



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 26 OF 2017

(FORMERLY ELDORET HCCRA NO. 118 OF 2013)

DANIEL KIPROTICH LANGAT.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama

Ravine Cr. Case no. 489 of 2012 delivered on the 13th day of June, 2013 by Hon. M. Ag. Ochieng, SRM)

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act, on 13/6/2013.

2. The appellant challenged the conviction and sentence upon the grounds set out in the Amended Supplementary Grounds of Appeal as follows:

(1) That the learned trial Magistrate convicted me on prosecution evidence which did not support the charge meted against me the appellant.

(2) That the learned trial Magistrate convicted me on defilement where the offence did not contain the necessary information as the nature of the offence charged.

(3) That the learned Magistrate convicted me whereas the prosecution evidence was doubtful and incredible.

(4) That the trial Magistrate convicted me by failing to take into consideration my defence in line with the Prosecution evidence before arriving at her conclusions.

The appellant filed written submissions on the said grounds of appeal.

3. At the hearing, the DPP opposed the appeal in oral submissions as follows:

“DPP

Appeal is opposed

Appellant convicted for defilement contrary to section 8 (1) (2) of the Sexual Offences Act and sentenced to life imprisonment.

Pw1 who was the complainant stated in her evidence that she was 8 years old. It was corroborated by evidence of Pw2 who produced a copy of the child Health Card indicating that the complainant was born on 8/11/2004.

Appellant was positively identified by complainant and she reported to Pw2 and her grandmother.

Pw1 had known the appellant as employee of the grandmother and the incident took place during the day, and therefore Pw1 would see the appellant well and she had no reason to implicate him.

Pw5 examined complainant and on examination genitalia had bruises on both left and right minora and he testified that although the hymen was intact Pw1 had been infected with Gonorrhoea. He concluded that there was penetration. Penetration may be partial or complete.

In his defence, the appellant denied being at the scene of offence which is a mere denial. The evidence is overwhelming and there is no other sentence under section 8 (2) of the Sexual Offences Act.

We urge court to dismiss the appeal.”

Whether defilement proved against appellant

4. The issue is whether defilement was proved against the appellant. The complainant, an 8 years old girl gave sworn evidence upon the Court finding that “minor is composed of good understanding of oath and may give sworn evidence”

“PW1

I am DCK. I am 8 years old. I go to [particulars withheld] Primary School class two. On 23.05.2012 ‘gogo’ told me to sweep Daniel Kiprotich Langat’s house. Daniel Kiprotich Langat is accused herein. (Accused pointed out). Daniel Kiprotich Langat was living at ‘gogo’s home. He was digging the farm. G told me to sweep Daniel Kiprotich Langat’s house which I did. He came and did ‘tabia mbaya’. It was Daniel Kiprotich Langat. I did not raise alarm. Daniel Kiprotich Langat’s house is one roomed. He laid on my stomach. He left me and went away. He removed my clothes. He removed his inner wear. I remained in the house. No. one found me in that house. [Pursuant to section 199 CPC complainant is distressed and crying.] I went home. I did not tell my mother. She had gone to church. I told ‘shosho’. She did not say anything. My mother wanted to wash our clothes. She washed my clothes. It was a white dress. It was a white dress. It was the inner clothes. My mother asked me. I told her Daniel Kiprotich Langat did ‘tabia mbaya’. I was taken to hospital. We went to Mlango Moja. There was no one. We arrested Daniel. We took him to the Police. We were given P3 form – MFI – 1 which was duly filled by doctor.”

5. The complainant’s mother Pw2 corroborated the evidence of the minor when she at washing found the minor’s clothes dirty as follows:

“PW2

I am ET. I live in [particulars withheld]. I am a farmer. On 23.05.2012 at 4 pm I went for evening prayers in church. I left the children at home with g. I found out on the next day 24th about what happened. I wanted to wash clothes. The child’s clothes were dirty. It was her inner wear. It was dusty. I asked the child. She told me that her grandmother sent her to sweep Daniel Kiprotich Langat’s house. Daniel Kiprotich Langat came and held her. He did not say anything. I went to hospital at Eldama Ravine District Hospital on that day. She was treated. I was given a medical chit – MFI – 2 referred. I was given a P3 form – MFI – 1. Identified. I took it to hospital. The doctor filled it. I took it back to the hospital. My home and Daniel Kiprotich Langat is not too far. My child is 8 years old. Copy child Health Card. – MFI – 3. Original got burnt. I looked for another one in hospital. I was given this copy. It is rubber stamped. The child was on 08.11.2004. It is in the names of DCK the police helped me arrest accused. No grudge. My home is approximately 300 metres from Daniel Kiprotich Langat. Daniel Kiprotich Langat is accused herein. Complainant is my child. I am not related to Daniel Kiprotich Langat. Daniel Kiprotich Langat works in the shamba at home for now 2 months.

Cross-examination

I got home at 6 pm that is when the deed was done. On 23rd I realized at about 2 pm after the child went to school and came back on 24th. I was in the shamba with my husband. You were also in the shamba. At 1 pm when the child came you were worried. You left, I don’t know whether you used to go to the farm with my husband. I reported on 24th. You were drunk. People came. You said you would go to the police who took action. You were drunk even at the shamba.

Re-examination

We were in the farm on 24th. We did not go to the farm on 23rd with accused.”

6. The medical evidence of Pw5 is clear as to a case of “trial of forceful penetration” as follows:

“PW5

I am Philip Kipkorir Yator. I am a Doctor at Eldama Ravine District Hospital. MFI – 1 referred. I filled it on 28.05.2012 patient was 8 years old brought with complain of defilement by a known person and a herdsboy in his house. Patient reported he removed her pants, closed her mouth to stop her from screaming and defiled her once. Minor looked worried on examination was physically and mentally stable.

Thorax and abdomen – on the lower side of the abdomen. Genitalia had bruises on both right and left labia minora. She had hyperemic hymen, but not perforated. She had vaginal discharge whitish in colour. Urinalysis – many pus cells detected meaning there was an infective process. There was trauma inflicted on external reproductive system of child. There was trial of forceful penetration but the real penetration did not occur because hymen was intact.

I made finding of defilement. P3 form exhibit 1. MFI - 2- accompanied the patient to my office. Relied on it and filling P3 form. MFI-2 now exhibit 2. Child health card MFI – 3 from Eldama Ravine District Hospital referred – Name corresponds to name on P3 form. Date of birth 08.11.2004 now exhibit 3.

Cross examination by accused

Patient said she was defiled on 23.05.2012 at 10.00 am. I did not ask patient about school, I only asked what happened. I did not find spermatozoa. It is not a must that it be found. Results are seen in 3 days. I did not see you when I examined the child. I did not examine you. You should have been examined for your own good as we found the child had bacterial infection. The child said she was told not to tell anyone or her mother would discipline her, by the perpetrator. Her mother brought her to hospital when she was told the incident by the child. The child was defiled on 23rd but came to hospital on 25th.

Re-examination

There are instances where perpetrator does not ejaculate especially when there is fear. It is retrograde ejaculation. During HVS we look for spermatozoa and pus cells which may cause gonorrhoea. Infection was there which gonorrhoea is.”

7. The appellant raised an alibi defence as follows:

“DW1

I am Daniel Kiprotich Langat. I live in Timboroa. I am a Mason. On 23.05.2012 complainant said she was defiled. On that morning I woke up and went to work at complainant’s home where I was employed as a herder. I had work to weed maize. I weeded from 8:00 am to 2 pm with the complainant’s father. I was paid my dues at 2 pm of 1350/= complainant’s father borrowed 200/= from me, which I gave him. Then I went with him at 3 pm to do some more digging in another farm. I left the farm at 6 pm and went home. I went to the posho mill thereafter, it rained I stayed at the posho mill till 7:30 pm. I went back home I had also been sent by g to grind her maize. I took her maize and went to my house. I slept till 24th.

At 6:30 am complainant’s mother came to my house. Knocked on the door. I woke up. She said she wanted me to lend her 500/=. I did not. She went back to her house. I woke up and did my milking chores. At 8:00 am I went to weed the shamba with complainant’s father and mother till 2:30 pm. Complainant came from school and came to the shamba told her father she was sent to get activity fee of 50/=. His father asked me to lend him 50/=. I gave it to the child. The child’s mother later came to quarrel and asked why I defiled the child. I was taken to Police Station. My statement was recorded. I was put in cells.”

Analysis of the evidence

8. Upon considering the evidence of the prosecution against the unsworn statement of the defence as a whole, I find overwhelming evidence of sexual assault on the complainant by the appellant whom she knew and was able to identify as he lived at her grandmother’s home, the assault being confirmed by medical evidence of the Dr. Philip Yator, Pw5. The unsworn statement by the appellant that he was at shamba with the complainant’s father from 8 am to 2pm and thereafter at another shamba up to 6pm must be dismissed as an afterthought as it was not raised earlier in the proceedings or on the cross-examination of the complainant Pw1.

9. Although the doctor referred to the case as one of a “*trial of forceful penetration*” he made the correct finding of defilement because in terms of section 2 of the Sexual Offences Act, penetration is defined to include partial penetration. In this case, there was evidence of bruises on both right and left labia minora and, therefore, although what the doctor calls “*real penetration did not occur because hymen was intact*” the partial penetration that caused the bruising of the labia minora was sufficient penetration for purposes of the Sexual Offences Act. It matters not that there was no spermatozoa.

10. The appellant was, therefore, properly convicted of the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act, the trial court having considered the evidence of age of the complainant as demonstrated by the Child Health Card of Pw1 indicating her date of birth as 8/11/2004 and, therefore, 8 years old on 23/5/2012, the date of the defilement.

Order

11. Accordingly, for the reasons set out above, the Court finds no merit in the appellant’s appeal herein and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF MAY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

