



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 48 OF 2014

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 461 of 2013 delivered by P.W. Wasike Resident Magistrate on 24/04/2014)

RODGERS BOIYO MOIBENAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. Rodgers Boiyo the appellant herein was charged with the offence of **Defilement 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 14th day of February 2013 at [Particulars withheld] Farm in Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the anus of L K. , a child aged 7 years.

He faced an alternative count of **Indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that the appellant on the 14th day of February 2013 at [Particulars withheld] in Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely anus of L K a child aged 7 years.

2. The appellant denied the charges and the matter proceeded to full hearing after which he was convicted and sentenced to life imprisonment. Being aggrieved with the judgment he filed this appeal citing the following;

i) That there were no primary witnesses to the prosecution case though PW1 claimed that he was offended while in company of other three kids.

ii) That there was a critical contradiction between PW1 and PW3 that PW1 spoke of attempted defilement while PW3 came out with a report of defilement which was miscarriage of justice to the innocent appellant.

iii) That PW3 did not prove to the trial court about the presence of anal fluids, swaps, spermatozoa, semen, friction penetration but clung to unspecified injury which he did not accounted for before the trial court.

iv) That the whole prosecution case was marred and barred with irregularities in that the condoms which were availed did not contain any remains of fluids to prove their use at the commission of the bad ordeal.

v) That he was not medically examined to prove the credibility of sexual intercourse with the anal of the minor.

vi) That though the case was done in camera PW1 was privately interrogated by the trial magistrate and he was only ordered to ask limited questions without knowing the ideals of PW1.

vii) That his defence case fell on deaf ears in that the case he knew was that of assault but the prosecution allegations were unconstitutional and miscarriage of justice to the innocent appellant.

viii) That the trial magistrate erred in law and facts that he failed to discover that the prosecution side based on hearsay which is no evidence in our new constitution.

ix) That the judgment established by the trial magistrate was imagination, indefinite, unreliable, unlawful and harsh in that his verdict lacked truth beyond any reasonable doubt as per our constitution.

3. When the appeal came for hearing the appellant through his written submissions, told this court that PW1's evidence was not reliable. That he had said the appellant met him at the grazing field and told him to remove his pair of shorts. On this he submitted that it was not usual for strangers to commit such an act. That him and PW1 were not known to each other.

He further submitted that one Joshua was allegedly asked by the appellant to look after the cow, but he said Joshua was not called to testify. That there was an allegation of a girl who witnessed the commission of this offence. This girl too was not called to testify and same to the Kenya Police Reservist (KPR) mentioned by PW2.

4. The appellant argued that the evidence of PW3 the medical officer disapproved the evidence of both PW1 and PW2 on the use of the condom even if photos of the scene showing the condom had been taken. He insisted that had he done what was alleged, spermatozoa would have been present in the anus of PW1. He asked the court to consider the evidence of the clinical officer on his findings.

5. The appellant also raised issue with the contradictions in the dates of his arrest.

6. The State through Mr. kakoi submitted that all the necessary elements of the offence were proved by the prosecution. That PW1 was aged 7 years and this was proved by his father (PW2) and the clinical card. Further that penetration was proved by the evidence of PW1, PW2 and PW3 (the medical officer).

7. He stated that PW3 had found that PW1, had been defiled. Finally he submitted that PW1 is well known to the appellant who is his neighbour and the incident occurred at 4 pm. He concluded that the appellant was identified. He prayed that the appeal be dismissed.

8. A summary of the case is that **PW1 (L K)** a minor aged 7 years was on 14th February 2013 4 pm looking after their diary cow, in their neighbour's farm. The appellant whom he knew came and asked him to remove his pair of shorts, and he obliged. The appellant also removed his pair of trousers and wore a condom on his male organ, and asked Joshua to look after the cow.

9. He then inserted his male organ into his anus, making him feel a lot of pain. This happened in a pit on the farm. When he was done he asked him to get out of the pit and put on his clothes. He reported this experience to his mother. The scene was photographed and the condom left by the appellant at the scene was captured (Exhibit 1 a-c.).

10. **PW2 D K** is the father of PW1. He knew the appellant as a herdsboy at Kibet's home. Kibet is his neighbour. He came home on 14th February 2013 7.30 pm to find a large crowd gathered having arrested the appellant for defiling PW1. The minor could not properly sit, because his lower backside was aching

and it was sore. The appellant and PW1 were escorted to the police station. The scene was visited.

PW3 Dr Kakundi Blastus, a medical superintendent Endeless District Hospital saw PW1 on 15th February 2013. The complaint was rape of the minor. His findings were as follows;

- a small anal tear.
- Anal swab revealed red blood cells, plus white blood cells, no spermatozoa seen.

11. The doctor produced the P3 Form (exhibit 3) and PRC form (Exhibit 4).

PW4 Michael Samoei, is the village elder who received the report of the sexual assault at 9.45 pm of same day. He went to PW2's home and met PW1 and the parents. He brought the appellant to PW2's home and also visited the scene. He identified the scene in photos Exhibit 1 a – c. Him and others took the appellant to the police station.

PW5 P.C Stanley Chepkwonyi was the investigating officer herein. he interrogated the minor and issued him with a P3 form. The Appellant was in the police cells and when searched, he was found with two (2) un-used condoms (Exhibit 6), the used condom was Exhibit 5. He went to the scene and took photos (Exhibit 1a-c).

12. The appellant gave an unsworn statement of defence. He stated that he was looking after cows in Endeless on instructions of his employer. This was on 12/02/2013. At 1 pm he was told to go and eat while the children looked after the cows. When he returned he found the children had left the cows which had eaten tomatoes of a neighbour. He beat the 4 children. The complainant's mother came and chased him with a panga, but he went to his employer's and waited. PW1's mother later came and quarrelled with the wife of his employer. She threatened him with death and he got scared. At 7 pm he was called by PW2 and he went. He was tied up with ropes and beaten by PW2 and others. They snatched his phone and kshs 2,500/- and he was taken to the police station then to court.

14. This being a first appeal this court has a duty to re-evaluate and reconsider the evidence and arrive at its own independent conclusion. I should also bear in mind that I did not have the advantage of seeing or hearing the witnesses.

See Okeno Vs Republic 1972 EA 72, Kiilu & Ano. Vs Republic (2005) 1 KLR 174.

15. I have considered the evidence, the grounds of appeal and the submissions by both parties. I find the following to be the issues for determination.

- i) what the age of PW1 was**
- ii) Whether there was penetrative sexual intercourse of PW1's anus**
- iii) whether the appellant is the one responsible for the penetrative sexual intercourse complained of:**

Issue No. (i) - What the age of PW1 was

16. Section 8(1) of the Sexual Offences Act provides:

“ A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(2) provides:

“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.”

The ingredients of this offence are (I) Age and Penetration.

PW2 who is the minor's father said the minor was born on 11th March 2006. No clinical card was produced as stated by the State. The trial magistrate who saw this child observed at Page 3 of the typed proceedings that the minor was a child of tender years. My understanding is that he was a child aged ten (10) years and below. The P3 form (Exhibit 3) and the PRC form (Exhibit 4) show that he was then aged 7 years. All this evidence put together confirms that PW1 was a child of tender years.

Issue no. ii - Whether there was penetrative sexual intercourse of PW1's anus

17. The complaint raised by PW1 is that he was sodomised by a man. In other words a man penetrated his anus using his male genital organ. If proved, this is an offence under Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

Section 2 of the said Act defines “genital organs as to include the whole or part of male or female genital organs and for the purpose of the Act includes Anus.”

18. PW1's evidence explained what the person did to him and did this in detail. When he was through he told him to get out of the pit and put on his clothes. PW1 went and reported to his mother. PW2 and PW4 who observed the minor testified that the boy was unable to sit and he was feeling pain in his buttocks. Both confirmed that PW1's anus was stained.

19. PW3 who is the doctor that examined PW1. He clearly made a finding at Page 4 of the P3 form which states:

“ There is evidence of sodomy to the child”

The doctor's finding corroborates the evidence of PW1 totally. Infact PW1 said that the defiler used a condom and that's why there was no spermatozoa found in anal swab.

My finding on this issue is that there was penetrative sexual intercourse of PW1's anus.

Issue no iii – Whether the appellant is the one responsible for the penetrative sexual intercourse complained of

20. Under this head I will address grounds 1, 2, 4, 5, 6 and 9.

The appellant raised issue with some persons who were not called as witnesses. Joshua who was said to have been told to look after the cows did not record any statement. An unnamed girl whose identity is unknown could not be called to testify. The Kenya Police Reservist (KPR) officer Amos only informed PW2 of the defilement of PW1. He did not witness the incident and so was not a witness. In any event the court hearing a case of this nature may convict on the single evidence of the victim so long as he finds the victim to be credit worthy. This is supported by

Section 124 of the Evidence Act which gives room for that. It provides;

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, he accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and

proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

21. PW1 explained that this incident took place in a pit latrine. He is the one who led PW2, PW4, PW5 and others to the scene. Indeed the scene was photographed and a sunk place can be identified together with a condom which is said to have been used. It is only one condom (Exhibit 5) that was said to have been used. The incident occurred on 14th February 2013, and the scene was visited . It is not clear the exact time this condom was recovered on 15th February 2013 and whether any spermatozoa could be detected at that time.

22. The appellant has raised issue with the failure to be taken for medical examination. First of all this is a not mandatory requirement since the court can use any other available evidence to determine whether he is the one who committed the offence or not. The record shows that PW1 testified in the presence of the appellant and he was given an opportunity to cross examine him. The issue of alleged private proceedings does not arise and is not supported by the record.

23. This incident occurred at around 4 pm which was broad day light. The appellant was a herdsboy at the home of Kibet who is a neighbour to PW2. When PW1 returned home he immediately informed his mother what the appellant had done to him. By the time PW2 came home at 7.30 pm the appellant had been arrested and there was a huge crowd at the home. When the village elder (PW4) came to the home at 9.45 pm of the same day. PW1 told him it was the appellant who had defiled him.

24. In his defence the appellant stated that this case was fabricated on him by PW1's mother after the appellant beat up 4 boys who had left cows to eat tomatoes and vegetables belonging to other people. That PW1's mother had threatened to have him killed. He further stated that PW2 had beaten him at his home and taken away his phone plus kshs 2,500/-.

25. There is no evidence that he complained any where over these allegations. When he first appeared in court on 18th February 2013 he informed that court that he felt lots of pain in his eyes and requested for the plea to be differed. He did not mention any where that PW2 and another had beaten him. When he came back on 20th February 2013 he did not refer to his illness again and he was fine. I am satisfied that he was not assaulted by anyone.

26. After considering all the evidence and grounds of appeal I am satisfied that the appellant is the person who defiled PW1. I find no reason to make me interfere with the judgment in its entirety.

27. I dismiss the appeal and confirm the conviction and sentence.

Orders accordingly.

Delivered, signed and dated this 25th day of August 2017 in open court at Kitale.

H. ONG'UDI

JUDGE

In the presence of;

Mr Kakoi for the Respondent present

Appellant – present

Kirong – Court Assistant

Court- Judgement delivered in open court.

Right of appeal explained to appellant.

H. ONG'UDI

HUDGE

25/8/2017