



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO.16 OF 2017**

**DIBA YATTANI BORU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Judgement of the Principal Magistrate, Hon B.M. Ombewa at Marsabit delivered on 7.12.2017 Criminal Case (SOA) No.10 of 2017)*

**JUDGEMENT**

The Appellant was charged with the offence of Sexual assault contrary to section 5(1) (a) as read with Section (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on 3<sup>rd</sup> July 2017 at Marsabit County, unlawfully used his fingers to penetrate the vagina of K.A. K. a child aged 3½ years.

The trial Court convicted the appellant and sentenced him to serve ten (10) years imprisonment. The grounds of appeal are THAT:-

- 1. The appellant pleaded not guilty***
- 2. The medical evidence did not connect the appellant with the offence.***
- 3. The prosecution evidence is riddled with contradictions***
- 4. The translator and complainant are from the same clan and were the appellant's political rivals.***
- 5. Non of the members of public who alledgly went to the scene testified.***
- 6. The appellant was denied the chance to mitigate***
- 7. The appellant is the sole bread winner of his family.***

During the hearing of the appeal, the appellant stated that he relies on his grounds of appeal. He is 68 years old and has seven (7) children. Three of his children were in secondary school but have left school. The chief went to the scene and said nothing happened.

Mr. Chirchir, prosecution Counsel, opposed the appeal. Counsel submit that the victim was 3½ years old. PW4, a Clinical officer, examined the child and found bruises on her private parts. This corroborated the evidence of PW1 who saw the appellant fingering the child. There is no contradiction on the prosecution evidence. The proceedings show that there were several interpreters. The issue of the interpreter being from the same clan as the complainant cannot arise. No specific number of witnesses is required to prove a case. The evidence was overwhelming. The sentence is proper.

This is a first appeal. The evidence adduced before the trial Court has to be evaluated afresh for this court to arrive at its own conclusion. **PW1 G.A.** is the child's mother. It is her evidence that the appellant is her husband's friend. On 3.7.2017 the appellant went to their home. Her husband was away. She was cooking in the kitchen. She went into the house and found the victim on the appellant's laps. She got suspicious and went to check through the window. She saw the appellant had lowered the child's pantie and inserted his finger in her vagina. The appellant had a kikoi. He asked the child to suck his penis. PW1 screamed and locked the door from outside. Neighbours went there. The child told the neighburs what the appellant had done to her. PW1 fainted and was taken to hospital with the child. The matter was later reported to the Police. A P3 form was later filled. It is her evidence that the appellant did not see her when she was checking on

the child. Several neighbours went to the scene including mzee Roba.

**PW2 P.C. MOHAMED NOOR** was attached at the North Horr Police station. He investigated the case. On 3.7.2017 the area chief called the station and informed them that a suspect was locked up in a house and people wanted to assault the suspect. They proceeded to the scene on a Police vehicle. There was a crowd of people who were agitated. They opened the door and found the appellant and a girl child. PW1 was screaming. PW1 and her child were taken to hospital. A P3 form was filled. The appellant was charged with the offence.

**PW3 A U** is the child's father. On 3.7.2017 he met the appellant in town at about 11.30am. Later some people traced him in his mother's house. He was told to go home. He found a crowd at his home with the child. People wanted to assault the appellant. The chief called the Police. A P3 form was later filled.

**PW4 SALESA MOLU** is a Clinical officer. He was stationed at North Horr sub-county hospital. On 3.7.2017 at about 2.00pm the child was taken to the hospital. Her age was estimated to be 3½ years. She had bruises on her labia minora. There was no blood. There was no presence of penile penetration. A nail or a finger could have caused the injury on the labia minor. He filled the P3 form. The child had been seen by a nurse in the hospital.

In his sworn defence, the appellant denied committing the offence. He denied that he was with the child. Roba Diba and Golo Yaficha went to the scene and asked PW 1 to show them any mark, but she could not. The chief also went to the scene and suggested that the child be taken to hospital. It is the chief who locked him inside the house as PW1'S relatives wanted to assault him. He was in the house of PW1's mother. He was framed.

**DW1 ROBA DIBA** testified that they heard screaming and rushed to the scene. The appellant was locked inside the house and family members of the victim wanted to kill the appellant. They restrained them. He can't tell whether the alleged act happened or not.

**DW2 GOLO YAFICHA** saw a crowd of people while on his way home. The appellant was inside the house. The Police were called and arrested the appellant. He did not witness the appellant committing the offence.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt against the appellant. The victim did not testify. PW1 was not an intermediary as she gave her own evidence. The appellant contends that none of the members of public who responded to PW1's screams was called to testify. He also contends that the medical evidence does not connect him to the offence. The appellant brought two members of public who testified on his behalf. It is clear that any members of public who went to the scene did not witness the incident. The incident had already taken place when the members of public heard the screams. The lack of calling anyone of those members does not weaken the prosecution case. None of them would have been an eye witness.

The medical evidence normally deals with the examination of the victim. All what the evidence establishes is whether the complainant was defiled or sexually assaulted. This is not a case for defilement. The charge is that of sexual assault. There was an alternative count of committing an indecent act with a child. PW1 stated that the appellant told the child to suck his penis. It is not in evidence that indeed the child complied. That is why the prosecution preferred the alternative charge.

On the issue of medical evidence, it is established that the child was seen by the medical officers on the same day. The treatment notes indicate that the child was in pain. The child's vulva was bruised. PW1 testified that he saw the appellant inserting his finger on the child's vagina. Soon thereafter the child's vagina was examined by a medical officer and found to be bruised. The only conclusion one can make is that it is the appellant's finger which caused the bruises. PW1 saw the appellant having placed the child on his laps.

The appellant contends that he was framed. The reasons for being framed are not stated. PW1 knew the appellant as her husband's friend. She was cooking in the kitchen and did not worry so much as she knew the appellant. Why would PW1 frame the appellant. That cannot be a good defence. The medical evidence proves that the child's private parts were bruised. Can it be said that it is PW1 who caused the bruises on the child and framed the appellant. That cannot be the case given the circumstances of this case.

The appellant denied committing the offence. His two witnesses arrived at the scene but did not witness the incident. The two defence witnesses were quite categorical that they did not know whether the appellant committed the offence or not. The Police arrived at the scene and rescued the appellant. The appellant was inside the house with the child. The appellant evidence that he was not with the child and that he was in the house of PW1's mother cannot be true. Even the defence witnesses confirmed that the appellant was locked inside the house.

Section 5 of the Sexual Offences Act provides for the offence of Sexual assault. The offence is committed if any person penetrates the genital organs of another person with any part of his body or the body of another person [S. 5(1)(i)]. The prosecution evidence is that the appellant penetrated the child's vagina with his finger. According to PW1, the appellant used his index finger. The fact that PW1's hymen was not broken does not disprove the prosecution evidence. The private parts of the child were bruised. The evidence of PW1 is corroborated by that of PW4 who produced the treatment notes and P3 form.

The child was 3½ years old. It would have been unfair to call upon the child to testify. There was no miscarriage of justice. The trial process was fairly conducted.

The ten (10) years imprisonment is the minimum sentence under Section 5 of the Sexual Offences Act. Despite the appellant's old age, he has to undergo the sentence as the conviction is based on sound evidence.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

**Dated, Signed and Delivered at Marsabit this 29<sup>th</sup> of May, 2018**

**S. CHITEMBWE**

**JUDGE**