



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 110 OF 2015

MATHEW KIPCHUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case

Number 487 of 2015 in the Senior Principal Magistrate's court

at Kapsabet – Hon. G. Adhiambo (SRM)

JUDGMENT

1. The appellant herein **MATHEW KIPCHUMBA** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, the particulars being that on 22nd February 2015 at Kapkerer Location in Nandi County did cause his penis to penetrate the vagina of AJ (*particulars withheld*) a child aged 7 year.
2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on the said date, 22nd February 2015, he intentionally and unlawfully caused his penis to come into contact with the vagina of AJ a child aged 7 years.
3. The appellant pleaded not guilty of both the main court and the alternative charge and a trial was conducted in which the prosecution tendered the evidence of 4 witnesses. At the close of the prosecution's case the trial court found that the appellant had a case to answer and placed him on his defence. The appellant tendered an unsworn statement in which he denied any involvement in the said offence and at the close of the case the trial court found him guilty on the first count of defilement after which he was convicted and sentenced to life imprisonment.
4. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he faulted the trial court for relying on weak, contradictory and unreliable evidence. He also claims that the medical evidence that the trial court relied upon did not satisfy the ingredients of defilement.
5. A summary of the prosecutions case was that PW1, the complainant, was a girl aged 7 years as shown in the clinic card which indicated that she was born on 8th April 2009. The complainant lived with her grandmother PW2 while the appellant worked for PW2 as a herdsman.

6. The complainant testified that on the material day the appellant called her to his cottage at about 2pm and defiled her after which she reported the incident to PW2 who took her to hospital.

7. PW2 confirmed that the appellant was her employee and that he lived in a hut within her home. She further stated that on the material day, she noticed that the complainant looked distressed and asking what had transpired, PW1 informed her that the appellant had defiled her.

8. PW4 Denis Chirchir was the Clinical Officer who examined the complainant following the assault established that she had been defiled.

9. PW5 P.C. Wilson Chirchir conducted the investigation, recorded witness statements and arrested the appellant who was then charged with the offence of defilement and the alternative count of indecent act with a minor.

10. When placed on his defence, the appellant denied committing the offence and only explained the circumstances under which he was arrested and arraigned in court.

11. As a first appellate court, this court is under a duty to re-consider and reanalyze the evidence tendered before the lower court afresh with a view to arriving at my own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Isaac Ng'anga Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 Of 2005**

12. At the hearing of the case, the appellant relied on the written submissions filed in court on 30th August 2018 which I have carefully perused while Miss Mumu, learned counsel for the state, submitted that all the ingredients the offence of defilement namely; age of the complainant, penetration and identification of the appellant as the perpetrator of the offence had been proved beyond reasonable doubt.

13. On the age of the complainant, I note that the prosecution tendered both oral evidence of PW1 and PW2, and documentary evidence from the P3 form (exhibit 2a) and child health immunization card which showed that she was 7 years at the material time having been born in 8th April 2009. I am therefore satisfied that there was sufficient evidence to show that the complaint was a child of tender years at the time of the offence and identification of the appellant. On penetration and identification, I find that the complainant tendered cogent and compelling evidence to show that she was defiled by the appellant. The appellant was well known to the complainant as he had worked for the complainant's grandmother (PW2) for a period of at least 2 years prior to the incident. The complainant was defiled in broad daylight at about 2pm and I therefore find that there was no possibility of mistaken identity. Besides the complainant reported the incident to the grandmother almost immediately after it happened. The complainant testified as follows on the act of defilement:

“I know this one (points at the accused). He is called Kipchumba. He lives at our home. He herds cattle at our home. He sleeps at our home....He found me on the road and pulled me to his cottage. He then did bad manners to me. Before he did bad manners to me he removed my clothes. He removed my inner pant.....He did bad manners here (points at her vagina).....He made that thing he used for urinating to enter here (points at her vagina area). I felt pain here (points at her vagina) I screamed.”

14. PW4, the Clinic Officer corroborated the complainants testimony as follows:

“On detailed examination of the vagina there were bruises on the labia minora. The bruises were fresh and the hymen was freshly broken....on my conclusion there was forceful penetration vaginal intercourse done to a minor causing physical harm and pre-vagina and psychological harm.”

15. I find that the evidence tendered by PW1 and PW4 was consistent and was not impeached on cross examination. I am therefore satisfied that the prosecution proved the offence of defilement beyond reasonable doubt. I further find that the appellant's unsworn statement in his defence amounted to a mere

denial that did not dislodge the otherwise water tight evidence of the prosecution witnesses. I therefore find that the trial court arrived at the correct decision in convicting the appellant.

16. On sentence, Section 8(2) of the Sexual offences Act stipulates as follows:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

17. In the instant case, the appellant was sentenced to life imprisonment for defiling a child below 11 years and I therefore find that the sentence was lawful.

18. In a nutshell I find that the instant appeal is not merited and I hereby dismiss it.

Dated and signed at NAIROBI this 6th day of December 2018.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018.

OLGA SEWE

JUDGE

In the presence of:

Appellant in person

Ms Mumu for the state