



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL APPEAL NUMBER 3 OF 2017

(From original conviction and sentence in criminal case number 314 of 2016 of the Principal Magistrate's Court at Kapenguria)

TIMOTHY RUTTO.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

TIMOTHY RUTTO, the appellant herein, was charged in the main count 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 of this offence are that on the 30th day of January, 2016 within the West Pokot County, the Appellant caused his penis to penetrate the vagina of C C L, a girl aged 12 years.

In the alternative the Appellant was charged with the offence of **Indecent Act, Contrary to Section 4(1) of The Sexual Offences Act No. 3. of 2006**. The particulars hereof are that on the 30th day of January, 2016 within the West Pokot County, the Appellant caused his penis to touch the vagina of C C L, a girl aged 12 years.

The prosecution case is that the complainant was born on 17/2/2003 according to her produced health card. On 17/10/2016 when she gave evidence she was 13 years old and was a pupil at [particulars withheld] primary school in class 5.

On 30/1/2016 at about 9.00 a.m. she returned home from fetching water. The Appellant who had been hired by her father (PW-2) to make a table at home, followed her in the house requesting for assistance with panadol tablets. The complainant looked for the tablet till she got it. She handed it to him with some water. She was alone in the house. The Appellant grabbed her and tried to fell her down. She screamed for help. The Appellant dashed outside. The Appellant kicked it open and pursued her upto the bedroom. He once more grabbed her. He warned her against telling her mother or anyone else, or she will kill her. She screamed. He removed his trousers, lowered her skirt and biker and penetrated her. He used his penis to penetrate her womanhood. He wore no protection. After finishing he calmed her down and repeated the warning telling her if she will ever tell anyone he will kill her and himself.

PW-2, the complainant's father had on the material day taken another child to Chepareria hospital. He got back home at 7.00 p.m. He saw the complainant crying and asked her what was wrong. She did not say much. The mother got home and he asked her to enquire from the complainant what the problem was. She disclosed that she was defiled by the Appellant. PW-2 was set to go to the Appellant parents house but his

wife restrained him. The following day he called the appellant parents and explained to them what he had done. He urged them to examine the complainant before he took her to Kapenguria District Hospital. She was examined and her P3 form was filled by Mr. Litole. It was produced on his behalf by PW-3, a Clinical Officer at Sigor Health Centre. Treatment notes shows there were visible tears and lacerations on the vagina/introich. There was also whitish discharge from the vulva. Specimen were taken and their examination revealed presence of pus cells and the urine epithelial cells. Spermatozoas were not seen. He concluded that she was defiled.

The Appellant gave unsworn testimony in his defense. He said he was 21 years old and a student in form four. PW-2 had requested him to do some carpentry work. He went to his house on 30/1/2016 for the work. He did not find PW-2. He proceeded to work and did the work for 30 minutes. When the children got home from fetching water, their mother too entered. She made tea of which all took. He then continued with his work. At midday complainant's brother entered and the Appellant sought his assistance in the work. He worked till 3.00 p.m. when a neighbour called Rosebelle visited the place. At 4.00 p.m. he completed the work. Food was ready and was served. He ate, was paid for the work he did and went home. The following morning KPR officers arrested him. He was taken to Chepareria Police Station. The police explained to him about the complaint. Two weeks later he was re-arrested and charged with the offences herein.

The Trial Magistrate weighed the evidence, found him guilty, convicted him and sentenced him to serve 15 years imprisonment. Aggrieved by the said conviction and sentence, he appealed to this court on the grounds that:-

- 1. He pleaded not guilty at the trial.**
- 2. The elements of the offence were not proved beyond reasonable doubt.**
- 3. He was not accorded enough time to prepare his defense and witnesses.**
- 4. The prosecution evidence was contradictory.**
- 5. The case was poorly investigated if at all it was.**
- 6. The evidence was weak and could not sustain a conviction.**
- 7. Crucial witnesses were not called.**

The Learned Advocate for the Appellant submitted that penetration was not proved by the prosecution to the required standard. PW-3 offered evidence on behalf of another medical officer whom he had never worked with apart from having met in the workshops. The medical report were not clear on whether hymen was present or missing. They only disclosed presence of some lacerations. They were not produced in court as exhibits. On contradictions in the prosecution evidence she averred that the complainant had said she had walked with the Appellant home but on the cross-examination stated she found him there making a table. She had as well stated she had screamed till the father turned up, while the father said he went home at 7.00 p.m. The complainant on cross-examination said parents went home at 4.00 p.m. The Advocate submitted that in ***Criminal Appeal No. 12 of 2012, of Jacob Ndurungo Kamundo -vs- Republic***, the court held that the witnesses in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence. It was argued that the evidence of PW-1 is suspicious and therefore unreliable.

The state conceded to the appeal. They averred that the evidence of PW-1 and PW-2 is contradictory as was claimed by the Appellant. The treatment notes are also not consistent with the P3 finding. The Clinical Officer who filled the P3 form was not called and the Investigating Officer as witnesses. The

state concluded that the case was improperly handled at the trial. I have evaluated the evidence in the case, judgment of the Lower Court, grounds of the appeal and submissions by both sides.

The complainant was not consistent and firm in her evidence. She was not very clear on the time her parents returned home and where she met or joined the Appellant. The case was poorly investigated and prosecuted. The Clinical Officer who filled the P3 form and made the clinical notes was not called as a witness and no reason was given for it. The witness who offered evidence on his behalf, (PW-3), did not comply with provisions of section 33 of the Evidence Act and also Section 50. He did not even produce the said documents as exhibits. The Investigating Officer was not called as a witness. We do not know the investigations he conducted. It was alleged a door was broken at the scene and there was an alleged made table by the Appellant. No tangible evidence was adduced to confirm the same. The arresting officer was not called and it is not clear on how the Appellant was arrested. The complainant's mother was also not called. It is sad that such a serious case was handled in such a casual manner. The P3 is not clear on whether the hymen was present or missing and the age of noted injuries on the complainant genital organ was not given.

Penetration was not well established. The shortfalls in the prosecution case raises valid doubt as to whether the offence the Appellant was convicted and sentenced of was really committed. I concede with the defense and the state that the appeal is merited. **The conviction and sentence are therefore quashed.** The Appellant be set free unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of MsChebet for the Appellant and MsKiptoo for the state, this 20th day of December, 2017.

S. M. GITHINJI

JUDGE

20.12.2017