



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL APPEAL NO.7 OF 2015

(From Original Conviction and Sentence in Criminal Case No.439 of 2013 of the Principal Magistrate's Court at Kapenguria)

ABDALLA SWALEH AWATHAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Abadalla Swale Awath, the Appellant herein was charged with the main count with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006.

The particulars of this offence are that on the **11th** day of **May, 2013** in West Pokot County, he did cause his penis to penetrate the vagina of **EC**, a child aged **5 (five) years old**.

To this count there was an alternative one of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.

Its particulars are that on the **11th** day of **May, 2013**, in West Pokot County the appellant intentionally caused his penis to come into contact with the vagina of **EC** a child **aged 5 (five) years old**.

This case was initially heard before a Resident Magistrate, Hon Washira upto PW4. The said Magistrate was transferred and when the Appellant was availed before Hon. Barasa, he elected to have the matter heard de novo. The matter was reheard and the prosecution called a total of 5 witnesses.

The prosecution case is that PW4 is the mother to the complainant. On 11/5/2013 at about 3:00pm she was in her home at Makutano. She was in bed as she was not feeling well. PW2 who is her complainant was playing outside the house. The appellant is their neighbour. The appellant called the complainant for a "**p.k.**" PW4 heard him calling her. PW2 witnessed it. He then went to the toilet. When the appellant called the complainant he placed her on his bed. He undressed her and as well undressed. He laid her facing upward (on her back) and went on her, facing her. He 'did to her what she referred to'as)"**tabia mbaya**" of which was 'interpreted by the trial court in English 'as "**bad manners.**" PW4 called out PW2 and told him to check on the complainant.

PW2 went to the appellant's house door and knocked on it. Nobody answered. He pushed the door open and entered. He found the appellant and the complainant in bed naked. The appellant was on her. The appellant told him not to tell anyone as he'll give him a "**p.k.**" Complainant was set free and she was not walking properly.

He took her to PW4. PW4 examined her sexual organ and found that she had been defiled. She called her husband who took the complainant to hospital.

The complainant was examined at Kapenguria District Hospital on **13/5/2013** by PW3. He noted that she had no bruises on the labias. The labias were not swollen. H.I.V test was negative. Urinalysis was done and spermatozoa were not found. The Clinical Officer concluded it was a case of attempted defilement given the history.

The case was investigated by PW5 who preferred the said charges against the appellant.

The appellant in his defence denied the offence. He said on the material day he worked as usual and went back to his house at 11:00am to take tea. It's while in the house that he was arrested.

It was alleged that he had defiled the girl. He was later charged.

The trial Magistrate, given the evidence of the Clinical Officer found that there was no penetration of which is an important ingredient for the offence of defilement. He further concluded that given the position the appellant and the complainant were in, naked, there is no doubt that his genital got into contact with the genital organs of the complainant, and hence found the offence in the Alternative Count proved beyond reasonable doubt. He accordingly acquitted the appellant of the offence on the main count and convicted him on the alternative count. He was sentenced to serve 20 years in prison.

Dissatisfied with both the conviction and the sentence, he appealed to this court. The appeal was argued by Mr. Nyamu for the appellant, while Mr. Nabuyumbu appeared for the State.

Mr. Nyamu argued that the prosecution evidence was contradictory and unbelievable. He pointed out contradictions are that PW2 said when the complainant urinated he noted the urine had blood.

PW1 did not herself state that and the evidence is not supported by that of PW3, the Clinical Officer. PW1 does not state how she was lured into the appellant's house, while PW2 states she was called for a "p.k." PW5 the Investigating Officer says it was a "**Big G.**"

Mr. Nyamu also argued that the trial Magistrate doubted the witnesses on the evidence in relation to defilement and could not depend on the same doubted evidence to convict on the alternative count.

The State Prosecutor opposed the appeal on the grounds that Section 179 of the Criminal Procedure Code allowed the trial Magistrate to convict on the Alternative Count if proved.

On the alleged contradictions he relied on **Criminal Case No.5 of the year 2013 between Erick Onyango Odeng'** as the appellant and the Republic as the Respondent. In this case it was held that grave contradictions unless satisfactorily explained will usually but not necessary lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks they point to deliberate, untruthfulness or if they do affect the main Substance of the prosecution case. I have evaluated the entire evidence this being the first appeal of which entitles this court to even come up with an independent finding.

The two eye witnesses in this case, PW1 and PW2 agrees substantially in their evidence as to what the appellant did to the complainant. However what the complainant states to be "**Tabia Mbaya**" was not explained to ascertain whether it included penetration of her genitals by the appellant, using his genitals. "**Tabia Mbaya**" when used by a child could mean anything.

However it was established as of fact that the appellant laid on her in bed naked, while she was also naked. PW3 was clear in his evidence that there was no evidence of penetration. The offence of defilement of which penetration is a **must** ingredient is therefore out as the trial Magistrate rightly found. He considered the alternative count stating given the position the genitals had contact, and therefore convicted on the alternative count. He was equally right in so finding. As rightly pointed out

by the learned State Prosecutor Section 179 of the Criminal Procedure Code allows him to make such a consideration and a finding. When a witness gives a detailed account disclosing more information than that disclosed by another, that's not contradiction. Contradiction is where there's different statement of the same fact. Prosecution evidence is not contradictory. The Investigating Officer was not an eye witness as to whether the complainant was called for a "**p.k**" or a "**Big G**".

Both "**p.k**" and "**Big G**" are chewing gums and a mistake on them is understandable.

I therefore find no ground warranting the court to interfere with either the conviction or the sentence in the case. **The appeal is accordingly dismissed.**

STEPHEN GITHINJI J.

Judgment read and signed in presence of Madam Jebet who's holding brief for Mr. Nyamu for the Appellant, Mr. Thuo the State Prosecutor and the Appellant this 30th day of November 2015.

STEPHEN GITHINJI J.

30/11/2015