



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 90 OF 2018

BETWEEN

JOSEPH JUMA WAMALWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda– PM dated 3rd September 2018 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No.39 of 2017)

JUDGMENT

1. The appellant, JOSEPH JUMA WAMALWA, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section (2) of the Sexual Offences Act (‘the Act’)**. The particulars of the offence were that on 24th September 2017 in Transmara West District of Narok County, he intentionally caused his penis to penetrate the vagina of RB, a child aged 9 years.

2. In his petition of appeal, the appellant complains that he was convicted on the testimony of one witness and the court erroneously relied on the fabricated testimony of the witness. He argued that the court failed to consider his defence that there was bad blood between him and the complainant’s family.

3. The respondent’s position was that the prosecution proved all the elements of the offence of defilement.

4. In order to prove the offence of defilement, the prosecution must prove that an accused did or caused the act of penetration to a child. “Penetration” under the Act means *“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”*

5. The child (PW 1) gave sworn testimony after a voire dire. She told the court that on 24th September 2017, her grandmother sent her to collect firewood and a donkey the appellant had taken earlier that day. She narrated what took place as follows;

“I asked accused to help me out. Accused refused. He took me to the forest/thicket. At the thicket, alinifanyia tabia mbaya. He defiled me. Accused removed his clothes. He also removed his. He penetrated me. I felt pain. This was my first time I was doing this. I used to see accused before my screamed. Boy found me at the scene. I was not able to scream.”

6. The child’s grandmother (PW 2) recalled that on the material day when the child did not return, she went out to look for her. At about 5.00pm, she found PW 1 and the appellant together. PW 3, also testified that earlier on, PW 2 told her that PW 1 had disappeared and they began searching for the child. While searching, she heard PW 1 screaming and calling out the appellant. When he went there, he found PW 1 and the appellant. They arrested the appellant and took him and the child to the police station.

7. The investigating officer (PW 4) told the court that on the material day, PW 1 and the accused were brought to the police station. She issued a P3 form and escorted the child to Lolgorian Sub-County Hospital.

8. The Clinical Officer (PW 5) testified that the child was brought to the hospital on 25th September 2017. He observed that the genitalia was normal, the inner labia were reddened (hyperemic) and the hymen was absent. He concluded that there was penetration.

9. When put on his defence, the appellant gave an unsworn statement in which he denied the charge against him. He stated that the reason he

was charge is that he worked for PW 2 and she owed him money. In lieu thereof, she wanted to give him a motorcycle and some money but she only repaid him some money but did not give him the motorcycle.

10. Having analysed the evidence as the first appellate court, I am satisfied that the evidence of the child was sufficient to establish an act of penetration. Her testimony was corroborated by that of PW 2 and PW 3 who found them together. The medical evidence also shows that there was penetration.

11. The appellant's defence confirms that he was not a stranger to PW 1 but his case that there was a grudge was an afterthought as this issue was not put to PW 2 in cross examination.

12. The age of the child is a question of fact and it was established to be 9 years from the child's own testimony, the testimony of the mother and the age assessment conducted by PW 5. There is no doubt that PW 1 was a child and since she was below the age of 11 years, the mandatory term of life imprisonment imposed as a sentence was warranted.

13. The conviction and sentence are affirmed. The appeal is dismissed.

Dated and delivered at Kisii this 15th day of March 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Sagwe for the appellant.