



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 28 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

ABEL NYANSERO AROGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. N. Makila dated 11th May 2018 at Chief Magistrates Court at Kisii in Criminal Case No. 388 of 2012)

JUDGMENT

1. The appellant, **ABEL NYANSERO AROGO** was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** (“the Act”). The particulars were that on 25th March 2013 in Kisii Central District within Kisii County, he intentionally caused his penis to penetrate the vagina of VM, a child aged 15 years. He was sentenced to 20 years’ imprisonment.
2. The appellant was also charged and convicted for the offence of escape from lawful custody contrary to **section 123** as read with **section 36** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on the night of 25th and 26th March 2013 in Kisii Central District within Kisii County, being in lawful custody of No. 83860 PC Benedict Tindi at Nyakoe Police Patrol Base, he escaped from the said custody. He was sentenced to serve 1 year 6 months to run consecutive to the sentence on the first count of defilement.
3. The appellant now appeals against the conviction and sentence. He relied entirely on the petition of appeal, supplementary grounds of appeal and the written grounds of appeal. The thrust of his appeal was that the prosecution failed to prove the case beyond reasonable doubt. He assailed the medical evidence relied on by the prosecution on the ground that it was not properly admitted and that the trial magistrate overlooked his defence. Counsel for the respondent supported the conviction and submitted that the prosecution proved all the elements of the offence of defilement.
4. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form an opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to perform this task I now turn to the evidence as it emerged before the trial court.
5. The child, PW 1, testified on oath that on the evening of 25th March 2013 she was home in the kitchen washing utensils when she heard someone coming and standing behind her. She asked him what he wanted and he held her mouth with his left hand. She narrated what took place as follows:

He started locking the door. He took me to the bathroom which was within the kitchen area. He locked the first door. Accused told me to remove my clothes but I refused. He tore my clothes. It was a skirt. He tore my inner wear – pant and biker. I heard someone touching the door. He inserted his penis into my vagina. Someone touched and opened the door from outside and knocked it. He defiled me while lying on the floor. Accused on hearing someone at the door ran out through the window. Accused had removed his trouser. I opened the door and saw my father I told him what happened and my father trues calling the accused but he refused to come.

6. The child’s father, PW 2, recalled that on the same evening, he came home and found the kitchen door closed. He heard some noises in the another room inside the kitchen house. When he opened the door, he heard PW 1 screaming, “leave me, leave me”. When he opened the window to one of the rooms, he saw the appellant taking off through the window and running dressed in his shirt and holding his trouser. He

raised alarm and as he went to the room where PW 1 was, he found her with her torn clothes. PW 1 narrated to him her ordeal.

7. PW 2 called the assistant chief and with the help of community policing the appellant was arrested. One of the people who assisted in arresting the appellant was PW 3 who recalled that he was called by the assistant chief to go and assist PW 2. He went to his home and saw PW 1. He then went to the appellant's house and arrested him and took him to the police post at Nyakoe where the report was received by PW 5, the investigating officer. PW 5 issued the P3 form and escorted PW 1 to Kisii Level 5 Hospital. In the meantime, as PW 5 was escorting the appellant for a medical examination under the watch of PC Tindi, the appellant escaped. He was later arrested on 12th April 2013 by members of the public and brought to the police post.

8. PW 1 was examined and treated at Kisii Level 5 Hospital. PW 4, a clinical officer, testified that PW 1 was seen at the hospital on 26th March 2013. He produced the P3 medical form which he prepared when he examined her on 27th March 2013. According to the vaginal swab, there was spermatozoa, red blood cells, proteins and pus cells which were indicative of penetration. The genitalia were normal with no obvious tears or evidence of vaginal bleeding on the day she was examined.

9. In his sworn testimony, the appellant admitted that he knew PW 1 and PW 2. He recalled that on 25th March 2013, PW 2 had told him not to fetch water from his house in his absence but he went to the house and got keys from PW 1 and as he was leaving he met PW 2 who threatened him with dire consequences. He went home and was later arrested by community policing and taken to Nyakoe Police Station, where he was held in custody until late in the evening when he was released. He later went to Eldoret and when he visited home some time later he was arrested. He claimed that PW 1 was being forced to give false testimony against him.

10. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

11. In her testimony, PW 1 gave clear testimony how the accused inserted his penis into her vagina after he had approached her, covered her mouth, tore off her clothes and dragged to the room next to the kitchen. Her testimony on what took place was unshaken in cross-examination. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated but the proviso to that section makes an exception in sexual offences and provides that the accused may be convicted on such evidence if the court is satisfied that complainant is telling the truth and records the reasons. The trial magistrate commented on PW 1's testimony as follows, "*The testimony of PW 1 was consistent, logical and gave a believable account of what transpired on the material day between the accused and the minor victim.*"

12. In light of the provision I have cited and the trial magistrates' reasons, it was not necessary for PW 1's testimony to be corroborated but there was ample corroborative evidence. PW 2 came to the locus in quo as the appellant was in the course of committing the felonious act. When PW 2 knocked and opened the door, the appellant ran out of the window holding his trouser. PW 2 clearly saw him. It is worth noting that the appellant was not a stranger to PW 1 and PW 2 as he admitted in his defence that he knew both of them. Further, the appellant admitted that on the material evening he was with both PW 1 and PW 2. In addition, the medical evidence was also confirmed that indeed there was penetration.

13. The appellant attacked the medical evidence on the ground that the treatment notes were not produced in evidence. While the treatment notes were not produced, PW 4, who examined PW 1, produced the P3 medical form. Moreover, he testified that he had access to the hospital records which he relied upon to prepare the report. The report shows that the incident was reported to the police station at about 2140 Hrs, the laboratory investigations were ordered on 26th March 2013 and the P3 form filled on 27th March 2013. Given the chain of events, I am satisfied that the medical evidence was properly admitted and provided a basis for supporting the finding that there was indeed penetration. I would also hold that this evidence was only corroborative in light of the proviso to **section 124** of the **Evidence Act** I have referred to and even if it was excluded for any reason, the findings would still stand.

14. Finally, the appellant's defence could not withstand the weight of the prosecution evidence. The parties were neighbours and knew each other. They were together on the same evening and nothing was put to the witnesses in cross-examination to suggest that they were lying or had a grudge with the appellant or his family in the manner alleged by the appellant. I therefore find that the appellant's allegation that PW 2 had warned the appellant of dire consequences was an afterthought.

15. The age of PW 1 was proved by production of the birth certificate which shows that she was born on 13th January 1998 hence was 15 years at the time the offence took place. Under **section 8(3)** of the **Act**, where the child defiled is between 12 and 15 years old, the minimum mandatory sentence is 20 years' imprisonment. Although the charge sheet referred to **section 8(2)** of the **Act**, I do not think the appellant was prejudiced as this only referenced the sentence which in this case is prescribed by law.

16. As regards the second count regarding escape from lawful custody, the testimony of PW 3 and PW 5 confirmed that the appellant was arrested on the same day the incident was reported. Thereafter he disappeared until he was arrested and charged on 12th April 2013. He could not account for his release from lawful custody.

17. I affirm the conviction and sentence on both counts. The appeal is dismissed.

DATED and DELIVERED at KISII this 21st day of September 2018

D.S. MAJANJA

JUDGE

Appellant in person.

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