REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.121 OF 2014

(From C.M's Court at Bungoma Cr.No.698 of 2014 by: Hon. L. A. Olel (RM)

TAI.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

JUDGMENT

TAI, the appellant, was convicted for the offence of ***defilement contrary to section 8(1) as read with subsection (2) of the Sexual Offences Act No.3 of 2006***.

> **The particulars of the charge are that on diverse dates between 20/3/2014 and 26/3/2014 in Teso North, Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of SA a child aged 11 years.**

In the alternative, he faced a charge of committing an indecent act contrary to section 11(1) of the Sexual Offences Act in that between 20th March, 2014 to 26/3/2014, he unlawfully and willfully caused his penis to come into contact with the vagina of SA a child aged 11 years.

The court did not make any finding on the alternative charge but having convicted the appellant on the first charge, sentenced him to serve life imprisonment.

The appellant is aggrieved by both the conviction and sentence. He preferred this appeal. The grounds of appeal are contained in his petition of appeal filed in court on 9/10/2014 which are as follows:

> ***1. That the magistrate erred in law and fact in conducting proceedings that violated his rights guaranteed by the Constitution;***
>
> ***2. That the magistrate erred in failing to warn him of the consequences of the charge;***
>
> ***3. That the magistrate erred in considering extraneous facts when delivering its verdict;***
>
> ***4. That the court erred in failing to analyze the evidence on record before making its decision.***

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

Apart from the grounds filed, the appellant did not file any submissions nor did he add anything to the grounds.

In opposing the appeal, Ms. Njeru, Learned Counsel for the State submitted that the complainant was aged 11 years while the appellant was then aged 78 years old; that the appellant is related to the complainant and the complainant knew him as 'Babu' (grandfather); that the appellant had the intention to defile the complainant because he invited her to his house where he detained her from 20 – 26th March, 2014 and locked the complainant in the house whenever he went out and threatened her with death and kept a panga in the house to prove his threats; that a search for the complainant was mounted by the relatives till she was traced in the appellant's house where she was hiding under the bed though the appellant had denied knowing where she was. Counsel further submitted that the medical report confirmed that the complainant's hymen was missing and her private parts were swollen. Counsel urged that the trial court did analyze the evidence well.

This is a first appeal and it behoves this court to examine all the evidence tendered before the trial court afresh, analyze it and make its own findings and determinations. See ***Okeno v Republic (1972) E.A.32***. The court however takes into account the fact that it did not have an opportunity to see or hear the witnesses.

The case before the trial court was as follows: PW1, a child aged 11 years, in standard six and who knew the appellant as 'Babu' recalled that on 19/3/2011, a Wednesday when she was going home for lunch. She met the appellant by the roadside who told her to wear two sets of clothes when going back to school. On Tuesday, she wore the clothes, she found the appellant on the road and he asked her to go with him to a nearby forest where he told her to remove the uniform and she remained with home clothes. The appellant took her books and clothes and went ahead. She later followed him to his house. In the evening, the appellant told her to sleep on the bed and he joined her on the bed and slept on top of her and did 'bad manners' to her. He warned her not to leave and that if she dared leave or raise alarm, he would cut her up with a panga which was in the house. The appellant detained PW1 till 26/3/2014 when her uncles and mother found her and that all that time, the appellant was doing '*tabia mbaya'* to her.

PW2 AN, the grandmother to PW1 recalled that PW1 went to school on 20/3/2014 but never returned home. They mounted a search for her and got information on where she could be found and they went outside the appellant's house at 3.00 a.m. where they heard PW1's voice, knocked, the appellant opened the door but denied that PW1 was there. The boys forced their way into the house and found PW1 hiding under the bed. The matter was reported to the chief then police.

PW3 DKO, a son to PW2 and uncle to PW1 took part in the search for PW1 and reiterated what PW2 told the court, on how PW1 was found in the appellant's house and they took them to the chief then Malaba Police Station.

Cpl. Wanjiru of Malaba Police Station PW4 received a report from PW2 on how PW1 had gone missing on 20/3/2014 and was found in the appellant's house on 26/3/2014. Both the appellant and PW1 were taken for medical examination and age assessment and a P3 was filled.

PW5 Elias Adoka, a Clinical Officer at Bungoma Provincial Hospital produced the P3 form that had been filed by Dr. Ramzan Mansoo who examined both PW1 and the appellant and found PW1 to have inflamed reddish labia majora, the hymen was missing and she had a whitish discharge but no spermatozoa.

When called upon to make his defence, the appellant opted to keep quiet, which is his right.

The appellant faced a charge of defilement contrary to Section 8(1) of the Sexual Offences Act. It is the duty of the prosecution to prove beyond any doubt that the following elements exist;

1. That the complainant was a child;

2. The identity of the perpetrator;

3. That there was penetration of the complaint.

It is apparent that the prosecutor and even the court never enquired from PW1 how old she was. It is PW2, PW1's grandmother and her guardian who told the court that she was 11 years. An age assessment was conducted on PW1 at Bungoma District Hospital using the dental formula and she was confirmed to be 11 years old, therefore a child.

It is common ground that the appellant was known to PW1, PW2 and even PW3. PW2 confirmed that the appellant was distantly related to them. PW1 is the appellant's grandchild. There was no allegation of a dispute or grudge existing between the appellant and PW1 or any of the witnesses.

PW1 went into a great detail in narrating how she came to find herself in the appellant's house; that the appellant told her to wear two sets of clothing which she did and he lured her to his house where he detained her from 19/3/2014 till 26/3/2014.

PW2 and 3 corroborated PW1's evidence on how she was found under the appellant's bed on 26/3/2014. It was PW1's evidence which was unchallenged that the appellant locked her up in that house and threatened her with death if she tried to leave or raise alarm. Indeed when PW2 & 3 went to the house, the appellant denied that PW1 was there. They returned to the house at 3.00 a.m., laid ambush and enquired from the appellant whether the complainant was there which he again denied. They forced their way inside the appellant's house and found PW1 under the bed.

I am satisfied that PW1 was found in the appellant's house where she had been kept captive from about 19th or 20th March 2014 to 26/3/2014.

PW1 told the court that the appellant did to her 'tabia mbaya' for all the days he held her in his house. When asked what she meant by 'tabia mbaya', PW1 was not able to tell court. When narrating her first night with the appellant, she said that the appellant told her to sleep on his bed and he went and slept on top of her. Upon being examined by the doctor, PW1 was found to have an inflamed reddish labia majora and pus cells and the hymen was missing. Though the doctor did not explicitly form an opinion of what may have happened to the complainant, the injuries to the complainant's labia majora are indicative of penetration of the genitalia. Children will ordinarily refer to sexual act as 'tabia mbaya', the mention of sex being taboo. Penetration is defined in section 2 of the Sexual Offences Act as:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

The injury to PW1's labia majora is evidence of penetration of PW1. It is not for nothing that the appellant detained PW1 in his house for one week and may have continued to do so had he not been found out. The trial court found that the narration of the events by PW1, was consistent and was also corroborated by PW2 & 3's evidence and was credible. The trial court was convinced beyond a shadow of doubt that the appellant planned and intentionally caused his penis to penetrate the genital organ of the complainant. The prosecution therefore proved

beyond any doubt that there was penetration of PW1 by the appellant. The conviction was therefore well founded and the appellant has not convinced this court why it should interfere with that finding.

The appellant complained that the trial court did not analyze the evidence. I have had a chance to look at the trial court's judgment and I am satisfied that it complies with Section 169 of the Criminal Procedure Code. The evidence was summarized, analyzed and a determination arrived at.

Although the appellant alleged that his fundamental rights were breached, he did not disclose which rights were breached by the court.

On the allegation that the court considered extraneous facts, the appellant did not point out which facts these were.

In the end, I find that the appeal lacks any merit and it is hereby dismissed.

Signed and Dated at *BUNGOMA* this *23rd* day of *November,* 2018.

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R.P.V. Wendoh

JUDGE

Coram:

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present