



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE 86 OF 2013

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal case No. 2791 of 2012 delivered by S.K. Ngetich Senior Resident Magistrate on 12/7/2013.)

R W B.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. R W B“ the appellant” was charged with the offence of **defilement of a child contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 OF 2006**. The particulars being that the appellant on the **12th day of November 2012 [particulars withheld]** within Trans – Nzoia County **intentionally caused his penis to penetrate the vagina of D N W alias I N W a child aged 3 years**.

2. The case proceeded to full hearing and he was convicted and sentenced to serve life imprisonment. He was dissatisfied with the judgment and filed this appeal citing the following grounds:

i) That the trial magistrate erred in law and facts by convicting the appellant on a fabricated evidence from the witnesses who are relatives in the matter herein.

ii) That the learned trial magistrate erred in law and facts when she he said that the appellant was found with the victim and not considering his defence that he was not found with the said child and that was extraneous evidence adduced.

iii) That the learned trial magistrate erred in law and facts by convicting the appellant having in mind that the accused was not medically examined to prove the alleged offence.

iv) That the trial magistrate erred when he refused his evidence that he was HIV Positive and if the said child had been bruised, the chances of the child being infected are very high and yet the Doctor's result was HIV Negative.

v) That the trial magistrate erred in both law and facts without considering that the appellant and the parents of the child had a conflict/grudge that raised all these and resulted in the appellant being imprisoned.

3. When the appeal came for hearing the appellant presented his written submissions which he relied on. He asked the court not to rely on the evidence of PW1 who was not at home when the incident took place. He wondered how a 3 year old child defiled could not bleed, from the genitalia. He disputed that

sperms could be seen with naked eyes.

4. He wondered how he could have had sex with a small child while standing. He argued that PW6 (the clinical officer) did not conduct his work professionally and his evidence should not be relied on.

5. Mr Kakoi on behalf of the state opposed the appeal. He submitted that age was satisfactorily proved by the clinic card and the court's own observation.

On penetration it was his submissions that PW3 the father of PW1 had found the appellant in the act of defiling the minor. He was joined by PW3 and together they arrested the appellant.

6. Lastly the clinical officer (PW5) confirmed the defilement and this is also in the P3. (Exhibit 2). He further submitted the appellant was an employee of PW3 and was identified by name. That the sentence meted out was legal.

7. A summary of the case is that the victim of this incident was aged 3 years. She was left with the father (PW3) as the mother went to the posho mill.

PW3 L W was at home with PW4. At around 1.00 pm it started drizzling and he went to the house as PW1 Played with other children. He saw PW4 coming but she did not come to the house. He got out and went towards a brick house under construction. He found the appellant with PW4. They were standing and the appellant's penis was outside. He got hold of him, and took PW4 to hospital then reported to Sibanga police station. He added that when he found them PW4's dress was up and he was holding her towards his body and there was body contact.

8. **PW1 J N** is PW4's mother. When she returned from the poshomill she found PW3 struggling with the appellant and on asking she was told the appellant had defiled PW4. His penis was out and his shorts had been pulled down. She said she saw some sperms on PW4's vagina. A rope was sent for but police officers appeared and the appellant was arrested. She said the appellant worked for her brother in law.

9. **PW2 C N O** was in her house on 12th November 2012 1 pm when PW3 called her to the brick house. She found the appellant, whose penis was out erected. The trouser zip was open. She saw PW4 who had no pant on. She saw something like sperms on PW4's vagina. The child was taken to hospital.

10. **PW5 PC Philip Siele** rearrested the appellant from members of the public.

PW6 Linus Ligare is the clinical officer who examined the girl a day after the incident. He testified that the child's hymen was torn and fresh looking. Other tests done were negative. She was placed on treatment.

11. In his unsworn statement of defence the appellant denied the offence. He stated that PW3 had found him in his house and started screaming that he had defiled his daughter.

12. This being a first appeal this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own independent conclusion. It should be borne in mind that this court never saw nor heard the witnesses and give an allowance for that. *See Mwangi & Another v Republic [2004] 2 KLR 28 ; Kinyanjui V Republic [2004] 2 KLR 364 Okeno V Republic 1972 EA 32.*

13. I have accordingly considered the evidence afresh together with the grounds of appeal. I have equally considered the submissions by both parties.

14. I wish to quickly dispose of two grounds.

The first is ground no. 3 where the appellant says he was not medically examined to confirm that he committed the offence. Medical examination for the suspect is not mandatory as long as the prosecution believes it has other sufficient evidence to support its claim. The court may consider all other evidence to

enable it arrive at a just decision.

Secondly at ground 5 he talks of grudges/conflicts with the complainant's family. The record does not anywhere show where this came out in the proceedings. It was not raised by the appellant in cross-examination.

15. I will now deal with the rest of the grounds under 3 broad issues namely;

i) Age – Whether PW4 was a child.

ii) Whether PW4 was sexually penetrated.

iii) If (ii) is in the affirmative whether its the appellant who did it.

Issue I) Age – Whether PW4 was a child

16. PW1 and PW3 who are the parents of the minor said pw4 was aged 3 years as at the time of offence. Clinic card (Exhibit 1) showed that PW4 was born on 14th April 2009.

On 12th November 2012 she was 3 years 8 months.

The trial magistrate who saw her appreciated her age and subjected her to a voire dire examination. I am satisfied that she was a child of tender age.

Issue No. ii – Whether PW4 was sexually penetrated.

17. PW2 was said to have found the appellant in the act of defiling PW4. He explained that when he went to the brick he found the appellant and pw4 standing. What was noticeable was the appellant's erect penis. He was not defiling the child. In cross-examination he said he found PW4's dress up and he was holding her close to his body.

PW1 who came long after the incident says she found the appellant's erect penis still outside.

PW2 also says she found the appellant's erect penis outside. Besides seeing the appellant's penis PW1 and Pw2 did not see the appellant defiling PW4.

18. The appellant has in his submissions asked if its possible for a man like himself to have sexual intercourse with a child aged 3 years, while standing. It is evident that PW3 did not witness any sexual encounter between PW4 and the appellant.

PW1, PW2 and PW3 did not bother about finding out where PW4's pant was.

19. PW4 was taken for treatment and examination. She was seen a day after the incident.

PW6 who examined her testified that PW4's hymen was torn and was fresh looking. He did not explain anything else.

The P3 form (Exhibit 2) at page 3 makes provision for what the doctor should examine under part “C”.

There is no report on any part of PW4's genitalia as is required under part “C”.

20. There is no mention of bleeding in the vagina. PW1 and PW2 had said they saw sperms splashed all over PW4's vagina. No swab was taken to check for the presence of spermatozoa, pus cells etc.

It should be remembered that the appellant is an adult who is said to have defiled a 3 year old child. It was not enough for the clinical officer to come and make such a sketchy report and say he confirmed

defilement.

21. He was not supposed to rely on the history given by the emotional parents. He was to do an independent evaluation after thorough examination.

22. From what PW3 told the court contrary to the belief by the other prosecution witnesses he never caught the appellant in the act of defiling PW4. It is only the medical evidence which could have confirmed the charge. The medical evidence before this court is too sketchy to be relied. This is not the only.

P3 I am raising issues with since I started hearing appeals in this station. I suggest that the DPP takes this up with the MOH of his County to restrain his/her officers on the filling of P3 forms especially for sexual offences and age assessments.

23. In this case it was expected that a proper filling of section "C" of the P3 form at Page 3 be done. This was not done.

The victim here was a 3 year old girl. The person supposed to have mounted and penetrated her was and is an adult. There is no evidence that this baby cried at all.

24. PW3 was not attracted to the brick house by any noises, cries or sound of any form. There was no bleeding in her vagina and there were no sperms found in her genitalia. I am left wondering whether PW6 carried out any serious medical examination on this baby or he was directed by someone to write what he did.

25. The appellant was arrested soon after the incident. He was not taken for medical examination. It was the evidence of PW1 and PW2 who were not the first at the scene that they found the appellant's male organ still erect. PW1 said she found him in shorts with his manhood erected and out. The shorts had been pulled down, she said.

PW2 said she found the appellant with an erected penis and in trousers but the trouser's zip was open. Were these two ladies seeing the same things? They were the same ones who claimed to have seen sperms on the child's vagina. There was no medical proof of this.

26. The appellant has denied committing this offence.

The contradictions in the evidence of the witnesses and more so the sketchy medical evidence by PW6 and the P3 form (Exhibit 2) casts a serious doubt as to the basis of the charge against the appellant.

The Investigating Officer (PW5) did not carry out any meaningful investigations in this matter. The appellant may have prepared to do what is claimed but as a court of law I can not make any assumptions.

17. What has clearly come out from the evidence of PW3 is that the appellant was found with the minor in a brick house under construction. His manhood was erect and the minor was without pants. My finding is that he intentionally caused the contact between his penis and the genital organ of the minor (vagina) aged 3 years.

I invoke the provisions of Section 179 of Criminal Procedure Code to convict him of an offence under Section 11(1) of Sexual Offences Act No. 3 of 2006 even though he was not charged with it.

I therefore allow the appeal and set aside the conviction and sentence.

I substitute the conviction with one for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act O. 3 of 2006. He will serve ten (10) years imprisonment from date of conviction.

Orders accordingly.

Delivered, signed and dated on 29th day of August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of;

M/s Kagai fro Mr Kakoi for state

Appellant – present

Kirong – Count Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

29/8/2017