



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 54 OF 2018

BETWEEN

LAO..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. K. Mutai – RM dated 20th July 2015 at the Magistrate’s Court at Ogembo in Criminal Case No. 23 of 2018)

JUDGMENT

1. The appellant, LAO, was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2) of the Sexual Offences Act** (‘the Act’). The particulars of the charge against him were that 17th February 2018 in Nyamache Sub-County within Kisii County he unlawfully did cause his penis to penetrate the vagina of EB, a child aged 5 years.

2. The appellant has challenged his conviction and sentence based on his petition of appeal and written submissions. He stated that the case against him was not proved beyond reasonable doubt. He contended that the court overlooked the fact that he was HIV positive and was thus a victim and subjected to discrimination. Counsel for the respondent contended that the prosecution proved all the elements of the offence of defilement.

3. As this is a first appeal, I am required to re-evaluate all the evidence and come to an independent conclusion bearing in mind that I neither heard nor saw any of the witnesses testify in order to make an assessment on their demeanour. In order to proceed with this task, it is necessary to outline the evidence that emerged before the trial court.

4. The complaint’s mother, PW 1, recalled that on 12th August 2012, she had left her children, including the complainant (PW 2), at home during the day. When she returned from the market at about 9.00pm, she found the child crying a lot and when she inquired what had happened, PW 2 narrated to her that she had been sexually assaulted by the appellant during the day. PW 1 stated that she knew the appellant as a herdsman at her brother’s home. She took the child to hospital for examination and treatment.

5. PW 2 gave unsworn evidence after a voire dire. She narrated her ordeal on the material day as follows:

The accused did bad things to me in his bed. I was at home with my sister when he called me. My mother had gone to the market, he took me to his bed. I felt pain. He inserted his penis in my vagina. He gave me Kshs. 20 to buy sweets. I bought sweets. I shared the sweets with my sister. It was daytime.

6. PW 2 explained that when her mother returned home that night, she told her what happened and she was taken to hospital. PW 2 told the court that she knew the appellant as he was staying at her uncle’s house.

7. The investigating officer, PW 3, recalled that PW 2 accompanied by PW 1 reported the incident at Nyangusu Police Station on 19th February 2018. She took their statements and issued a P3 as the child had already been treated at Nyamache Sub-County Hospital. A clinical officer at Nyamache Sub-County Hospital, PW 4, testified that PW 2 was seen at the Hospital on 17th February 2018 and treated on the following day. A whitish discharge was noted on the external genitalia and a healing laceration on the vagina. PW 2 filled the P3 Medical report and the Post Rape Care (PRC) form which she produced in evidence.

8. In his sworn defence, the accused denied the offence. He testified that on 18th February 2018, he was working the entire day. He went home and on that evening he was arrested and taken the police station. He was later charged for an offence he did not know about.

9. 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.”

10. The key testimony of the implicating the appellant was the unsworn testimony of a child. Under the proviso to **section 154** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the trial court may convict an accused in sexual offences on the basis on the uncorroborated testimony of a child if, for reasons to be recorded, the court is satisfied that the victim is telling the truth. In this case, PW 3 gave graphic testimony on how the appellant committed an act of penetration. She told the court that she knew the appellant as he was her uncle’s worker and the incident took place at daytime. The trial magistrate noted that, “The court observed the complainant in this case. There is nothing in the witness testimony that she was not telling the truth.”

11. PW 2’s testimony notwithstanding, her testimony was corroborated by other evidence. First, she immediately narrated her ordeal to PW 1 when she came home. Second, the medical evidence following examination of her vagina revealed the absence of a hymen, laceration and a whitish discharge which were consistent with an act of penetration having taken place.

12. The appellant defence only dealt with his arrest. He said nothing of the events of 17th February 2018 this leaving the prosecution case standing on solid rock. In his submissions and his questions to PW 5, the appellant suggested that he was HIV positive and that tests conducted on PW 2 would have confirmed that she was HIV positive if he is the one who committed the act of penetration. The trial magistrate considered the testimony of PW 4 who stated that PW 2 was put on a Post-Exposure Prophylaxis (PEP) which was 99% effective against any infection of the victim by a HIV positive assailant. He also concluded that not every act of sexual engagement between a HIV positive person and a HIV negative person would result in infection. I agree with these conclusions and reject the appellant’s arguments.

13. Finally, the prosecution established the age of the child by production of the birth certificate. She was born on 12th August 2012 and therefore at the time of the offence she was aged 5 years old. At any rate, she was below the age of 5 years where under **section 8(2)** of the **Act**, the sentence of life imprisonment is mandatory where the victim is below the age of 11 years.

14. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at KISII this 17th day of DECEMBER 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.