



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 148 OF 2015

(Arising from PM's Kimilili Cr. No.68 of 2014)

ISSAC BUSOLO KHISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein Isaac Busolo Khisa was charged with the offence of defilement contrary to Section 8(1) & (2) of the Sexual Offences Act. He was convicted and sentenced. It is against the judgement in PMCC Case number 68 of 2014 that he prefers this appeal.

2. His grounds of Appeal are mainly three; that his rights were violated, the evidence was contradictory, and the trial Court did not analyse the evidence on record.

3. During the appeal in his written submissions the appellant introduced the issue of age and an alibi.

4. In objecting to the appeal the state submitted that there was no contradiction in the Prosecution Case, the age was adequately established and the defence was long and full of contradictions and urged for the appeal to be dismissed.

5. Being the first appellate Court I have considered the evidence afresh, analysed the same in order to arrive at an independent opinion.

6. The Prosecution case is that on the 17th of January, 2014 at Kapkateny market – Cheptais within Bungoma the Appellant defiled a minor Complainant then aged 7 years old. The evidence of the witnesses may be summarized as follows;

PW1 B W N aged 7 recalled that on 17/1/2014 at about 6p.m. while playing with 2 other children the appellant took her to his house and did “Tabia mbaya” upon removing her pant and biker.

PW2 I N S the mother to PW1 stated that on 21st of January 2014 as she cleaned PW1 she came across a foul smell she interrogated PW1 who narrated to her the incident. She called the accused’s mother who denied. She then went to the area Mkasa and the Police. The child was found to have injuries in her private part and taken to Kamalewa Health Centre.

PW3 Jonathan Barasa Wepukhulu the village elder, recalled receiving PW2 on 20/1/2014 at 2p.m. who informed him of the incident alleging that the appellant was about to escape. He went to the

appellant's home and indeed found him arranging his belongings about to escape. He questioned the Appellant who denied the accusations. He took the Appellant to Kapkota Police Station.

PW4 Catherine Akuru a Clinical Officer from Kimilili hospital examined the minor and filled her P3 form. She found the minor's private parts had bruises, the hymen was ruptured and with a wet smelly vagina. She formed the opinion that the minor had been defiled.

PW5 was PC Robert Onkoba who received the minor and her parents on 20/1/2014 at around 4p.m. in the company of the village elder and the accused. He received a report that the minor had been defiled by the accused. He noticed the minor walk with difficulties and referred her to hospital and later charged the accused.

7. On his part the accused denied the offence and stated that on the material day he was in Malaba. He further went on to give an account of an incident totally unrelated to the offence stating that he was arrested on 9th of January, 2014 and not for the alleged offence.

8. Having considered the record the issues for determination are;

i) Age of the Complainant

ii) Whether there is evidence that the Complainant was defiled.

iii) If the answer to (ii) above is positive whether there is evidence linking the appellant to the offence

iv) What is the appropriate sentence if the appellant is culpable.

v) Whether the Appellant's rights were violated.

9. At the hearing the minor gave her age as 7 years, and PW3 produced her notification of birth confirming the age. The Appellant did not dispute the age and I will therefore conclude that indeed the minor was 7 years of age at the time of the alleged offence.

10. Despite her age the Complainant was intelligent and clearly narrated to the Court how the Appellant got her as she played with another child at her grandmother's and defiled her, on the 17th of January 2014 at about 6.00p.m. On 20th January 2014 PW2 the minor's mother noticed a foul smell and on questioning the minor, she gave an account of what happened and again named the Appellant as the defiler. PW4 examined the Complainant and found her to have a ruptured hymen, bruises to her private parts and wetness in her vagina that smelled.

She formed an opinion that the minor had been defiled.

11. From the statement of PW1, the evidence of PW2 & indeed that of PW4 there is absolutely no doubt that the minor herein was defiled and so I find.

12. Is there evidence linking the Appellant to the offence? As it is in most cases of this nature, it is the evidence of the Complainant as against the Appellant that forms the basis of the evidence before Court. The minor was categorical that the Appellant defiled her. I have formed the opinion that the minor was truthful, and clear in who defiled her, I have also considered the fact that after the incident the appellant attempted to flee. I have relied on the Proviso to Section 124 of the Evidence Act and believed the evidence of the minor in finding the appellant culpable. I reject the alibi which appears to be disjointed and an afterthought and I will therefore convict the Appellant accordingly.

13. Having considered the record I did not come across any violation of the appellant's rights as alleged.

14. For the offence that the appellant committed the sentence provided by the Law is life imprisonment. This is the sentence that was meted out by the trial Court and there is no basis for this Court to interfere with the same.

For all the above reasons the appeal stands dismissed.

DATED and DELIVERED at BUNGOMA this 21st day of September, 2017

ALI-ARONI

JUDGE