



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 278 OF 2012

(An appeal against both the sentence of the Hon. J. S. WESONGA, RM in Kakamega Chief Magistrate's Court Criminal Case No. 411 of 2011 dated 31st day of October, 2011)

JAMES KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with defilement of a child contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual Offences Act No. 3 of 2006. The particulars of charge were that on 20/2/2011 at [particulars withheld] , within Western Province unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of M A a girl aged 5 years. In the alternative he was charged with indecent act with a child contrary to section 11 (a) of the same Act. The particulars of charge were that on the same day and place unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of M A a girl aged 5 years.. He denied both charges. After a full trial, he was convicted on the main charge of defilement. He was sentenced to serve life imprisonment.

Being aggrieved by the decision of the trial court, the appellant has appealed to this court against both the conviction and sentence. He also filed written submissions, which I have perused.

At the hearing of the appeal, the appellant relied on his written submissions.

The learned Prosecuting Counsel Ms Opiyo, opposed the appeal. Counsel submitted that the prosecution had proved its case against the appellant beyond reasonable doubt. Counsel added that the evidence of the doctor showed that the minor was defiled. There was also no contradiction in the prosecution evidence.

The facts of the prosecution case were that on the 20/2/11, the appellant went to the homestead of the grandmother of the complainant PW3. It was after around 3 p.m. He found the complainant PW3 with an older sister called F PW2. The appellant sent PW2 to call her grandmother because he claimed to have worked for her and wanted to be paid his money. When PW2 went to call her grandmother, the appellant took complainant into a kitchen and defiled her. When PW2 returned, she found the appellant in the process of defiling the complainant. Then PW2 started crying and the appellant hurriedly put on his trousers and ran away, after telling her to go away. The grandmother arrived shortly thereafter and found PW2 crying. She took both children. Meanwhile, the mother of the complainant PW1 M K was informed about the incident. She left her place of work at [particulars withheld], and hurried to the scene. She took the complainant to Kakamega General Hospital. The matter was reported to the police and the appellant was arrested and charged.

When the appellant was put on his defence, he testified but not on oath. He admitted having gone to the house of the grandmother of the complainant that day. He stated that he had worked for her as a tailor and had gone to ask for his money. He said that he had been involved in an accident earlier and did not have an active sexual life since the accident. He stated also that there was an existing grudge between the families because, at one time, the complainant's elder sister had alleged that the appellant's sister had stolen her biro pen.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant any beyond reasonable doubt. The court convicted and sentenced him. Therefrom arose this appeal.

This being a first appeal, I am duty bound to re-evaluate all evidence on record and come to my own conclusions and inferences. See the case of **Okeno -vs- Republic [1972] EA 32**. I have re-evaluated the evidence on record.

The first issue is with regard to the age of the complainant. From the record and documents produced as exhibits, the age of the complainant was established as 5 ½ years. She was therefore a minor.

The conviction of the appellant is grounded on the testimony of two minors, PW2 and PW3. They both gave evidence which was not on oath. They claimed that the appellant defiled the complainant. The appellant claimed that there was a grudge between the families and that he had gone to look for his money. Is the testimony of the two minors believable?

The Evidence Act (Cap. 80) Section 124, does not require that evidence of minors victims of sexual offences be corroborated, as long as it is believable, and is so believed by the trial court. The prosecution however, in all cases is required to prove the guilt of an accused person beyond any reasonable doubt.

From the evidence on record, the grandmother of the complainant was the person to whom the appellant sent a message claiming his money. PW2, Flavian clearly stated in evidence that her grandmother came to the scene shortly after the incident and found her crying. The grandmother was the first person to take immediate action to protect the two children. She was not called as a witness. No reason was given as to why she was not called to testify.

In my view, the grandmother was a crucial witness who could explain the circumstances in which she found at the scene and the two children and what they informed her immediately after the appellant had ran away. She was an adult. In addition, the appellant was said to have been arrested by members of the public. They were also not called to testify on the circumstances and reasons why they arrested the appellant.

In the case of **Bukenya & Others -vs- Uganda [1972] EA 549**, the court held that where crucial witnesses are not called, the court is entitled under the rules of evidence to make an inference that the evidence of such crucial witnesses would be adverse to the prosecution case. In the present case, the evidence of the adult grandmother would have fortified the evidence of the two minor children. It would have cleared any doubt on credibility. She was mentioned as having come to the scene immediately after the incident and seen the children crying. She would also have explained what the children explained to her.

In my view, the gap created by the failure of the prosecution to call this crucial witnesses, greatly weakened the prosecution case. In my view, it is quite possible that the appellant was framed as he alleged. The benefit of doubt has to be given to the appellant and I do so. As a result the conviction and sentence cannot stand, as the prosecution failed to prove its case against the appellant beyond reasonable doubt.

In the result, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E