



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIM. APPEAL NO. 271 OF 2015

P N W.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the Judgment of Honourable L. Komingoi Senior

Principal Magistrate, delivered on 23rd April, 2013 in Nakuru

Chief Magistrate's Court Adult Criminal Case No. 77 of 2011)

JUDGMENT

1. PNW (“Appellant”) was presented before the Chief Magistrate’s Court in Nakuru in Criminal Case No. 77 of 2011 charged with a single count of defiling EG, a child aged eleven (11) years contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had intentionally and unlawfully committed an act which caused penetration by inserting his male genital organ namely penis into the female genital organ namely the vagina of EG, a child aged eleven (11) years. The offence reportedly took place in [Particulars withheld] in Njoro district within the then Rift Valley Province on 22/04/2011.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 22/04/2011 at [particulars withheld] in Njoro district within the then Rift Valley Province, he intentionally committed an indecent act with a child namely EG, a child aged eleven (11) years by touching her private parts namely vagina.

3. The Appellant pleaded not guilty to both the main and the alternative charge and the case was set for hearing. After a fully-fledged trial, the Learned Trial Magistrate convicted the Appellant in the main charge and sentenced him to life imprisonment as the law dictates.

4. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court.

5. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court’s findings as a foil to endorse or reject its findings. See ***Okeno v Republic [1973] E.A. 32; Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570.***

7. The evidence presented during the trial was as follows. EG testified that she used to live in Nairobi with her sister, J W W (PW3). During the April holidays, PW3 took EG home to visit with their mother. She left her there to spend the April holidays there.

8. EG testified that on 22/04/2011 at around 3:00pm, she was home with her three younger siblings – A K; M W; and J W. Her mother was out of the house having gone to buy some medicine. The Appellant is her “step-father” – he used to live with her mother and they had three children together but had not formally adopted EG nor formally married the mother. In any event EG testified that the Appellant was outside the house lying on the grass as she went about the business of washing utensils in the house. The Appellant testified that the Appellant then send away the three younger brothers to go buy some sweets in the shops while he went into the house. He asked for a file; and used it to sharpen a knife. He then, reportedly, brandished the knife and told her to remove all her clothes. In her words, this happened next:

He threatened me with a knife. I removed my skirt and my pant (sic). He then took me to his bedroom. He told me to live on the bed. I lay on the bed. He removed the thing he uses for urinating and put in my thing of urinating. He had pushed down his trousers. He then removed his thing of urinating and dressed up and returned to the grass. I wore my pant (sic) but I saw blood then I threw it at (sic) a thorny bush. The [Appellant] had threatened that I do not tell anybody. I wore another pant (sic). My mother came back, she had some mental breakdown. I explained to her but she could not understand.

9. It was EG's testimony that she did not tell anyone about the incident because she was afraid of the Appellant. However, still traumatized by the event, when she returned to Nairobi, she wrote what had happened on a piece of paper and hid it under the mattress in the hope that her sister, PW3, would see it. She did. PW3 testified that she saw the writing and, at first, thought it was a work of fiction. However, when she confronted EG, she confessed that it had happened to her. PW3, then, swung into action – including taking EG for medical examination at Nairobi Women's Hospital, and reporting to the Police back in Mau Narok. PW3 testified to all this in her testimony.

10. The report was made to Mau Narok Police Station and the OCS effected the arrest of the Appellant on information provided by EG. PC Nancy Nkatha was assigned the case as the Investigating Officer. She is the one who escorted EG to Mau Narok Health Centre for the P3 Form to be filled out.

11. At Mau Narok Health Centre, the medical personnel they found was Jacob Chelimo, a Clinical Officer. He relied on a physical examination of EG as well as the Treatment Notes from Nairobi Women's Hospital to fill out the P3 Form. He found a perforated hymen and a foul-smelling discharge in her genitalia. He concluded that there had been defilement. He treated her with Analgesics and Antibiotics.

12. After these witnesses testified, the Learned Trial Magistrate made a finding that the Appellant had a case to answer and put him on his defence. He gave sworn testimony. In it, he advanced the theory that PW3 was against his marriage to EG's mother and hence hatched a plot to frame him with defiling EG and then coached EG to make the allegations.

13. In her judgment, the Learned Trial Magistrate dismissed the defence as a "mere denial" and proceeded to convict. She found that all the ingredients of the offence of defilement had been proved beyond reasonable doubt.

14. The Learned Trial Magistrate, upon the conclusion of the case, considered the evidence before him under three headings which form the elements of the charged offence of defilement. These are:

- a. Age of the victim;
- b. Proof of penetration; and
- c. Positive identification of the Accused as the assailant who unlawfully caused the penetration.

15. In her judgment the Learned Trial Magistrate concluded that EG was eleven years old a conclusion culled from her testimony during *voir dire* as well as the P3 Form produced as Exhibit in the case. While the Appellant protests this finding on the ground that the birth certificate was not produced, I find no reason to fault this finding by the Learned Trial Magistrate: the oral evidence of the Complainant coupled with the P3 Form established the age of EG beyond reasonable doubt.

16. The Learned Trial Magistrate analysed the element of penetration as defined in the Sexual Offences Act. She made a finding that the medical evidence was conclusive that there was penetration of EG's genitalia. In my view, the *viva voce* evidence of EG; the evidence of the Clinical Officer; the P3 Form produced as well as the testimony of PW3 related to how she came to know about the defilement mutually reinforce each other to establish beyond reasonable doubt the fact that EG was, indeed, defiled. EG's conduct – to wait until she was away from the dangerous space where the sexual assault happened and to initially communicate indirectly through a letter to her sister – is typical and symptomatic of young victims of sexual assault.

17. Throughout her testimony, EG was quite clear and consistent on what happened – and that it was the Appellant who defiled her. The assault happened at 3:00pm in broad daylight and there is no chance that there was mistaken identify. The Appellant was, of course, very well known to her as her mother's lover or husband.

18. The Learned Trial Magistrate said that she believed the testimony of the Prosecution witnesses. In particular, the Learned Magistrate was impressed by the evidence of EG as truthful. At the same time she disbelieved the Appellant's theory of being framed up. I have found no reason to impugn the factual findings by the Learned Trial Magistrate. The Prosecution witnesses gave straightforward and credible testimonies which remained largely unshaken during cross examination.

19. On appeal, the Appellant argued that the charge sheet was defective because it charged him with the offence of defilement while, from the evidence given, the charge should have been incest. This argument is misguided. EG explained that she considered the Appellant her "father" because he was "married" to her mother. There is no question that the Appellant is not the biological father of EG and not even a formal step father for the offence of incest to have been considered.

20. The Appellant also complains that there were material discrepancies in the testimony of PW3 which should have led to a finding that there was reasonable doubt entitling him to an acquittal. I have carefully perused the Trial Court record and I have not found any such material inconsistencies or discrepancies. The only seemingly substantial one is where PW3 says during cross-examination: "I did not see any letter." In her examination in chief, she had testified that she had found a letter under the bed as she was cleaning her house. I have now looked at the hand-written transcript. It is not at all clear to me that that the witness, in fact, said she did not see any letter. It is possible that the handwritten script was modified after the fact. In any event, the context of the evidence makes this discrepancy even if it were one immaterial: it was the witness' clear testimony that she found the letter under the bed and EG took it and tore it up after she had read it.

21. Having reached these conclusions, it follows that the appeal herein must fail. It is, consequently, dismissed. The conviction is hereby affirmed.

22. As for sentence, the Appellant was imprisoned for life. This is the only sentence allowed by the law upon conviction for an offence contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. Therefore, no appeal against sentence is possible here.

23. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of life imprisonment is affirmed.

24. Orders accordingly

Dated and delivered at Nakuru this 28th day of June, 2018.

JOEL NGUGI

JUDGE