



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 20 OF 2015

J A N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Ogembo

PMCR NO. 696 of 2011) (Hon. N. Wairimu - SRM.)

JUDGMENT

1. This appeal is anchored on the grounds enumerated in the petition of appeal filed herein on 24th March 2015, by the appellant, **J A N**, who was convicted and sentenced to life imprisonment by Senior Resident Magistrate at Ogembo in Criminal Case **No. 696 of 2011**, on a charge of defilement, contrary to **S. 8(1)** read with **S.8(2)** of the Sexual Offences Act.

2. It was alleged that on the 22nd June 2011, at *[particulars withheld]* Sub-location *[particulars withheld]* District within the County of Kisii, the appellant defiled M M, a girl aged eight (8) years old. In the alternative, he allegedly committed an indecent act with the same girl by touching her vagina with his hands, contrary to S.11(1) of the Sexual Offences Act.

3. It was after the trial that the appellant was convicted on the main count and sentenced accordingly. He was however, aggrieved by the outcome and preferred this appeal which was heard in his presence and in which he presented and relied on his written submissions.

The State/respondent opposed the appeal through the learned Prosecution Counsel, **M/s Mbelete**, who also presented written submissions.

4. Being a first appeal, the duty of this court is to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses as was held in **Okeno Vs. Republic (1972)EA 32**, and many other subsequent decisions of the superior courts.

5. Briefly, the prosecution case was based on the facts that the child complainant **M M (PW 1)**, was at the material time aged less than nine years. She was a primary school pupil and lived with her parents **J O N (PW 2)**, who was her father and **TB (PW 3)**, who was her mother. She knew the appellant to be her uncle, brother to her father.

6. On the material date, she (complainant) was standing by the side of the road when she was spotted and called by the appellant who was their neighbour. He took her into his house where she was given a meal of posho (ugali) and milk. Thereafter, he laid her on a bed, removed her clothes including the innerwear and proceeded to defile her. She bled and felt hurt after the episode. She was then told to leave lest she be found by the appellant's wife.

7. The complainant returned to her home and did not find her mother. She therefore reported the incident to her aunt, **G.G.** (PW 6) who examined her and noted that she was bleeding from her private parts thereby confirming that she had been defiled. She (PW 6) could not contact the complainant's mother immediately. She therefore contacted the complainant's father who was at Kehancha at the time.

8. The father (PW 2) arrived home later and found that the complainant had been taken to hospital. He proceeded to the hospital and thereafter recorded a statement at Nyangusu Police Station.

Upon her return home on the material date, the complainant's mother (PW 3) found the complainant in the company of G (PW 6). The complainant explained to her what had happened at the appellant's house. She (PW 3) also noted that the complainant was bleeding from her private parts. She reported to the area chief and was referred to the hospital at Ogembo. Thereafter, she reported the matter to the police at Nyangusu Police Station.

9. The complainant was further examined at Gucha Level 4 hospital where the necessary police medical examination form (P3 form) was compiled by a clinical officer called Benjamin Okioma.

The form (P.Ex 1) was however, tendered in evidence by a colleague clinical officer, **Wycliffe Atambo (PW 4)**. It confirmed that the complainant had indeed been defiled.

10. The matter was investigated by **IP John Nyagah (PW 5)**, who recorded necessary statements from witnesses and later preferred the present charge against the appellant who was arrested on 12th July 2011, by **APC Sibieon Joshua Kibarusi (PW 7)**. In his defence, the appellant denied the charge and contended that it was false. He indicated that he was an educator on HIV/Aids and a clan elder and that he was away on the material date dispensing nets at Nyachenge dispensary.

11. He (appellant) further contended that he was HIV positive discharged with the role of creating awareness on the same and as such he could not defile the complainant. He attributed his plight on the dislike his brothers and sister (PW 6) had against him especially due to his role as a clan/village elder. His sister (PW 6) had also previously alleged that he had defiled her daughter.

12. The trial court after having considered the evidence in its totality concluded that the complainant had indeed been defiled on the material date while she was only aged seven (7) years and that the appellant was responsible for the offence.

The trial court, in holding that the appellant was the culprit stated as follows:- ***"This court notes the close relationship between the complainant and the accused. Accused is brother to the father of the complainant. They stay in neighbouring homes. To this end, I do not see any possibility of the complainant not knowing the accused. She knows him well and this incident was during broad daylight"***.

13. This court, having reconsidered the evidence, is satisfied that the ingredients of the charge of defilement were duly established by the prosecution through evidence led by the complainant (PW 1), her mother (PW 3), her aunt (PW 6) and the clinical officer (PW 4).

In essence, the fact that the complainant was defiled was never disputed. The basic issue which fell for determination by the trial court was whether the appellant was the person responsible for the offence.

14. In that regard, the trial court rejected the appellant's defence terming it an afterthought and incapable of offering formidable challenge against the prosecution case which was proved against the

appellant beyond any reasonable doubt.

In criminal cases, the general rule of law is that the burden of proving the guilt of a suspect on a standard of proof which is beyond reasonable doubt is always on the prosecution and never shifts whether the defence set up is an “alibi” or something else (see, **Sekitoleko Vs. Uganda (1967)EA 531**).

15. Indeed, it is not for the accused to establish his innocence (see, **Kioko Vs. Republic (1983)KLR 289**).

Herein, when the trial court noted in its judgment that the appellant’s defence was lacking corroboration, it was in effect expecting the appellant to prove his innocence. With profound respect to the court, this was an error.

16. Be that as it may, the trial court also held that the defence was an afterthought and incapable of dislodging the prosecution’s case. This court totally agrees, for reason that there was credible evidence from the complainant (PW 1) placing the appellant at the scene of the crime at the time that it occurred in broad daylight. Further, the appellant was well known to the complainant. He was her uncle and there was no plausible reason as to why she should have implicated him if at all he did not commit the offence. Not even his allegation that he was HIV positive and an educator on HIV/Aids could have saved him from the credible and cogent evidence against him by the child complainant.

17. The trial court saw and heard the complainant and believed her. This court did not have that advantage for it to interfere with the findings of the trial court based on the credibility of the witnesses among other factors.

Indeed, a first appellate court cannot interfere with those findings of the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed error of law (see, **Republic Vs. Oyier (1985)KLR 353**).

18. Ultimately, this court must also hold as did the trial court, that the appellant was the person responsible for defiling the complainant, his own niece. His grounds of appeal and the supporting written submissions are therefore without merit and/or substance. The evidence against him was credible and devoid of hearsay. He was nor denied his right to legal representation and was generally accorded a fair trial leading to his conviction and sentence.

19. Both the conviction and sentence were proper and lawful and are hereby upheld with the result that this appeal stands dismissed.

[Delivered and signed this 28th day of February, 2017].

J.R. KARANJAH

JUDGE

In the presence of

State Counsel - Mr. Otieno

CC Njoroge/Dorothy

Appellant