



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.43 OF 2017

(Being an appeal from the decision and sentence by Hon. S. Mokuu (CM) in Kericho S. O. No.86 of 2016)

HEZBON CHANZU ABIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted in the Chief Magistrates Court at Kericho with defilement contrary to section 8 (1) (2) of the Sexual Offences Act. The particulars of the offence were that on 5th January 2017 at around 5.30 p.m at [particulars withheld] Village in Kabianga Location, Kericho West District within Kericho County wilfully and intentionally caused his penis to penetrate the vagina of LKN (name withheld) a girl aged 8 years. He was sentenced to life imprisonment.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the grounds that-

a) The trial magistrate erred in law and fact by convicting him without proper consideration that the entire prosecution evidence was contradictory and insufficient and based on fabrication and conspiracy.

b) Section 169 (i) of the Criminal Procedure Code was contravened.

c) The magistrate erred in convicting him yet the entire prosecution evidence did not attain the threshold of proving a case beyond reasonable doubt.

3. The appellant also filed written submissions which I have perused and considered. At the hearing of the appeal, the appellant added that he was implicated maliciously because his employer had gone to his younger wife that day. He added that his employer had borrowed Kshs.1,500/- from him which he had not paid back.

4. The Learned Assistant Director of Public Prosecutions Mr. Ayodo opposed the appeal and submitted that the victim (child) PW1 gave clear evidence on how the appellant lured her to his house and defiled her, and that she informed her father PW2 about the incident. In addition PW4 the Clinical Officer confirmed that the complainant had bruises in her vagina, which was evidence of partial penetration. Since PW1 was 8 years old, the offence was proved.

5. Counsel also argued that section 169 (1) of the Criminal Procedure Code (cap.75) was complied with by the trial court which gave the reasons for arriving at its findings.

6. This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic [1972] EA 32.**

7. Having perused and considered the evidence on record, I am of the view that the prosecution proved their case beyond any reasonable doubt. There is no doubt that PW1 the complainant was a minor at the time of the incident. The incident occurred in broad day light and the complainant reported that same evening to her mother, who unfortunately did not testify as the investigating officer PW5 sgt Joan Chelagat stated that she moved to her rural home after the elections. However, the complainant's father PW2 Evans Okemwa Obai gave clear evidence about the report that was also made to him when he came back from tea picking and he gave instructions to his wife for a report to be made to the police, which happened.

8. The Clinical Officer PW4 Joshua Kibet confirmed finding bruises in the vagina of the complainant which was evidence of partial penetration. In my view, it was established that the complainant was sexually penetrated by the appellant. The issue raised by the appellant about the employer having gone to visit his younger wife and about a debt of Kshs.1,500/- owed to him by a neighbour was an afterthought

meant to divert attention, as he did not raise any such issue during cross-examination.

9. With regard to section 169 of the Criminal Procedure Code (cap.75), in my view, the trial court complied with the requirements for writing a judgment. As for sentence, it was the minimum sentence and thus lawful.

10. I thus find no merits in the appeal. I dismiss the appeal and uphold the decision of the trial court. Right of appeal explained.

Dated and delivered at Kericho this 27th day of November 2019.

George Dulu

JUDGE