



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: D.S. MAJANJA

CRIMINAL APPEAL NO. 66 OF 2018

BETWEEN

DAVID KIBET BIWOTT.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. E. Kigen, RM dated 2nd May 2013 at the Magistrates Court at Eldoret in Criminal Case No. 4333 of 2012)

JUDGMENT

1. The appellant, **DAVID KIBET BIWOTT**, 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”). It was alleged that on 7th October 2012 in Keiyo South District of Rift Valley Province, he intentionally and unlawfully caused his penis to penetrate the vagina of AJ, a girl aged 10 years.
2. The appellant has now appealed against conviction and sentence on the grounds set in the petition of appeal, grounds of appeal and further supplementary written submissions. In summary, the appellant contends that the prosecution failed to prove the case beyond reasonable doubt, that the evidence of the complainant was uncorroborated and that his defence was not considered. The respondent takes the position that the prosecution proved every element of the offence beyond reasonable doubt.
3. As this is the first appeal, I am required to evaluate the evidence afresh and reach an independent conclusion as to whether or not to uphold the conviction (see *Njoroge v Republic [1987] KLR 19*). This exercise calls for me to set out the evidence as it emerged before the trial court and it was as follows.
4. The child, PW 2, gave unsworn testimony in which she recalled that on 7th October 2012 at about 4.00pm, she met the appellant whom she knew as “*Baba Chumba*” as he was the father of Chumba and who lived in the neighbourhood. She narrated how he held her hand and dragged her into a maize shamba, made her lie down, removed his trousers upto the knees and proceeded to insert his penis into her vagina. He left her alone so she went home. She only told her mother, PW 3, what happened when she started feeling pain in her private part.
5. PW 3 recalled that on 11th October 2012 at about 2.00pm, she noticed that PW 2 was not feeling well. PW 3 told her she was having a headache and stomachache. She also noticed that PW 3 was not walking properly. When she inquired from her what happened, PW.2 told her about her ordeal with *Baba Chumba*. She checked PW 2’s vagina and noticed some bruises. Since she knew *Baba Chumba*, she informed her husband, PW 4. She reported the matter to Kaptagat Police Station after taking the child to the dispensary. PW 4 recalled that PW 3 told her that PW 2 had been sexually assaulted by the appellant. On learning this he decided to go and arrest the appellant as he was his neighbour. He took him to Chepkorio Police Post.
6. The Investigating Officer, PW 5, recalled that the incident was reported at the police station on 12th October 2012. She issued the P3 medical report form and completed investigation. The doctor who examined the child, PW 1, testified that when she examined her on 15th October 2012, there were swellings and abrasions on the labia majora and tenderness and swelling as well as redness around the urethra while the hymen had no tears. She concluded that there was partial penetration based on the injuries.
7. In his defence, the appellant admitted that he was “*Baba Chumba*” but denied committing the offence. He told the court that he was assaulted and beaten by PW.4 who called him to inform him that they had his money.

8. 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."

9. Having considered the evidence, I am satisfied that penetration was proved by the clear testimony of PW.2. Her testimony was corroborated by that of her mother, PW 5, who saw her in a state of distress and observed injuries on PW 2's private parts. Likewise, the medical evidence of PW 1 corroborated the testimony of PW 2 by confirming injuries on the private parts. Even though PW 1 concluded that the penetration was partial, for purposes of **section 2** of the **Act**, partial penetration is penetration.

10. As to whether the appellant committed the offence, PW 2 identified him as *Baba Chumba*. The incident took place at daytime and in view of the familiarity of both of them, the case of mistaken identity is excluded. The appellant admitted that he was *Baba Chumba* and the fact that PW 4 called him and lured him to his arrest supports the prosecution case that he was a neighbour. I therefore find and hold that the appellant is the person who committed the act of defilement.

11. In law the testimony of PW 2 did not require corroboration, it was capable of supporting a conviction under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides that the uncorroborated testimony of a victim in sexual offences is sufficient to support a conviction without corroboration, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate who heard the witnesses, stated that there was nothing to suggest that PW 1 had been coached and in his view she told that court what transpired and was telling the truth. Having evaluated the entirety of the evidence, I find the conviction well founded on the evidence.

12. The age of a child is a question of fact. There is no doubt that PW 2 was below the age of 18 years. Her birth certificate was produced and even though it was prepared during the proceedings, PW 3 was clear that PW 2 was born on 30th April 2002. She was aged below 11 years and such, the trial court was mandated to pass the sentence of life imprisonment under **section 8(2)** of the **Act**. The sentence was therefore within the law.

13. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at ELDORET this 23rd 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.