



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 33 OF 2013

ISIAIAH KIPTOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number SO 155 of 2010

in the Senior Principal Magistrate's Court at Vihiga delivered

by Hon. B.N. Ireri (Ag. PM) on 21st January 2013)

JUDGMENT

Background

1. **ISIAIAH KIPTOO**, the appellant herein has filed this appeal against conviction and life sentence on a charge of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act.
2. Appellant was also charged with committing an indecent act with the child.

The prosecution's case

3. The prosecution called 5 witnesses in support of the charges. **PW1, C K**, the complainant's mother stated that complainant was born in in 1997. She recalled that returned home from a funeral on 13.2.10 and complainant who had gone to visit her grandmother returned home on the same date and informed her that the appellant had waylaid her on her way from school. That she reported the matter to police, escorted the complainant to hospital and the appellant was later arrested and charged. **PW2 S.A**, the complainant stated that she was 12 years old. She recalled that on 13.2.10 at about 3.00pm, she was walking home from school when the appellant requested her to go to Kapengere and assist him carry some luggage. That on their way, the appellant dragged her into a nappier grass field and defiled her after which he fled from the scene. **PW3 M K**, stated that on 13.2.10, he saw the complainant and appellant emerge from a nappier grass field and suspecting that complainant had been defiled reported the matter to complainant's sisters and asked them to interrogate the complainant. **PW4 Godfrey Wangila**, a clinical officer examined complainant on 13.2.10 after she reported that she had been defiled. He filled a P3 form (PEXH. 2) which shows that complainant had several facial pains on right side, lacerations on labia minora and hymen was broken. **PW5 Cpl Paul Muriithi**, the investigating officer stated that he received complainant's report that she had been defiled and also received a P3 form in support thereof and later charged the appellant. He produced complainant's certificate of birth (PEXH. 4) which shows that she was born on 30.10.97.
4. When put on his defence, the appellant denied the offence and stated that he was charged for offences that he did not commit.
5. *In a judgment dated 21.1.13*, appellant was convicted and sentenced to life imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In his undated petition of appeal, the appellant raised 8 grounds of appeal which I have summarized into 2 grounds as follows: -

1) That the requirements of Section 19 of Oaths and Declarations Act were not met

2) That he was arrested on 10.2.10 yet complainant stated she was defiled on 13.2.10

7. When the appeal came up for hearing on 4.9.18, Mr. Osando, learned counsel for the appellant stated that he was wholly relying on two sets of submission filed on 4.9.18. He placed reliance on **Bernard Kebiba v Republic [2000] eKLR.**

8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

Analysis and Determination

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs. Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant.

11. In dealing with this appeal, I will address the following issues which have risen from the petition of appeal and from the submission.

i. Whether the appellant was arrested on 10.2.10 for an offence that was committed on 13.2.10

ii. Whether the requirements of Section 19 of Oaths and Declarations Act were not met

iii. Whether the appellant’s right under Article 50 (2)(j) of the Constitution was breached

iv. Whether the prosecution case was corroborated

When was the appellant arrested

12. The charge sheet shows that the offence was committed on 13.2.10 and that the appellant was arrested on the same date. PW1, who is complainant’s mother indeed told court that the appellant was arrested on the same day that the offence was allegedly committed. The appellant’s claim that he was arrested on 10.2.10 long before the offence was committed is therefore incorrect.

Was Section 19 of Oaths and Declarations Act complied with ?

13. Section 19 of Oaths and Declarations Act cannot be considered disjointedly with **Section 124** of the Evidence Act Cap 80 Laws of Kenya. 14. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.

14. **Further; Section 124** of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury.

15. In the brief **voire dire** of PW2, the trial court ruled that she understood the meaning of an oath and ruled that she gives evidence on oath. From the foregoing; I find that the trial magistrate complied with **Section 19** of the **Oath and Statutory Declaration Act and Section 124** of the Evidence Act and did establish that the child understood the nature of an oath and duty of telling the truth.

Was the appellant’s right under Article 50 (2)(j) of the Constitution was breached

16. Appellant argues that his right to a fair hearing was breached since he was not supplied with the statements in support of the prosecution case. I have considered the evidence on record and I find that this issue would have been better addressed by the trial court but it was not raised. This ground of appeal therefore fails.

Whether the prosecution case was corroborated

17. Complainant stated that she was defiled on 13.2.10. Complainant was examined on the same date that she was allegedly defiled. The P3 form filled on 15.2.10 tendered as (PEXH. 2) which shows that complainant had several facial pains on right side, lacerations on labia minora and hymen was broken. In my considered view, medical evidence contained in the P3 form conclusively corroborates the complainant's evidence that she was indeed defiled.

18. From the above analysis, I conclude that the prosecution discharged its burden and proved the case against the appellant beyond any reasonable doubt. Accordingly, I find that this appeal has no merit. It is dismissed. The conviction and the sentence are upheld.

It is so ordered.

DATED THIS 19th DAY OF September 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26th DAY OF SEPTEMBER 2018

WILLIAM M.MUSYOKA

JUDGE

In the presence of-

Court Assistant - Erick/Polycarp

Appellant -

For Appellant -

For Respondent -