



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 223 OF 2009

DENIS KIPKOECH KIGEN APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant **Denis Kipkoech Kigen** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been arraigned in court on a charge of **Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The appellant entered a plea of **'Not Guilty'** to the charge. His trial commenced on 8/11/2008 and the prosecution called a total of five (5) witnesses in support of their case.

PW1, M O the victim told the court that he was 6 years old at the time. He sates that he was out playing with others when the appellant came and called him. The appellant led the child to a forest nearby where he proceeded to sodomize him. After the act the appellant gave the boy a cake and sent him home.

PW2, P A the mother of the child told the court that on the material day at 11.00 a.m. she saw her son M return home with a cake. She asked who had bought him the cake. The child stated that it was **'Denis'** who gave him the cake after defiling him. **PW2** informed her husband **N O**. The child led them to where the appellant was grazing cattle. The appellant was then taken to the police station. The child was taken to hospital where he was examined and treated. Upon conclusion of police investigations, the appellant was taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having sodomized the complainant. On 24/6/2009, the learned trial magistrate delivered his judgment in which he convicted the appellant and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this appeal.

I have carefully perused the record of the trial. I note that the child was said to be six (6) years old. No proof of his age was tendered. No birth certificate, immunization card or baptism card was availed as proof of the child's age. It has severally been held by our superior courts that the age of the victim in defilement cases is a crucial issue, one which requires clear proof. Failure to prove age is fatal to the charge since the sentence to be imposed in the event of a conviction depends on the child's age. I am very mindful of the serious nature of this charge. I am also mindful that the victim is a minor. However, this court is bound on the doctrine of **'stare decisis'** by precedent from our superior courts. I therefore

find that in the absence of proof of a critical element the charge of defilement could not be sustained.

Having said that I do note that the prosecution did adduce evidence to prove that the child was in fact defiled. The complainant gave to the court a concise and graphic account of what happened to him on the material day. In his testimony at page 4 line 4 the complainant states:-

“when I followed him (the appellant) he took me to a forest and removed my trouser and he also removed (his) trouser. Then he put his thing in my anus. He then gave me Kshs.10 to go and buy a cake....”

Here the child is clearly describing the act of sodomy. His evidence is corroborated by **PW4, Tabitha Ngugi** who examined the child. She noted that he was walking with his legs apart. Upon examination **PW4** noted **‘redness on the anal region with widening.’** She also noted that the area around the anus was tender. All these are conclusive signs that a sexual assault had occurred. **PW4** treated the complainant and prescribed analgesics for pain as well as antibiotics for possible infection. She filled and signed the P3 form which was produced in court as an exhibit **PEXh.1**. From the evidence on record I harbour no doubt at all that the complainant was sodomized as he alleged.

The next question is whether there exists sufficient proof of the identity of the perpetrator. **PW1** identified the appellant whom he named as **‘Denis’** as the man who sodomized him. The incident occurred during the day time. Visibility was good. In addition **PW1** spent ample time in close contact with the appellant and was able to see him well. **PW3, P A** told the court that when she questioned her son he told her that **‘Denis’** is the one who sodomized him. At no time did the child waver in his identification of the appellant as the man who sexually assaulted him. In his judgment at page 20 line 23 the learned trial magistrate observed as follows:-

“This may be a child of 6 years, but I can say because I had occasion to examine this child as he testified I honestly believe the child was being very truthful.

These were the sentiments of the trial magistrate who heard and saw the complainant testify. I have no reason to doubt these comments upon the child’s demeanour.

I have considered the appellant’s defence. I find that he did not at all address the charges which he faces. The defence amounted to a mere denial and is therefore dismissed as such. I am satisfied that there has been a clear positive and reliable identification of the appellant as the one who sexually assaulted the complainant.

Based on the foregoing I am satisfied that the prosecution mounted an overwhelming case. Due to the lack of proof of age I do hereby quash the appellant’s conviction on the charge of defilement. However, I am satisfied that the facts and evidence do prove beyond reasonable doubt the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. I therefore substitute a conviction against the appellant for this offence of Sexual Assault. Further I do set aside the sentence of life imprisonment imposed upon the appellant and instead hereby sentence him to a term of twenty-five (25) years imprisonment. This sentence to run from the date of the original conviction in the lower court. It is so ordered.

Dated in Nakuru this 11th day of December, 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Appellant in person

