



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 70 OF 2016

EKAI ALELO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Senior Resident Magistrate Hon. J.M. IRURA, delivered on 29/7/2016 in ISIOLO Court Criminal Case No. 372 of 2015.)

JUDGMENT

The appellant was charged with the offence of defilement Contrary to Section 8 (1) (2) of the Sexual Offence Act Number 3 of 2006. The particulars of the offences are that the appellant on the 29th day of August 2015 at [particulars withheld] area in Isiolo County within Eastern Region, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of M.A. a child aged 11 years.

The trial court convicted the appellant and sentenced him to serve life imprisonment. The grounds of appeal are that:-

1. The trial court relied on inconsistent, uncorroborated and contradicting evidence to convict the appellant.
2. The circumstances were not favorable for positive identification.
3. The trial court erred in law and fact by relying on the evidence of minors who could not understand the meaning of taking oath.
4. The trial court relied on the evidence of the medical examination officer (PW3) which evidence was conflicting and inconclusive.
5. The prosecution failed to prove its case beyond reasonable doubt.

The appellant submits that the prosecution evidence was inconsistent, contradictory and not corroborated. PW1 testified that the person who defiled her was wearing a T-Shirt bearing the word “Kenya”. PW4 testified that the same person was wearing a shirt with the word Kenya and a Kikoi. There is a difference between a T-Shirt and a shirt. The two witnesses contradicted each other. The appellant further submits that the circumstances under which the identification was made was not favorable for positive identification. The complainant claimed that she was walking home when she was accosted by the appellant who instantly attacked and defiled her. The only way she identified the appellant was because he was wearing a T-Shirt bearing the word “Kenya”. PW1 and PW4 had never seen the appellant before. The fact that the two witnesses alleged that the appellant was wearing a T-Shirt branded Kenya does not clearly point to the guilt of the appellant. It is possible that the complainant was defiled by somebody else wearing a branded T-Shirt and by coincidence the appellant was also wearing a T-Shirt branded Kenya.

The appellant also submits that the prosecution witnesses lacked integrity and credibility. The complainant did not explain how long the incident took. There is a possibility of mistaken identity. The complainant was a minor who could not understand the consequences of either taking an oath or making an affirmation. The evidence if the minor is required to be corroborated. The medical evidence found that the hymen was broken. For a hymen to be broken, it is not mandatory that forceful penetration is the cause. Sports and games can be the cause of her hymen to be broken. The approximate age of the injuries was given as four days. According to PW2 the complainant was taken to hospital for treatment soon after she was defiled. The evidence is contradictory. It is submitted that the appellant was framed. There is evidence that those who arrested the appellant followed footsteps of the appellant but the size or the type of the shoes the appellant was wearing was not explained. The incident occurred on a public road.

The state opposed the appeal. **MR ODHIAMBO** submitted that the case was proved beyond reasonable doubt. The age of the minor was proved through the immunization card she was eleven years old. A P3 form was produced and penetration was proved. The offence occurred on day broad light and the minor was able to identify the appellant through the clothes he was wearing. The appellant was arrested the same day wearing the same shirt with a Kenya logo. The issue of there being a grudge was not raised before the trial court.

Before the trial court seven witnesses testified. PW1 was the complainant. She testified that she was eleven years old and a pre-unit pupil at Ngaramara. On the 29th day of August 2015 at about 4.00pm she was going home from Ngaramara shopping center in the company of other small children. The appellant was following them. The appellant held PW1's small sister and threw her away. The other children ran towards their home as they had reached not very far away from home. The appellant pushed her on the ground and defiled her. He then slapped her on the cheek and warned her not to tell anyone otherwise he would kill her. She felt a lot of pain and was not able to walk properly. The appellant was wearing a T-Shirt with the word Kenya. The appellant left and she started walking towards home. She met her brother (PW5) and narrated to him what the appellant had done. She told her brother that the defiler was wearing a shirt with the word Kenya. The defiler was also wearing a black kikoi and had a lesa which he had tied around himself. PW1's mother was called and took her to hospital. Thereafter the case was reported at Isiolo police station. She was issued with a P3 form.

PW2, MME is PW1's mother. She was called on 20th day of August 2015 at about 4.00pm and informed that her daughter had been defiled. She went home and found PW1 crying. She checked PW1 and found that she had blood stains and her clothes were dirty. PW1 told her that the person who defiled her was wearing a T-Shirt labeled "Kenya" and had a kikoi and a lesa tied on his shoulders. The matter was reported to the area councilor who organized with a driver from the conservancy to have the suspect arrested. PW2 took her daughter to hospital. She went back and found that the appellant had been arrested. She knew the appellant as he comes from Manyatta Zebra.

PW3, KARAIYU JILLO is a senior clinical officer who was stationed at the Isiolo district hospital. He produced a P3 form which had been filled by his colleague **DAUDI DABASO** who he had known for two years and he was familiar with his hand writing. The P3 form was filled on 3rd day of September 2015. PW1 had tenderness on the right side of the neck and tenderness in the abdomen. She also had tenderness on the lower limbs on the thighs. The approximate age of the injuries was four days. Upon examination of her genitalia, the hymen was torn and there were aspects of bleeding. PW1 had a whitish discharge. Urinalysis examination was done and it showed puss and epithelial cells. The examining officer opined that there were signs of forceful penetration and defilement had taken place.

PW4, CL is a cousin to PW1. She gave unsworn evidence. She was eleven years old. On the 29th August 2015 she was from the shops at Ngaramara heading home together with PW1. There was a tall man who was following them. He was wearing a shirt with the words "Kenya" and a kikoi. The man held PW1 by the chest and she fell down. PW4 stated running towards their home. She informed KINYUA and NATOBEI (**PW5**) about the incident. She told the two that someone was defiling PW1. She was there when the appellant was arrested. PW1 was not walking properly after she was defiled. The appellant was arrested and was taken to them and she was able to recognize him because of the clothes he was wearing. **PW5, JN** is a brother to PW1. He finished his standard eight in 2015. On 29th of August 2015 at about 4.00pm he was at home washing clothes. He heard children screaming as they were running towards home. PW4 informed him that someone was holding PW1. He was informed that the person was wearing a green T-Shirt with the word Kenya and also wearing a kikoi. He called other people and they went towards the road. They met PW1 who was crying and her feet were dirty. She told them that the person who had defiled her had followed a road downwards. They went up to the place where PW1 was defiled and saw foot marks. They saw the appellant who started running away. They managed to arrest him and took him to their home. The appellant was wearing a green T-Shirt with the words "Kenya" on it and had a flowered Kikoi. He had not seen him before. He was arrested and taken to the police station.

PW6, EKONO KORET MICHAEL is the chairman of the NAKUPAT GOTU Conservancy in Ngaramara. On the 29th of August 2015 at about 4pm he was attending a funeral when PW2 went there and informed him that her daughter had been defiled. He accompanied PW1 and PW2 to Isiolo district hospital. They then went to Isiolo police station where the case was reported. While at the hospital he got information that a suspect had been arrested. He directed that the suspect be taken to the police station using the conservancy vehicle. He saw the appellant whom he had not known before. **PW7 PC. CYRUS WAHOME** was stationed at Isiolo police station. On the 29th day of August 2015 at about 7.00pm the complainant was taken to the station with her parents. The case of defilement was reported. PW1 informed him that she was taken to the bush and defiled. PW7 investigated the case and caused the appellant to be charged with the offence. He was shown the immunization card of PW1 and it showed that she was born on 22nd of October 2004.

The appellant was put in his defence but he opted to remain silent.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is that on the material day she was walking together with other children from Ngaramara shopping center towards home. It was about 4.00pm. PW4 was with her. It is her evidence that there was a man following them who was wearing a T-Shirt labeled Kenya. The man was also wearing a kikoi and had a lesa tied on him. According to PW1 she was pushed down and defiled. The other children got scared and ran away. The medical evidence is to the effect that PW1 was defiled. Her hymen was torn and she had a whitish discharge. The incident occurred during the day. PW5 was at home when children including PW4 went there running and screaming. He was told that somebody was holding PW1. PW5 walked towards the road and saw PW1 who informed him that she had been defiled. PW1 also told them that the defiler had followed a certain route. They followed the route given by PW1 and were able to arrest the appellant.

The appellant contends that the circumstances were not favorable for positive identification since the incident was abrupt. According to PW1 and PW4 there was a man following them as they were walking. The two witnesses were able to describe the clothes the man was wearing. The incident occurred at about 4.00pm and PW1 and PW4 clearly saw the person who was following them. I do find that the circumstances were favorable for positive identification. The appellant also submits that whereas PW1 testified that the appellant was wearing a T-Shirt. PW4 alleged that it was a shirt. According to PW5 he was informed by PW4 that the person who had held PW1 was wearing a green T-Shirt. PW4 is a minor who was eleven years old and couldn't have been expected to differentiate between a shirt and a T-shirt. The most important thing is that PW1, PW4 and PW5 made reference to a T-Shirt which had the word "Kenya" on it. There is also the evidence that the defiler was wearing a kikoi. PW1 referred the Kikoi to be black in color. According to PW5 when the appellant was arrested he was wearing a green T-Shirt labeled Kenya and a flowering kikoi. According to the appellant it was a mere coincidence that he was also wearing a T-Shirt bearing the word "Kenya".

The evidence on records shows that the appellant was arrested shortly after the incident. PW4 informed the court that she was hiding behind trees when she saw the appellant arrested. She was able to identify the appellant as the person who had held PW1. This is not a case of mistaken identity. The arrest was made soon after the incident. It cannot be mere coincidence that the appellant was wearing the same clothes as those described by PW1 and PW4. The appellant was arrested near the scene and he is the one who defiled PW1. The prosecution

evidence is consistent and not contradictory. PW1 and PW4 are minors but their evidence is credible. The medical evidence proves that there was penetration and the offence of defilement was committed. The age of PW1 was proved as her immunization card was produced. The child was born on 22nd of October 2004. She was eleven years old when the defilement took place. The appellant contends that the complainant's mother was his wife and there was domestic misunderstanding between them. He had sent her back to her parents due to her bad manners. The complainant is her biological daughter and he could not have defiled her. He was framed due to the grudge. The evidence on record disproves all those allegations. PW2 knew the appellant as he comes from a different manyatta. PW2 testified that she has nine children and the complainant is her second last born child. There was no indication during cross examination that there is any relation between the appellant and PW2. PW1 was eleven years old and did not know the appellant. The same applies to PW5 who is PW2's son. There was no grudge as alleged by the appellant. This is an afterthought.

In the end I do find that the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and is hereby disallowed.

S. J. CHITEMBWE

JUDGE.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF JANUARY, 2018.

A. MABEYA

JUDGE.