



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 153 OF 2017

CORAM: D.S.MAJANJA J.

BETWEEN

ABDI NOOR KAMISA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.J.W.

Wanganga, RM dated 15th November 2017 at the Chief Magistrate's

Court at Maua in Criminal Case No. 41 of 2014)

JUDGMENT

1. The appellant, **ABDI NOOR KIMISI** was charged with the offence of defilement contrary to **section 8 (1) and (2)** of the ***Sexual Offences Act***. It was alleged that on diverse dates between 28th December 2013 and 31st December 2013 at [particulars withheld] in Garbatulla Sub-county of Isiolo County, he intentionally caused his penis to penetrate anus of RA, a child aged 7 years. He also faced an alternative charge of indecent act with a child contrary to **section 11 (1)** of the ***Sexual Offences Act*** grounded on the same facts. He was convicted and sentenced to life imprisonment and has now preferred this appeal.
2. The questions raised by counsel for appellant is whether penetration was proved. She submitted that the child (PW 1) did not give any evidence that he was subjected to penetration of the anus. She pointed out that although he told his grandmother (PW 2) that he had been sexually assaulted previously, PW 1 did not testify to this fact. Moreover, she submitted that the medical evidence was uncertain as to whether there was penetration.
3. Counsel for the respondent opposed the appeal. He submitted that the testimony of PW 1, PW 2 and the Clinical Officer, PW 3, taken together proved penetration and in terms of **section 2** of the ***Sexual Offences Act***, penetration includes partial penetration.
4. I am obliged to re-evaluate the evidence adduced so as to reach an independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that I neither heard nor saw the witnesses testify (see ***Njoroge v Republic [1987] KLR 19***).

5. PW 1 gave unsworn testimony that he was with the appellant while they were taking care of goats on 28th December, 2012. He narrated what took place as follows, “*He removed my trouser, then told me to hold my feet and he was on top of me.*” He thereafter reported the incident to his grandmother, PW 2. PW 2 recalled that PW 1 told her on 1st January 2014 that he had difficulty in going to the toilet because the appellant had defiled him and threatened him if he reported the matter. She decided to report the matter to the police station.

6. The P3 form was filled by a Clinical Officer (PW3). He examined PW 1 on 22nd January 2013. After examining, the child he noted that there was possible penetration in the anus as there was a laceration on the anus although he did not see any bleeding or discharge.

7. The appellant elected to exercise his right to remain silent in his defence.

8. After considering the entirety of the evidence, I am not satisfied that the prosecution proved the act of penetration. The testimony of PW 1 did not state or allude to any act of penetration. Further he did not give evidence on what he told PW 2 particularly that the he had been sexually assaulted before. Given that PW 1 was examined about a month after the incident, it is not surprise that the PW 3 concluded that there was probably penetration.

9. But thus not the end of the matter, PW1 clearly testified that DW1 told him to remove his trouser and lie on top of him. In my view and that of the appellant did satisfies the ingredients of an indecent act with a child. There was no reason for PW 1 to lie nor was it suggested in cross examination that he had reason to implicate the appellant. There is also no doubt from the testimony of PW 1 and PW 2 that the appellant was known to them.

10. Consequently, I allow the appeal and set aside the conviction and sentence for defilement and substitute it with a conviction for the alternative charge of indecent act with a child contrary to **section 11 (1)** of the ***Sexual Offences Act***. Accordingly, the appellant is sentenced to 10 years’ imprisonment.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.