



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 146 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ALFRED KIMUTAI KIPKOSGEL.....ACCUSED

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable C. Obulutsa in Eldoret Chief Magistrate's court Criminal Case No. 2395 of 2015 dated 23rd October, 2015)

JUDGMENT

The appellant, one *Alfred Kimutai Kipkosgei*, was charged in the lower court with a principal charge of defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence being that on the 17th day of May within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (Penis) to penetrate into the genital organ (vagina) of *MJ*, a child aged 6 years.

In the alternative the appellant faced a charge of Indecent Act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 17th day of May 2015 in Uasin Gishu County the appellant indecently and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of *MJ*, a child aged 6 years.

The prosecution case is that on 17th May, 2015 PW-2 in this case was at home with her two daughters. The younger daughter is *M*, the complainant in this case. She was born on 6th June, 2009, and was at the time aged 6 years. She was schooling at [Particulars Withheld] Academy. The appellant herein visited them looking for work. He was assigned the work of weeding potatoes at the shamba, about 30 metres away. PW-2 also went to the shamba to get vegetables and left behind the appellant with the complainant. The appellant then spread his sweater on the ground. He made the complainant lie on it. He removed her underwear and as well undressed. He then penetrated her private parts with his penis. She felt pain and cried. He told her to keep quiet. PW-2 called her and the appellant told her to go and tell her that she wanted to take a bath. He then continued weeding. When PW-2 got home she saw the appellant staring at her. She became suspicious and asked her elder daughter about it. She then saw the complainant going near the bathroom. She was in a skirt and without a T-shirt. She led her into the house and asked her what happened. She declined to disclose. PW-2 examined her and noted that she had no pant and had a whitish discharge on her private parts. She suspected that the appellant had defiled her. She alerted PW-3 about it. PW-3 who is a neighbor went to the place at 10.30 a.m. PW-2 told her that *Kosgei* had defiled the girl. PW-3 also examined the complainant and noted that she had a discharge on the private part.

On the way to the hospital they saw the appellant. PW-4 was herding cows and was called by PW-2. He was asked to apprehend the appellant. He however found him already apprehended on allegation of defilement and was escorted to Langas police station. The report was taken by PW-6 who referred them to Moi Teaching and Referral Hospital with a P3 form. The said P-3 form was filled by *Dr. Rono* on 19th May 2015. The Doctor found that she had a tear between labia minora and hymen. There was also a greenish discharge. There was no presence of spermatozoa and she had no related infection. The girl's (complainant) clinic card, pant and P3 form were produced as exhibits.

The appellant's defence is that he was aged 53 years then. He is a neighbor to PW-2. He knew the complainant only physically. He did not defile her. He was at home when PW-2 sent for him. He went to her house and found other people. PW-2 claimed that he had defiled her daughter. He denied the allegation. PW-2 said he should be taken to the police station. He saw the complainant and was not in pain. She could not have been defiled and fail to have tears. He was working for the family. The pant was not stained as alleged. He was not found at the scene.

The trial court evaluated the evidence and found that the offence in the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to life imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

1. He pleaded not guilty to the charge.
2. The case was not heard fairly and independently.
3. The case was not properly investigated.
4. No forensic evidence linked him to the offence.
5. Crucial witnesses were not called.
6. His defence was not properly weighed.
7. There was no eye witness evidence.

I have re-weighed the evidence adduced in the case, considered the judgment passed, sentence, grounds of appeal and submissions.

PW-1, the complainant, though aged 6 years, was able to establish firmly what was done to her and by who. She narrated how the appellant spread his sweater on the ground, made her lie on it and removed her underwear. He also undressed and placed his penis into her private parts. She felt pain and cried. The appellant told her to keep quite. These facts of which there is no cause to doubt, discloses an offence of defilement. There is no dispute that the girl was aged, then, 6years. The evidence of PW-2 buttresses that of PW-1. It shows the appellant who had been hired on that day to weed potatoes for her had an opportunity to commit the offence. When she and PW-3 examined the complainant they noted she had a discharge from her private part. The Doctor who filled the P3 corroborated the evidence as he observed a tear between labia minora and hymen. There was also a greenish discharge.

The appellants defence that he was fixed after he demanded his pay is not convincing. He never disclosed how much he was owed and when he demanded for the pay. PW-2's evidence shows he was arrested before he had even completed the given work. The pay was not an issue in the case and is just a creation of the appellant. The trial court weighed the evidence properly and correctly invoked the relevant legal provisions and authorities. The sentence was right. There is no ground on which this court can rightly interfere with the decision of the lower court. The appeal lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of March, 2019.

In the presence of:-

- (1) The appellant
- (2) Ms Mumu for State
- (3) Mr. Mwelem - Court assistant