



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 15 OF 2017

(FORMERLY ELDORET HCCRA NO. 190 OF 2011)

JOSEPH CHEPTAI CHEPUKENJI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 299 of 2011 delivered on the 20th day of September, 2011 by Hon. H.M. Nyaga, PM]

JUDGMENT

1. This an appeal from the conviction and sentence for imprisonment for life for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act by judgment by Hon. H.M. Nyaga sitting at Kabarnet Law Court in Criminal Case 299 of 2011 delivered on 20/9/2011. The particulars of the offence charged that the girl was aged 8 years. The Appellant also faced an alternative charge of indecent act with a child.
2. The Appellant was aggrieved by the conviction and sentence filed a Petition of Appeal on 4/10/2011 on the following grounds:
 - a. The Appellant never pleaded at the trial in the first place.
 - b. That, I the Appellant was not informed in advance of the evidence the prosecution intended to rely on as read on Article 50 sub-section 5 of the Constitution.
 - c. That the Appellants rights and Fundamental Freedoms were limited as I had no freedom from torture and cruelty from the police as read on Article 25 sub-section (a) of the Constitution.
 - d. That the availed prosecution witness was just next of kin to the Complainant which they had only to depend on of their own.
 - e. That the availed prosecution witness was full of contradictions and no eye witness was called to testify.
3. The Appellant filed an Amended Grounds of Appeal stating, *“that the trial Court erred grossly in facts and law when it convicted him.*
 - a. And failed to observe penetration was not proved.
 - b. Without citing that the age of the alleged minor was proved as required by law.
 - c. And failed to identify that I was improper identified.
 - d. And failed to observe that I was not fluent in the languages used by the Court and prosecution witnesses.
 - e. On prosecution exhibits which were devoid of merits.
 - f. Without finding that all the elements and facts were invalid and in fact not proved.
 - g. Without parallel evidence to corroborate the available scanty and insufficient evidence.

h. By failing to observe the material discrepancies surrounding dates bringing the offence.

i. On too many prosecution witnesses who had no any evidential value and thus too much exaggerations.

j. On undisputed sentence on judgment and if found it was illegal under International Conventions and Human Rights Act. The said amended grounds were filed together with Submissions in support to each of the grounds stated.

4. The Prosecution did not oppose the appeal and in oral submissions made on 17/10/2018 urged that:

“Appeal is not opposed. Appellant was convicted for defilement under section 8 (2) of the Sexual Offences Act and sentenced to life sentence. Although evidence was overwhelming, the age of the Complainant was not established. The Complainant testified that she was 7 years while Pw6 and Pw7 testified that the Complainant was 8 years. They did not disclose the source of information as there was no document to show the age. Age is an important ingredient to be proved under section 8 of the Sexual Offences Act as it determines the sentence. Even with the evidence against the Appellant it was unsafe to convict without benefit of age, and this should have been used for the benefit of the Appellant. I urge the Court to allow the appeal.”

5. Issue for determination:

a. Whether offence of defilement was proved beyond reasonable doubt;

b. Whether the alternative charge of indecent act with a child is proved; and

c. Whether Appellant properly identified as the perpetrator.

Determination

6. I have considered the evidence presented before the trial Court and I respectfully agree with the submissions of the Prosecution that age is an ingredient for the offence of defilement under section 8 of the Sexual Offences Act. See *Kasomo v. R.*, Malindi Court of Appeal Criminal Appeal No. 504 of 2010 (Githinji, Makhandia & Sichale, JJA.). The trial Court misdirected itself in accepting the age of the minor to be below 11 years and sentenced the Appellant to life imprisonment, without any conclusive evidence of age. It is unfortunate that the trial concluded without assessment of the minors age if there were no other supporting documents.

7. Despite the evidence of (Pw1) a Clinical Officer who, significantly, examined the Complainant after the passage of a long time after the incident, there was evidence by Pw6 a consultant Surgeon who had examined the child over a month previously when he child was taken to hospital after complaints of stomach aches as follows:

“On her external genitalia she had gapping of the labia majora and the hymen was not intact. This suggested a sexual act, causing infection of the inner parts.”

8. The Consultant Surgeon PW6 had on the P3 dated 21/7/2011 made additional remarks that:

“Patient was admitted on 06/04/2011 in Kabarnet District Hospital Ward 3 In-patient NO. 1681/11 with complaints of low abdominal pain, vomiting and hotness of body for the last 1 week prior to admission. On examination she was found to have marked abdominal pain, had a rigid abdomen that was also tense. Features of severe intra-abdominal infection. She was taken to the theatre on 08/04/11 for exploration of abdomen. In theatre she was found to have a pelvic abscess (collection of pus in the pelvic) an infection that had been acquired from a sexual act that ascended to involve he pelvic organs.”

9. On his part the Clinical Officer, PW1, observed that his examination was conducted late after the alleged incident and made his additional remarks as follows:

“Child brought after staying for long period without being taken for medical treatment. No positive findings found on examination and laboratory suggesting defilement.”

10. But for the inconclusive evidence on age of the Complainant, the offence of defilement would have been proved.

Indecent act with a child

11. In the proved act of sexual penetration of the girl, despite want of proof of exact age, the offence of indecent act contrary to section 11(1) of the Sexual Offence Act is complete. The offence requires only that the victim be a child, not one of a particular age. From the evidence before the Court, the victim was clearly a child and that is the reason the trial Court found on *voire dire* examination that:

“Though young, the Complainant has understood my questions well. She appears capable of telling the truth from lies. She will testify but neither be sworn or affirmed on account of tender age.”

12. I would find the fact that the Complainant was a child under the age of 18 years within the meaning of the Sexual Offences Act, and the offence of indecent act with a child proved beyond reasonable doubt.

13. It is noteworthy that the trial Court did not consider the alternative count:

“As such it is unnecessary to consider the alternative count which the accused was also charged with.”

The alternative charge is indecent act contrary to section 11 (1) of the Sexual Offences Act. The section applies to indecent act with children of all ages and the sentence is set to not less than 10 years imprisonment.

Orders

14. Accordingly, for the reasons set out above, the makes the following orders:

a. The conviction and sentence of Appellant for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act is, respectively, quashed and set aside.

b. The Appellant is convicted and sentenced to 10 years imprisonment for the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, as charged in the alternative count, the sentence running from **20/9/2011**, the date of the conviction and sentence in the trial Court.

15. As the Appellant has been in prison for over 7 years (7 years and 5 months) the Appellant has served in full, with remission, his sentence term of 10 years, and there shall, therefore, be an order directing his release from custody forthwith unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent