



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.11 OF 2017

E K L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court Sexual Offences Case No. 34 of 2016 (Hon. J. Ndururi, PM))

JUDGMENT

1. The appellant, E K L, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars of the offence are that on the 8th day of March 2016, at around 13.00 hours at [particulars withheld] Village, Ainamoi Location within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of D C, a child aged 9 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The appellant pleaded not guilty to the offence and was tried before the Chief Magistrate's Court in Kericho. He was found guilty of the main count of defilement as charged in the judgment of the court dated 1st February 2017. He was sentenced to life imprisonment as provided under section 8(2) of the Sexual Offences Act.

3. Dissatisfied with both the conviction and sentence, he has filed the present appeal in which he raises the grounds which are set out hereunder verbatim:

- 1. That the learned trial magistrate approached prosecution case had no value in a view that it was full of contradiction evidence. (sic)***
- 2. That the learned trial magistrate failed to take into account that there was no exhibit availed in court to support the charges despite this being a heinous crime.***
- 3. That the learned trial magistrate erred in both law and facts by convicting and sentencing me while relying on uncorroborated evidence adduced by prosecution.***
- 4. That the learned trial magistrate erred in both law and facts by ignoring my defense which was strong enough to acquaint me.***
- 5. That the learned trial magistrate erred in law and facts by not making a finding that I and the complainant had grudge and to rely on her evidence was total unsafe.***
- 6. That the learned trial magistrate in both law and facts while relying on hearsay statement from the witnesses.***
- 7. That the learned trial magistrate erred in both law and facts when he relying on exhibit and threats from unknown person's and yet I was already arrested.***

4. The appeal was argued before me on 7th December 2017. The appellant appeared in person and filed written submissions which he asked the court to rely on. Mr. Jacob Mutai appeared for the state.

5. As the first appellate court, I am required to re-evaluate the evidence and reach my own conclusion. In doing so, I must bear in mind that I have not had the advantage of hearing or seeing the witnesses which the trial court had the advantage of doing-see **Okeno vs R [1972] EA 32** and **Mohamed Rama Alfani & 2 Others vs Republic Criminal Appeal No. 223 of 2002.**

6. The unsworn evidence of the complainant, PW1 (hereafter 'the child'), who was unsworn, was that she is 9 years old and in class 3. On 8.2.2016 she left school at about 4.00 p.m. and went home. She found her mother at home. She then went to her friend C's home where she found C's father E (the appellant) outside. She went inside her friend's house and her friend's father followed her and asked her to undress but she did not. He removed her underpants and 'slept' on her, using his manhood, and she felt pain and cried, but no one came. She then went home. She did not tell her mother what had happened.
7. PW2 was the child's mother, J C T. Her evidence was that she had left the child, who was born on 31st August 2007, at home. She returned home at 6.00 p.m. on the material day. The following day, she was informed by C C (PW3, C) that the appellant had told C that he had chased the child and another boy out of his house. C had informed PW2 that she had seen the child going away while crying and walking with some difficulty and attempting to put her bikers on.
8. When the child returned home from school, PW2 asked her what had happened. The child informed her that she had gone to look for C but the appellant had got hold of her and defiled her. PW2 testified that she also noticed that the child was walking with difficulty, and she took her to Ainamoi Health Centre the following day then reported the matter to the Chief who referred her to Ainamoi Police Post where she made a report and was issued with a P3 form. She took the form and the child to Kericho District Hospital where the child was examined and the P3 form filled. PW2 further stated that the appellant was a cousin of her husband's and that they had a good relationship with no disputes.
9. PW3, C C C, had been walking home on the material day. The road passed near the appellant's house. He had called her and asked if she had seen any boy going away. She had informed him that she had not, but that she had met the child walking, while trying to put on her clothes, towards her home. Her evidence was that she had met the child a few metres from the appellant's home. The child was crying while trying to put on her biker, which she was holding in her hands. The following day, C told the child's mother what had happened the previous day. She also stated that the appellant was a distant brother in law with whom she had had a good relationship.
10. The evidence of PW4, Nancy Kosgei, is that she had passed near the appellant's house on the material day on her way to a funeral. She had seen the appellant sitting in his compound. She saw a girl standing near the appellant's door, whom she thought was the appellant's daughter, C, and she called the girl by the name C. The appellant informed her that the child was C and the girl came to the open and PW4 confirmed that it was the child in this case, PW2's daughter. Nancy later came to learn that the appellant had defiled the child. She stated that she had no grudge against him.
11. PW5 was CPL Elsie Leting, the investigating officer. She received a report of defilement of the child on 16th March 2016. PW6 was the clinical officer, Robert Kipyegon Langat. He produced the P3 form in respect of the child which had been completed by Yego Kirwa who had examined the child on 21st March 2016. The child had been sent to the hospital 13 days after the event. The medical evidence contained in the P3 form was that the child had a bruised *labia majora* and bruises on the vagina walls. There were a moderate amount of pus cells and red blood cells, but no vaginal discharge or spermatozoa. On the basis of the bruises on the vagina wall, the opinion of Yego Kirwa who examined the child was that she had been defiled. The P3 form was produced in evidence by PW6.
12. The court found that the prosecution had established a *prima facie* case and placed the appellant on his defence. In his defence, the appellant gave an unsworn statement. He stated that the offence he knew was not the one read to him in court. He made a statement about events of 13th June 2016 when he was at home and was informed that some cattle were at his farm. The cattle belonged to the child's mother. He drove them out of his home and the child's mother later came and insulted him. He was later arrested on 18th June 2016. The gist of the unsworn defence, as I understand it, is that the case against him was due to a grudge between him and the mother of the child over events that took place 3 months or so after the defilement.
13. In his analysis, the trial magistrate found that the child fell within the age bracket provided under section 8 (2) of the Sexual Offences Act as her birth certificate (P exhibit 1) showed that she was born on 30th August 2007. With respect to penetration, the court found that from the evidence of PW2, PW3, PW4 and PW6, there was no doubt that the child's genitals were penetrated. He also found that it was the appellant who had defiled the child.
14. In his submissions, the appellant notes that the child stated that she recalls 8th February 2016, while the charge sheet states the offence was committed on 8th March 2016. He submits that the child was couched by her mother, PW2. This was because PW2 had threatened him when her cattle had strayed into his bananas. He submits that all the witnesses, PW2, PW3, PW4 and PW6 framed him. He also pointed out various contradictions in dates and hours to argue that the contradictions should be resolved in his favour.
15. I have considered the submissions of the appellant and the oral submissions in response by the state. I note from the court record that the child defiled by the appellant was 8 years old at the time of the offence. The birth certificate produced in evidence showed that she was born on 30th August 2007 at Kericho District Hospital.
16. Her evidence, which the trial court, in my view, rightly believed, was that she had gone to visit her friend C, the appellant's daughter. She found the appellant at home, and he followed her into the house and defiled her. The appellant was someone she knew, the father of her friend. She could not have made an error about his identity. She may have been mistaken about the date the event occurred, but this was a child of tender years, who had undergone a traumatic experience, and I do not think the mistake in her evidence on the date the events occurred in any way weakens the prosecution case.
17. Moreover, the child was seen standing by the appellant's door by PW4, Nancy Kosgei, who initially thought she was the appellant's daughter, C. She was also seen by PW3, C C, crying, walking with difficulty, holding her biker in her hands, trying to put it on as she walked. Her own evidence was that the appellant had followed her into his house, told her to undress and when she had not, removed her bikers and defiled her.

18. The appellant latches onto some contradictions in dates mentioned by the witnesses, notably the child. In my view, however, these are not material. He also alleges that the biker that the child was carrying as she left his house was not produced in evidence as an exhibit. Again, this does not help his case, in light of the other evidence against him.

19. From the evidence of C C, PW3, the appellant tried to create a story to, perhaps, hide behind should the defilement of the child come to light. He asked PW3 whether she had seen a boy whom he had chased away, with the girl, from his house. This was clearly an attempt on his part to divert attention from himself.

20. Finally, he argues that he was framed by all the witnesses. The reasons for this, according to the appellant in his unsworn statement, was a quarrel over cows between him and the mother of the child that took place on 13th June 2016.

21. Having considered the appellant's grounds of appeal against the evidence adduced against him, I am unable to find any merit in his appeal. The child was 8 years at the time of the defilement. Section 8(1) and (2) of **Sexual Offences Act**, under which the appellant was charged, provides that:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

22. A birth certificate was produced which showed that the child was born on 30th August 2007. She was therefore below 11 years. Penetration was proved by the medical evidence, which indicated that 13 days after the defilement, there was bruising of the child's *labia majora* and vagina walls, as well as pus cells. The identity of the perpetrator was not in doubt: tragically, it was the father of the child's friend. The appellant had no compunction in defiling his daughter's friend, a child who was so much like his daughter that a neighbour could mistake the two from a distance.

23. This appeal has no merit, and it is hereby dismissed and the conviction and sentence upheld.

Dated Delivered and Signed at Kericho this 21st day of February 2018.

MUMBI NGUGI

JUDGE