa held, inter alia, that “ **an appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect.....affirm a conviction on evidence that has been reviewed.**”

The Prosecution Case

7. From the four prosecution witnesses the case for the prosecution is that: On the 14th September, 2017 at about 4.00 p.m., LM, mother of MK and who testified as PW1 noticed that her daughter MK aged 5 years old was missing from where she normally played around LM's business area at the market. For a moment, LM thought that MK had gone to play with other children. MK returned to where LM was after two hours and on seeing her, LM noticed that MK was walking with some difficulty.

8. LM then asked MK what the matter was, but MK was hesitant to speak out. LM then picked a stick and hit MK twice and that is when MK revealed that the appellant, who operated a stall next to LM's had given the child MK ten shillings before taking her to a house in a nearby maize farm and doing bad manners to her. From PW1's evidence, MK also told her that the appellant had warned MK against telling LM what the appellant had done to her (MK)

9. After hearing MK's narration, LM examined MK's private parts and noted that they were swollen and also had some pus. On examining MK's clothes, LM noticed a slimy substance on them, so she washed them before taking MK to hospital. LM also reported the matter to the police who issued her with a P3 form for MK.

10. During cross examination, LM denied a suggestion by the appellant that she was interested in having a sexual affair with him. LM also denied a suggestion from the appellant that she had demanded money from him [in order to drop the case].

11. MK., PW2 testified under oath after being taken through a *voir dire* examination. She told the court that on the material day, the appellant found her playing at the place where LM was selling her goods. The appellant took MK to a maize farm in Mathare and did bad manners to her after which he gave her ten shillings and cautioned her against telling anyone anything of what had happened to her. MK also stated that the appellant whom she knew by appearance made her to lie on the bed before doing bad manners to her. She felt pain during the ordeal. After accomplishing his mission the appellant took her back to the market. She was bleeding from her private parts.

12. MK's mother beat her when she revealed what appellant had done to her. She was taken to the police and then to the hospital.

13. Kennedy Kosgey Korit a clinical officer at Kapenguria District Hospital testified as PW3. He examined MK on 15th September, 2017. According to the physical examination, MK had tenderness on the inner thighs, laceration on both labia and inflammation of the labia minora. The hymen was broken. There was presence of discharge. Urinalysis revealed red blood cells and pus cells. The P3 form – Pexhibit 1 – was signed by Dr. Charles. On cross examination, PW3 stated that no spermatozoa was seen, though the patient had been seen within 48 hours of the occurrence of the alleged incident.

14. Number 89087 PC Peter Mureithi from Kapenguria Police Station gender desk was PW4. He received the report of the incident from LM on 14th September, 2017 alleging that MK had been defiled on 12th September, 2017. PW4 escorted the duo to the hospital for examination and treatment. He also issued a P3 form which was filled on 15th September, 2017. PW4 visited the scene and established that the appellant operates a clothes kiosk adjacent to LM's kiosk.

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

The Appellant's Case

16. The appellant gave sworn evidence and denied committing the alleged offence. He testified that he was arrested on 14th September, 2017 at around 1.00 p.m. on suspicion that he had stolen a motor cycle. The appellant did not call any witnesses.

Issues, Analysis and Determination

17. As rightly stated by the Learned Trial Court in its judgment, the issue for determination is whether the prosecution proved the charges against the appellant. I have now carefully analyzed and reconsidered the evidence on record, and from where I sit I am satisfied that the prosecution discharged its burden of proof to the required standard.

18. The first ingredient that required proof was whether the age of MK was proved. It is to be noted that age is a very vital ingredient of the offence of defilement for the simple reason that sentence upon conviction is determined by the victim's age. In the instant case the trial court, relying on the now celebrated case of **FAPPYTON MUTUKU NGUI –VS- REPUBLIC [2012] eKLR** concluded that though there was no documentary evidence to prove MK's case, she was satisfied that no formal age assessment was necessary. As a Trial Court she saw and heard MK and formed the opinion that MK was aged below eleven years, which is the threshold for triggering a charge under **Section 8(2) of the Sexual Offences Act**. Since this court does not have the privilege of seeing MK, it finds no reason to depart from the finding of the Learned Trial Court on the issue of MK's age. This position is fortified by PW1's evidence who testified that she gave birth to MK in 2012. In this regard, this court is of the firm opinion that a mother's word as to the date of birth of her child, unless the contrary is proved, can be accepted as gospel truth regarding the issue.

19. The second issue for determination is whether MK was defiled. PW3 the clinical officer stated that in his opinion, MK was defiled. He gave evidence to the effect that MK had some tenderness on both thighs labia with visible inflammation. PW3 also noticed that there was some discharge from MK's genitalia and further that the hymen was broken. On carrying out urinalysis, the test revealed red blood cells as well as pus cells in the urine. In his opinion MK, had been defiled. I am equally satisfied with the evidence as presented that bad manners were done to MK and consequently find that the appellant's complaint that the evidence by PW3 did not prove defilement to be without merit.

29. The ultimate issue for determination is whether the appellant was properly and positively identified as the villain in this matter. MK gave an account of how the appellant took her away from where she was playing to a maize farm and into a house thereon, made her to lie on the bed before he did bad manners to her. In the meantime, PW1 could not see MK, but thought she had gone to play and so continued with her work. MK further testified that after the applicant did bad manners to her, he gave her ten shillings as he also cautioned her against telling anyone. Though MK did not tell immediately her mother what the appellant had done to her, she eventually did so after she received some beating. This evidence by MK was not at all challenged by the defence. Though the appellant tried to suggest that LM may have fabricated the case against him because he declined to have some sexual relationship with her, I find there was no consistency in that allegation. I therefore find the defence offered by the appellant too lukewarm to offer any challenge to the prosecution case. What I am saying here is that he appellant was properly identified in connection with the commission of the offence herein and that his defence was no defence at all.

Conclusion

21. From all the foregoing, this appeal is completely lacking in merit and is **accordingly dismissed in its entirety**. The appellant has a right 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 for Respondent

Mr. W. Juma Court Assistant