



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 4 OF 2010

BETWEEN

J K WAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence at Embu in Criminal Case No. 1331 of 2007 by Hon. E.K. Nyutu RM on 19th January, 2010)

JUDGMENT

1. Joseph Kinyua Wambeti, the appellant was charged and convicted of the offence of defilement of a child contrary to **section 8(1)(2)** of the ***Sexual Offences Act, No. 3 of 2006***. The particulars of the offence read that on the 12th August 2007 at around 1200 noon at [*Particulars Withheld*] village in Embu District, intentionally and unlawfully had sexual intercourse with CMW, a child aged 7 years. He was also charged with an alternative charge of indecent assault contrary to **section 11(1)** of ***Sexual Offences Act***. The appellant was sentenced to life imprisonment on the main charge.
2. The prosecution called a total of six witnesses to support its case against the appellant. The material evidence was as follows. PW1 is grandmother to both the appellant and the complainant. She testified that on 12th August 2007 she left for church, leaving the appellant with other children at home. While in church at around noon, her son, PW3, came to inform her that the appellant had defiled her granddaughter, PW2. She went to the house and took PW2 to the hospital where she was put on medication for two months. PW2 had a problem walking and she told PW1 that she felt pain in her private parts and that the appellant had hurt her.
3. PW2 is the child victim of the offence. After conducting a *voir dire* examination, the trial magistrate concluded that PW2 should give unsworn testimony. PW2 gave an account of how on the material day at around noon she left church and returned home. The appellant then asked her to go to the main house wherein he asked her to remove her panty but she refused. He forcefully laid her on the bed and removed her panty and defiled her. She screamed attracting her uncle's attention who lives near her grandmother's house. The accused jumped out of the window. PW2 opened the door which was locked from inside for her uncle, PW3, to whom she narrated her ordeal. She accompanied him to church to inform PW1 of the incident. PW1 changed her clothes and took her to hospital.
4. PW3 is an uncle to both PW2 and the appellant and is PW1's son. He corroborated PW2's version

- of events. He heard his niece crying and screaming from his mother's house and on checking found the bedroom door locked from inside. PW2 opened the door for him and informed him what the appellant had done to her and that he had escaped through the window. They proceeded to church where they reported the incident to PW1.
5. PW4 and PW5 are police officers who booked in the incest report and received the appellant when he was brought to the station by his aunt and uncle.
 6. PW6, a medical doctor, produced PW2's P3 form on behalf of his colleague who had been transferred and could not be found. An examination of the genitalia had revealed that there was a creamy whitish discharge on her external genitalia. There was also evidence of blunt trauma on the private parts. The hymen was ruptured and rugged, evidence of penetration. According to the medical report, the injury was assessed as grievous harm.
 7. When put to his defence, the appellant first chose to give an unsworn statement but later opted to remain silent. He invited the court to make its decision.
 8. This being a first appeal, this court is mandated to re-evaluate the evidence afresh and arrive at an independent decision bearing in mind that it neither saw nor heard the witnesses as they testified. (See *Okeno v Republic* [1972] EA 32).
 9. The offence of defilement is defined under **section 8** of the *Sexual Offences Act* as follows;
 - (1) *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
 - (2) *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*
 10. The evidence of PW1, the victim's grandmother, regarding the condition of the complainant as having pain in her private parts and being unable to walk properly corroborates that of PW2 and PW3, who responded to the screams and found the child crying. PW3 observed that PW2 was in a lot of pain. He reported the incident to PW1. The dress that PW2 wore on the material day and which had been stained was positively identified by PW1 and PW3. The evidence of penetration was further corroborated by the doctor who produced the P3 form which confirmed that there has been sexual intercourse. All this evidence leaves no doubt that there was penetration as an element of the offence of defilement.
 11. The next issue is whether the appellant committed the offence. The appellant was well known to PW2. They are relatives and share the same grandmother. They stayed together in their grandmother's homestead. PW1 testified that she had left the appellant together with her other children at home as she headed to church. This effectively puts the appellant at the vicinity of the crime scene where he had the opportunity to commit the offence. The incident was committed in broad daylight. There was no reason for PW2 to lie about the appellant. Based on the foregoing, I am satisfied that the evidence on recognition was free from error and there was no possibility of mistaken identity.
 12. As regards the issue of corroboration, the proviso to **section 124** of the *Evidence Act, Chapter 80 of the Laws of Kenya* states, "Provided that where in a criminal case involving a sexual offence 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." Like the learned magistrate, I am satisfied that the evidence of PW2 was clear and lucid as to the events of 12th August 2007 and taken in light of all the other evidence, the conviction is sound.
 13. Upon re-evaluation of all material on record, I am satisfied that the prosecution proved that the appellant committed the offence as charged to the required standard.

14. I am also satisfied that PW2 was aged 7 years old based on her own statement during the *voire dire* that she was in standard three, the P3 form produced by PW6. The testimony PW4 confirmed that PW2 was seven years old. Under **section 8(2)** of the ***Sexual Offences Act***, the mandatory penalty for defilement of a child less than eleven years is life imprisonment. The sentence is therefore legal and cannot be varied.

15. The conviction and sentence are affirmed and consequently the appeal be and is hereby dismissed.

DATED, SIGNED and DELIVERED at EMBU this 9th day of January 2014.

D. S. MAJANJA

JUDGE