



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 1 OF 2018

IBRAE DABASO GODANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence of Hon B.M OMBEWA Principal Magistrate Marsabit in Criminal Case No 16 of 2017 on 24/1/2018)

JUDGEMENT

The appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence are that the appellant on the 30th of September, 2017 at Marsabit County intentionally caused his penis to penetrate the Vagina of T B G, a child aged between 12 and 15 years.

The trial court convicted the appellant and sentenced him to serve twenty (20) years imprisonment. The grounds of appeal are:-

- 1. That the appellant pleaded not guilty to the allegation leveled against him.***
- 2. That the complainant was medically examined and there was no tangible evidence noticed. The dry blood stains found was not proved whether it was her menstruation period or not. There was no sample of blood stain taken for DNA sampling because blood had dried up.***
- 3. That, the complainant was taken to Hospital after one week of the incident, no bruises and injuries were found.***
- 4. That, the witnesses were family members.***
- 5. That the appellant is a first offender before any court.***
- 6. That the appellant's is illiterate in both English and Kiswahili.***
- 7. That, the clinical officer carried tests to the complainant alone and did not test the appellant.***
- 8. That, the evidence adduced by witness was weak and shallow because there was no eye witness to that effect therefore sentence was not proper.***
- 9. That the little girl never reported the matter as stated by R J and A G, R heard noise but never witnessed any incident, he just suspected the accused had defiled the complainant.***

The appellant submitted that the charges were framed up. He was not paid his salary. The complainant was taken to hospital after seven (7) days. The appellant was not examined by a doctor. The evidence alleges that the complainant was examined after three days yet it was seven (7) days.

The appellant further submit that R J testified that he saw him with the complainant. He later changed and stated that he saw the complainant crying. He also alleged that he saw blood on the complainant's clothes. The clothes were not produced. He was framed because he is from far.

The state opposed the appeal. Mr. Chirchir, learned prosecution counsel, maintain that the prosecution case was proved beyond reasonable doubt. PW6 examined PW1 and noted that her vagina was swollen and hymen interrupted. Her age was assessed to be between 11-12 years.

There was no need to have the appellant examined by the doctor. The appellant was not framed. The complainant knew the appellant. The offence occurred at around 9:00am. The complainant cried and PW2 heard her. He saw the appellant leaving the scene.

This is a first appeal. The court has to evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. She told the court that she was thirteen (13) years old. She gave sworn evidence. She knew the appellant. They were herding livestock together. She had her own livestock to herd while the appellant had his. On 30/9/2017 the appellant pinned her down, removed her pantie and defiled her. The appellant told her not to tell anybody. The appellant then went away. She bled from her vagina. The incident occurred during the day and PW2 saw the appellant committing the offence. PW2 informed her uncle. The matter was then reported to the police. She was taken to hospital after three days.

PW2 R T is a herder. On 30/9/2017 at about 9:00am he was herding goats. PW1 and the appellant were also herding. He heard PW1 screaming. He went to the scene and found PW1 crying. The appellant left before he reached the scene. He had seen the appellant next to PW1. He informed PW1's uncle to ask PW1 why she was crying.

PW3 A G is PW1's uncle. On 30/9/2017 in the evening PW2 asked him to inquire from PW1 why she was crying at the grazing field. PW1 told him that the appellant had defiled her. The matter was referred to the chief and later to the police. PW1 was taken to hospital. PW1 was 13 years old.

PW4 P.C BENARD MALOMBE was stationed at Turbi Police Station. He investigated the case. On 4/10/2017 the area chief called the Officer commanding the police station (OCS) and reported the case. The Chief had already arrested the appellant. He went to the area and found the Chief with the appellant and PW1. PW1 had a blood stained dress. He re-arrested the appellant. PW1 was taken to Marsabit County referral hospital. The appellant was charged with the offence. PW1's age was assessed.

PW5 FRANCIS MUTUA was stationed at Marsabit County referral hospital. He assessed PW1's age at between 11 and 12 years old. PW6 Dr. DUB HALAKE DIDO was also stationed at the Marsabit county referral Hospital. He examined PW1 and noted that the Labia Minora of her vagina was swollen and her hymen was disrupted. She had infection on her vagina but that was not related to the defilement. He concluded that PW1 was penetrated. He was also given a green sleeveless dress which was blood stained. PW1 was taken to hospital after one week.

The appellant tendered sworn evidence. He denied committing the offence. He was framed up. He looks after livestock for PW1's family. They want to deny him his money and livestock. He was told five out of his ten(10) goats had been eaten by wild animals. He was told to go and take the remaining five (5) goats. He has not been paid for two (2) years. He was earning Kshs 4,000/= and was claiming Ksh 20,000/=.

The issue for determination is whether that prosecution proved its case beyond reasonable doubt. The prosecution evidence is that PW1 was defiled while herding cattle. The appellant's case is that he was claiming his two years salary from PW1's family. The evidence of PW1 is that she was herding their own cattle while the appellant was herding different cattle. PW2 was also herding his goats. Why was PW1 herding goats when the family had employed a herder. The defence evidence that the appellant was claiming his salary from PW1's family is doubtful. PW3 testified and stated that he comes from the same Manyatta with the appellant. The appellant did not raise any issue of his salary with PW3.

The evidence of PW1 is that the appellant defiled her. He pinned her to the ground and removed her pantie and defiled her. She started bleeding. The appellant contends that the blood stained clothes were not produced. The evidence shows that PW6 and PW5 saw the blood stained dress. The dress was produced in court by the investigation officer. PW2 was in the scene and saw PW1 crying. This was soon after PW1 had been defiled. I do find that PW1 was indeed defiled. The P3 form was filled on 4/10/2017. The case was reported on 3/10/2017 at the police station. Even if the medical examination was taken after seven (7) days as alleged by the appellant, that does not make any difference. PW5 concluded that PW1 had been penetrated. Apart from the medical evidence, there is the evidence of PW1. I do find PW1's evidence believable. She had no reason to implicate the appellant.

The charge sheet gives PW1's age as between 12 and 15 years. PW1 and PW3 testified that the complainant was 13 years old. The age assessment by PW5 gives the complainant's age at between 11-12 years. The trial court used the age of twelve years while sentencing the appellant. Section 8(3) of the sexual offences Act provides for punishment of not less than twenty (20) years where the victim is between twelve (12) and fifteen (15) years. I do find that the conviction and sentence is proper.

I am satisfied that the prosecution proved its case beyond reasonable doubt. PW1 was defiled, PW2 heard PW1 screaming. PW2 saw the appellant leaving the scene. It is the appellant who defiled PW1. The appellant was not framed.

The upshot is that the appeal lacks merit and is hereby disallowed.

Dated, Signed and Delivered at Marsabit this 26th Day of September 2018

S. CHITEMBWE

JUDGE