



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 77 OF 2016

BETWEEN

DUKE NYAMWAYA MONGENI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. N. Wairimu, PM dated 16th November 2018 at the Magistrates Court at Eldoret in Criminal Case SO No. 202 of 2018)

JUDGMENT

1. The appellant, **DUKE NYAMWEYA MOGENI**, 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 particulars of the offence were that 2nd November, 2015 in Estate Eldoret West District within Uasin Gishu County he intentionally caused his penis to penetrate the vagina of AN a girl aged 7 years.
2. The appellant now appeals against the conviction and sentence based on his grounds of appeal. He states that the trial magistrate erred in law and in fact in convicting him on a case that was not proved beyond reasonable doubt. He points out that the prosecution did not prove penetration and that the age of the child was not proved. He also stated that his defence was not considered. The respondent's view was the prosecution proved each element of the offence of defilement.
3. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that it neither heard nor saw the witnesses testify (see **Njoroge v Republic [1987] KLR 19**).
4. The prosecution evidence was that the appellant was a watchman at a compound near the school where the child, PW1, was attending. PW 1 and PW 2 both gave unsworn testimony that on 2nd November, 2015 as they were heading school, the appellant took PW 1 held her by the hand and took her to his house. PW2 recalled that the appellant left with PW 1 as she and the other children ran home. PW 1 told the court that the appellant did bad manners to her and that he, "*He put his dude in my dude*". Thereafter, the appellant wiped her and told her to go home and not look back. She also told the court that the appellant had sexually assaulted her before in the same house. She later told her father what transpired and he took her to hospital.
5. The child's father, PW 3, recalled that on the material evening, his daughter had different and when he spoke to her, PW 1 narrated to him her ordeal and told her that is, "the watchman near the school" who had defiled her. PW 3 told his wife PW 4 who examined PW 1 and observed that her private parts were bruised and there was a discharge.
6. PW 3 and PW 4 went to report the matter to the Police Station and to the school where PW 5 was the headteacher. PW5 confirmed that the appellant was a watchman at a compound next to the school. The Administration Police were informed and they arrested the appellant who was identified by the child.
7. A doctor at the Moi Teaching and Referral Hospital, PW 6, filed the P3 medical form. She testified that she examined PW 1 and that she had a scratch on the thigh, redness and pain the labia minora and her hymen was freshly torn. She affirmed that penetration had taken place.
8. In his defence, the appellant admitted that he was working as guard and that he was arrested on the material day.
9. The substance of the appellant's appeal is that the prosecution proved its case 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.”

10. I have considered the evidence and I find the testimony of PW1 was clear that she was subjected to an act of penetration. Her testimony on this issue was confirmed by the testimony of the mother, PW.3 who saw the state of her private parts and of PW.6 who confirmed that she had been injured. PW.1's injuries were consistent with penetration.

11. As to the identity of the appellant, PW.1 identified him as a watchman. She also stated that appellant has sexually assaulted her before. PW.2 was also present when she took her confirmed his identity and that he was working near the school. Likewise, when he was brought to the school on arrest he was properly identified. Though the appellant's defence was a mere denial, he accepted that he was working near the school as a watchman. I am satisfied on the basis of the evidence that the appellant was the person who cause an act of penetration to PW 1.

12. The age of a child is a matter of evidence. The appellant relied on the evidence of PW.6 to argue that the age of the child was 2 years. This was a mistake. The P3 medical form shows 7 years and so does the birth certificate. The child was below the age of 11 years hence the mandatory sentence of life imprisonment under **section 8(2)** of the **Act** was properly imposed.

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