



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA

CRIMINAL APPEAL NO. 101 OF 2015

BETWEEN

JUDAH KIMUTAI MAIYO.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence of Hon. G. Adhiambo, SRM dated 31st July 2015 at the Magistrates Court at Eldoret in Criminal Case SOA No. 3 of 2006)

JUDGMENT

1. This appeal by the appellant, **JUDAH KIMUTAI MAIYO**, was against conviction and sentence on one count of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* ("the *Act*") where he was sentenced to life imprisonment. The particulars of the offence were that on 23rd December 2014 at 00.20 hours in Sigot Sub-location within Nandi County, he unlawfully caused his penis to penetrate the vagina of JK, a boy aged 10 years. He was also convicted for the offence of rape contrary to **section 3** of the *Act* where the sentence was held in abeyance.
2. The appellant relied on his amended grounds of appeal. In summary he contested that conviction on the grounds that the prosecution failed to prove its case beyond reasonable doubt and that the evidence of identification was not safe and conclusive to sustain a conviction. He also added that medical evidence was insufficient and questionable and that the important element of penetration was not proved. He contended that his credible defence was disregarded. The respondent opposed the appeal and maintained the prosecution proved each element of the offence of defilement 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 all the time bearing in mind that I never saw or heard the witnesses testify (see *Njoroge v Republic [1987] KLR 19*).
4. The prosecution case was that on 23rd December 2014, the two complainants, JK (PW 1) and VK (PW 2) were sleeping in PW 3's house with PW 3, the appellant and another boy. PW 1 gave graphic evidence on how the appellant removed his trousers and underwear and did, "bad manners" to him through, "the hole where faeces come out when is in the toilet." PW 2 recalled after he had assaulted PW 1, the appellant, "put his penis in the hole that is my buttocks. The hole through which faeces come out." PW 1 told the court that the appellant was holding a torch belonging to PW 3 while PW 2 told the court that when the appellant was assaulting PW 1, he could hear PW 1 complaining. PW 1 tried to wake PW 3 up but PW 3 told him to leave him alone. PW 3 confirmed that he was in the same house with PW 1, PW 2, the appellant and another boy. He stated that came home to sleep but he was too drunk to hear or see anything.
5. The mother to PW 2 and the elder brother to PW 1 both testified that on the evening of the next day, they found out that the appellant had sexually assaulted the boys while they were sleeping at PW 3's home. They went to search for the appellant and found him, arrested him and handed him over to the police. They also took the two boys to hospital.
6. 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."
7. PW 1 and PW 2 both knew the appellant well as he was a herdsman in the neighbourhood. He was not a stranger to them and even though the incident took place at night, the interaction and proximity was sufficient to create circumstances favourable for positive identification. Moreover, the testimony of PW 1 and PW 2 was mutually corroborating as both of them were in the same room and PW 2 witnessed what the appellant was doing to PW 1. The testimony of PW 3 also confirms that there were only five people in the room and only himself and the appellant were the adults and since he did not commit the act of penetration, it is only the appellant who could have sexually assaulted PW 1

and PW 2.

8. The testimony of PW 1 and PW 2 is clear and consistent they were subject to an act of penetration by the appellant. PW 9 was the clinical officer, who initially examined both PW 1 and PW 2 on 24th December 2014, a day after the incident. He testified that PW 1 was feeling pain on the anal orifice and it was open but without bleeding but with indications of penetration. He also examined PW 2 who had pain in his anal orifice. His anal orifice was widely open and painful although there were no bruises. This evidence confirms that the children were indeed sodomised.

9. The appellant's defence was that he was framed by PW 4 who owed him money. I agree with the trial magistrate that the defence was an afterthought as he did not raise the issue with PW 4 when given an opportunity to cross-examine him. Moreover, the other evidence was overwhelming leaving no doubt that it is the appellant who caused the act of penetration to both PW 1 and PW 2.

10. The age of a child is a question of fact. As regards PW 1, the immunization card of PW 1 was produced which showed that he was born on 23rd December 2014 hence he was aged 11 years. The trial magistrate considered PW 2 as an adult as his age was not proved on the basis that it was not enough for him to say that he was 10 years old. Although I disagree with this approach, the respondent did not cross-appeal on this issue. She therefore found the appellant guilty of rape under **section 3(3)** of the **Act** in respect of PW 2. On the other hand, since PW 1 was aged below 11 years under **section 8(2)** of the **Act** the court was mandated to impose a sentence of life imprisonment.

11. There was no need to hold that the second sentence be held in abeyance. I dismiss the appeal. However, I vary the sentence the extent that Count 1 of life imprisonment and Count 2 of 10 years' imprisonment shall run concurrently.

DATED and DELIVERED at ELDORET this 23rd day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

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