



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 11 OF 2018

BETWEEN

KELVIN KIPRUTOAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. H. M. Nyaberi, PM dated 13th February 2018 at the Magistrates Court at Iten in Criminal Case No. 907 of 2013)

JUDGMENT

1. The appellant, **KELVIN KIPRUTO**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** and **(2)** of the *Sexual Offences Act* (“the *Act*”). The particulars of the charge were that on 30th August, 2013 at 4.30 pm at **[particulars withheld]** within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the anus of DK, a child aged 9 years.
2. The appellant appeals against conviction and sentence on the basis of the grounds of appeal in which he contends that the prosecution failed to prove the case against him beyond reasonable doubt. He stated that evidence against him was contradictory and that important documents were not presented to the court.
3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).
4. The prosecution case was that on 30th August 2013, the complainant, PW 1, and another child, PW 2, were herding sheep and playing football near the forest. The appellant came to where they were and asked PW 1 to assist him carry charcoal to the forest. PW 1 left PW 2 behind to herd the sheep while he followed the appellant. PW 1 stated that the appellant dragged him into the forest, put him on the ground, tore his shorts and proceeded to penetrate his anus with his penis. PW 2 heard PW 1 screaming and when he went into the forest, he found the appellant on top of PW 1, holding his mouth.
5. PW 3 received a report of the incident on the same day and went to hospital where PW 1 had been taken. PW 5, the Clinical Officer, examined the child and found that he had a laceration on the anal wall and a bruise on the right thigh. There was dry discharge on the thigh but without bleeding. The investigating officer visited the scene and arrested the appellant after he had been arrested by Administration Police Officer.
6. The appellant denied the offence on his unsworn statement. He stated that he did not know the reasons why he was arrested.
7. The thrust of the appellant’s case is that the prosecution failed to prove every element of the offence of defilement beyond reasonable doubt. Under **section 8(1)** of the *Act*, the prosecution must prove that an accused did an act of penetration with a child. “*Penetration*” under **section 2** of the *Act* means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”
8. I am satisfied on the basis of the credible and consistent evidence of PW 1 and PW 2 that the appellant is the person who committed the act of penetration against PW 1. It was at daytime and there was no opportunity for mistaken identity. Both PW 1 and PW 2 knew him as he came from the locality. The testimony of PW 1 was corroborated by that of PW 2 who witnessed the act and the medical evidence confirming penetration.

9. The age of the child is a question of fact and PW 1's age was duly established by production of the child health card which showed that he was born on 11th July 2005. At any rate he was aged below 11 years and under **section 8(2)** of the **Act**, the mandatory sentence is life imprisonment.

10. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.