



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 55 OF 2017

NICKLINE ODHIAMBO OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable C. Obulutsa in Eldoret Criminal Case No. 5755 of 2015 dated 12th May, 2015)

JUDGMENT

Nickline Odhiambo Otieno, the appellant herein, was charged in the first count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act, No. 3 of 2006, Laws of Kenya*.

The particulars of this offence are that on divers dates between 1st and 6th day of October, 2015 within Eldoret East District, within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (Penis) to penetrate the genital organ (vagina) of *S M*, a child aged 8 years old.

In the alternative, the appellant faced a charge of indecent act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006, Laws of Kenya*.

The particulars hereof being that on the diverse dates between 1st and 6th day of October, 2015 within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of *S M*, a child aged 8 years old.

The prosecution case is that at the time of the alleged offence, the complainant in this case, who gave unsworn testimony as PW3, was aged 8 years. Her parents, *D* and *J* were living in Kakamega. She was living in Eldoret with her elder sister, called *E*. The appellant herein and his wife called *H* were their neighbours in the plot. *E* used to mistreat the complainant. *H*, the complainant's wife took her to live with them. The complainant was as well taken to [particulars withheld]Academy. After sometime, *H* went to Nairobi, leaving the appellant with the complainant in the house. The complainant's sister also vacated the plot and went away.

The appellant's house was three roomed. The complainant used to sleep in a separate room from the appellant. One day the complainant returned to the house from school. She went to her room. She took out the uniform to change. The appellant joined her in the room and pushed her on the bed. He removed his trousers and went on her. He did bad things to her using his urinating organ of which he put into hers, between the legs. She screamed as he did so, but he covered her mouth.

On 1st October, 2015 teacher *N C* was in class at [particulars withheld]. She noted that the complainant was sitting awkwardly on the chair. She questioned her about it but she did not say anything. The following day she noticed the same thing. She, and her colleague *N* talked to the complainant who disclosed that she had been defiled by *Nick*. PW-1 requested PW-2, *J R* to inspect her. When PW2 tried to do so, the complainant cried and she released her. The following week the child went to school crying. She said she was in pain. PW2 took her to the house. She revealed that she had been defiled by *Nick* who used to live with her. PW-1 escorted her to Moi Teaching and Referral Hospital for examination and treatment.

Dr. Jane Yatich, who gave evidence as PW-4 examined the complainant on 7th October, 2015 at Moi Teaching and Referral Hospital. Genital examination showed that she had old healed hymenal tears. She had abrasions and tenderness in labia minora. She had a whitish vaginal discharge. Urine was normal and she had no HIV and Syphilis. The witness was of the opinion that the child had been defiled due to the broken hymen.

The matter was reported to Kapsoya police station. The appellant was arrested in the evening when he went to the school in company of a lady, to pick the complainant. He was then charged with the offences.

The appellant in his defence stated that the complainant and her sister were his neighbor. The complainant's sister ran away and the complainant went to live with them. She lived with them for an year and one day. On 7th October, 2015 she returned to go to school. They visited the school and her mother appeared. The appellant was arrested. They went back to the house where the complainant said she had been told to say it was the appellant.

The trial court evaluated and weighed the evidence. The appellant was found guilty of the offence in the main count. He was consequently convicted and sentenced to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds which I summarize as follows:-

- (1) The court failed to appreciate that injuries to the minor's private parts could be caused by anything.
- (2) The appellant was not subjected to medical examination and linked to the minor's defilement.
- (3) The claimed last date of the alleged defilement was 6th October, 2015 and the minor was examined on 7th October, 2015, the court failed to acknowledge that there was no evidence of spermatozoa.
- (4) The vaginal discharge was not examined for evidence which would have incriminated the appellant.
- (5) Neighbours were not called as witnesses.
- (6) The girl's evidence contradicts that of her teacher as to when she was taken for treatment.
- (7) The court failed to appreciate that the girl could have been coached by the teacher.
- (8) Life imprisonment was excessive given the circumstances of the case.

The appellant through his advocate, argued the appeal by way of written submissions. He challenged the evidence on age of the complainant, indicated as 8 years. He averred that no document like birth certificate, baptismal card and age assessment report were produced to ascertain her age. Sentence is determined by the age of the victim and the age was not proved. The advocate further submitted that all witnesses said what they were told, and neighbours were not called to state whether they had heard her scream. The victim's clothes were not availed as exhibits and the ruptured hymen could have been as a result of other factors other than defilement. Cycling and other physical exercises were given as examples.

The Doctor, is averred, also examined the complainant and did not find evidence connecting him to the offence.

The state opposed the appeal. On age of the victim they submitted that PW-1's evidence shows she was in Top class and was about 8 years old. The girl herself stated she was 8 years old. The produced P-3 form also indicated she was 8 years old. They relied on two decisions, the case of **Jackton Mwanzia Musembi –vs- Republic, Criminal Appeal No. 42 of 2016** where the court held that where actual age of a minor is not known, proof of his or her apparent age is sufficient under the Sexual Offences Act. The other is the case of **Denis Kinyua Njeru –vs- Republic, Criminal Appeal No. 19 of 2014**, where the court relying on a Ugandan decision, of **Francis Omuroni –vs- Uganda, Criminal appeal No. 2 of 2000**, observed that:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

On penetration the state submitted that the girl's evidence is sufficient. She narrated how the appellant penetrated her urinating organ with his. The evidence was corroborated by the doctor who noted she had hyminal tears and a discharge.

The appellant was properly identified as the culprit. The state so submits. The complainant was living with him and she knew him very well. The appellant himself acknowledged so in his defence. I was therefore urged to dismiss the appeal.

I have looked into the entire evidence on record, the judgement and sentence passed, the grounds of appeal and submissions by either side. The two issues which the court need consider in this appeal is whether the age of the victim was established by the prosecution to the required standard in law, and whether there was penetration.

The age of a person as we all know is calculated from the date of Birth. Where the date of Birth is not known, or is not given, knowing or establishing the actual age becomes a thorny issue. This is so because the best medical process of establishing the age of a person has an error margin of 2 years. Age is crucial ingredient for the offence of defilement in which the victim must be a child, that is below the age of 18 years as per *Section 8(1)* of the *Sexual Offences Act*. *Sections 8(2) (3) and (4)* provide different sentences to the convict depending on the given range in each of the age of the victim. For 11 years and below the sentence is life imprisonment; Between 12 years and fifteen, for a term not less than twenty years; and between 16 years and eighteen for a term not less than fifteen years. The prosecution under the law are obliged to establish the offence beyond reasonable doubt, which is close to a point of certainty.

In this case, PW-1 on the age of the complainant stated she was about 8 years old. She did not disclose the year or the date the complainant was born. She simply estimated her age and did not give basis on which she did so. PW-2 did not talk about the age. Complainant herself stated in the voir dire that she was 8 years old. She reiterated the same in her evidence-in-chief. However, she equally did not state the date

she was born or how she knew her age. She was not living with her parents and we do not know whether she ever lived with them. The best which can be made of her evidence, given the circumstances, is that it was also based on guess work.

PW4 who filled the P-3 form and examined her did not disclose about her age in her evidence-in-chief. It is only in the P-3 form section "C" where on the estimated age of the person examined, it's filled 8 years. There is no evidence that the complainant was subjected to examination for age, and the indicated 8 years is just an estimate or was simply borrowed from part 1, which is normally filled by the police and where her age is indicated as 8 years. The court of appeal faced with a similar situation, in the case of Evans Wamalwa Simiyu –vs- Republic [2016] eKLR observed that:-

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P-3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under Part C of the P-3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the doctor’s opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years”.

Having taken the foregoing in mind, it is our considered view that the minor’s apparent age was proved by the P3 form. The court ended up concluding that, “where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act- Jackton Mwanzia Musembi –vs- Republic Criminal Appeal No. 42 of 2016.

In Uganda, the Court of Appeal opened the brackets on means of establishing the age wider, where in the case of Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000 the court held:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense”.

On this issue I am well bound by the court of appeal position, but expressing my own opinion, I would say that importation of the meaning of “age” from the Children Act No. 8 of 2001 to the Sexual Offences Act, to the effect that “age” where actual age is not known means apparent age, and by allowing proof of age in a criminal matter by way of observation and common sense, lowers the standard of proof from, “beyond reasonable doubt”, to unknown standard in Criminal Law.

Nevertheless the apparent age is given by PW-4 as 8 years in the P-3 form. The victim’s age is therefore established.

PW-3, the victim was living with the appellant. The appellant was providing for her. She must have appreciated that fact given that he was not her real father and her own sister had mistreated her and abandoned her. This witness had no cause to fix the appellant. Save for this incident she did not talk ill of him. She narrated clearly to the court how the appellant went to her room when she was changing from school uniform. He pushed her to bed, removed his trouser and using his sexual organ (penis), penetrated her sexual organ (vagina). The doctor who examined her later noted evidence of penetration and concluded that she had been defiled. The trial magistrate did not doubt the truth of this evidence and neither do I doubt it. Its convincing as true. The appellant’s defence is of mere denial and in the strength of the prosecution case was rightly dismissed and or rejected.

Given the age of the victim the sentence passed of life imprisonment is appropriate.

I accordingly find the appeal unmerited and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th day of October, 2018

In the presence of:-

Appellant

Mr. Kandie who is holding brief for Mr. Andambi for the appellant

Kagali for the state

Mr. Mwelem - Court assistant