



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 8 OF 2016

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 1556 of 2015 of the Principal Magistrate’s Court at Kapenguria)

JULIUS PUSHEN APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

JULIUS PUSHEN, the appellant herein was charged, tried, convicted and sentenced for an offence in the main count of **defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act number 3 of 2006**. The particulars of this offence are that on the 30th day of august 2015 in West Pokot County, the appellant caused his penis to penetrate the vagina of T C. a girl aged 13 years.

In the alternative, the appellant faced a charge of **Indecent Act, contrary to section 11(i) of the Sexual Offences Act number 3 of 2006**. The particulars hereof being that on the 30th day of August 2015, in the West Pokot County, the appellant touched the vagina of T C, a girl aged 13 years, with his penis.

Prosecution called four witnesses and their case is that on 30th August, 2015 the complainant in this case, who was aged then 12 years, was from the church in the morning. She was alone when she met with the appellant. The appellant was taking care of cows in the area. He called the girl to his house. She went. He was living in the said house alone. He removed her clothes, inclusive of her inner wear. He then removed his. He then penetrated her vagina. He blocked her mouth. Muget got therein and found the girl naked. The complainant went home and told her mother about it. She reported that it was Julius who had done it. She had difficulties walking and peeing. PW-2 confronted the appellant about the incident but the appellant denied it. She visited the house where the incident happened and noted it belonged to the owner of the animals the appellant was taking care of. She managed to talk to the owner before she reported to the police.

Complainant was examined by one Litole Dunson on 2.9.2015. He found that her hymen was open. There were no tears, no lacerations. He opined there were positive signs of penetration. He also assessed the age of the girl as 13 years. The

P3 form was produced in court on his behalf by PW-3. PW-4 investigated the case and had appellant charged.

The appellant's defence is that on the material day, which was on a Sunday he went to Cheparereia to collect money. He then went back to his house where he stayed with his children till evening. He did not see the complainant that day. On Wednesday the girl's mother went to him claiming that the girl was missing. He had a land dispute with her and that is why she framed him. He was then charged. He denied the offence.

The trial court found him guilty of the offence. He was convicted on the main count and sentenced to serve 20 years jail term.

The appellant dissatisfied with the said conviction and sentence appealed to this court on 26th April, 2016 on the grounds that:-

- 1. Key witnesses did not give evidence**
- 2. Prosecution evidence was contradictory.**
- 3. The defence was rejected without cogent reason.**
- 4. The medical evidence did not support the rest of the prosecution evidence.**

On the first ground the only mentioned relevant witness who was not called by prosecution is Muget. PW-1 indicated that the said Muget got to the scene of the incident and found her naked. The prosecution did not however call the said Muget as a witness to corroborate the evidence of PW-1. However, the obligation of the prosecution in a trial is to call the witnesses they consider necessary to prove their case beyond reasonable doubt. This was the finding in the case of *Hassan Andirahiman vs Republic, Criminal Appeal number 41 of 2014*. Prosecution need not call all the witnesses there is in a case.

The court's duty should be to weigh the evidence adduced in court and find out whether it establishes the offence beyond reasonable doubt. The court can hardly weigh that which is not placed on its scale of justice. The law does not require the prosecution to call a given number of witnesses so as to establish their case. *Section 124 of the Evidence Act* indicates that in a criminal case involving a sexual offence where 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.

It is therefore clear that prosecution failure to call the said Muget as a witness is not fatal to their case.

The appellant in his submissions has not raised any relevant contradictions in the prosecution's case. The point that the doctor noted of no tears and lacerations on the victim does not by itself contradict the victim's evidence. Hymen was open which made him opine that there was penetration. The slightest penetration would suffice. Tears and lacerations to a female genitalia can be signs of penetration but their absence is not necessarily evidence to the contrary.

The trial magistrate weighed the prosecution case against the defence. He indicated in the judgment that he was satisfied that the victim was saying the truth and he found no cause to doubt her. The said magistrate had the advantage of seeing and hearing the girl. He believed her testimony and without any cogent ground for doubting her, on appeal, this court respects that position.

The complainant stated that she was penetrated by the appellant. She was then aged 13 years. This amounts to the offence of defilement of which the appellant was convicted and rightly sentenced to serve 20 years imprisonment. I accordingly do find his appeal unmerited. It is consequently dismissed. This court so orders.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 10th day of November, 2016.

S. M. GITHINJI

JUDGE

10.11.2016