



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 76 of 2011

JOSEPHAT KIPNGETICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act 2006.
- 2.
3. The Appellant was also charged with an Alternate Court of indecent assault with a child contrary to Section 11 of the Sexual Offences Act 2006.
- 4.
5. The particulars are that on the 3rd May, 2007 at [particulars withheld] the Appellant committed an act that caused penetration into the genital organ of IJ, a girl under the age of 18 years.
- 6.
7. The Appellant was found guilty on Count 1 and convicted and sentenced to 15 years imprisonment.
- 8.
9. The Appellant being aggrieved with both conviction and sentence preferred this Appeal and listed five (5) amended grounds of appeal in his Petition of Appeal which are as follows;
10.
 - i. **That my lordship, the trial magistrate erred both in law and facts by convicting the Appellant on the defective charge sheet.**
 - ii.
 - iii. **That the trial magistrate erred both in law and facts by not citing that the professional expert report was incomplete.**
 - iv.

v. **That the trial magistrate erred in both law and fact by failing to note that the investigation in to the instant case was not conclusive and exhaustive.**

vi.

vii. **That the trial magistrate erred both in law and facts by failing to consider that PW1's statement was of doubtful credibility, untruth worthy and misleading.**

viii.

ix. **That the trial magistrate erred both in law and fact by convicting the Appellant on inconsistent evidence from the prosecution.**

2.

11. At the hearing of the Appeal the Appellant chose to rely on his Written Submissions whereas the Counsel for the State made oral submissions.

12.

13. After hearing the oral submission and perusing the Appellants Written Submission this court finds the following issues for determination;

14.

i. Defective Charge Sheet

ii. Incomplete P3 Form

iii. Defilement

iv.

15. This being the first Appellate court, it is the duty of this court to re-visit the evidence, re-evaluate and re-assess the same and arrive at its own independent conclusion. Refer to the case of **LUKAS KERARIO SANGAI -VS- REPUBLIC (2011) eKLR**

16.

17. The Appellants first ground of appeal is that the words “ **male genital organ**” were omitted from the Charge Sheet.

18.

19. That the Appellant argues that these form the essential ingredients of the Charge for defilement, therefore the omission makes the charge fatally defective.

20.

21. Section 8 (1) of the Sexual Offences Act 2006 defines the offence of defilement as;

22.

“8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

1.

2. Upon perusing the particulars of the offence I find that indeed it does not mention the object used to penetrate. The key ingredients are “ penetration” and “ defilement” and both ingredients are included in the particulars of the offence. This court finds that the omission of the object used to penetrate does not render the charge defective.

3.

4. This court is satisfied that the Charge was properly framed and finds no merit on this ground of appeal.

5.

6. The next issue for determination relates to the P3 Form produced by Luka Rotich Chesire (**PW4**) a clinical officer based at Kabarnet District Hospital.

7.

8. **PW4** examined **PW1** and prepared the P3 Form which was produced into court as evidence and it was marked as “**PEXb 1**”.

9.

10. The Appellant submitted that the P3 form was a professional experts report but was incomplete, inadmissible and that the entire report ought to be disregarded.

11.

12. Counsel for the State had submitted that the finding of pregnancy was conclusive proof of penetration.

13.

14. There is therefore need for this court to address the clinical officers findings set out in the P3 Form to establish whether the Appellant was properly convicted for defilement

1.

15. A pregnancy test involves sampling either blood or urine to detect the hormones secreted that determine whether a woman is pregnant.

16.

17. From perusal of the P3 Form this court finds that PW4 used urine sampling and the pregnancy test tested positive.

18.

19. This court concurs with the submissions of the Appellant that the P3 Form is incomplete in that PW4 the Clinical Officer made a finding of “Pregnancy” but failed or omitted to make a finding as to the age of the foetus.

20.

21. This court opines that the witness PW4 ought to have included this critical observation or determination which would have given an indication as to when conception occurred which translates to

when “penetration” took place.

22.

23. The incident occurred on the 3rd May, 2007 and the Complainant was examined on the 18th May, 2007 by PW4. The period from the date of the incident to the examination amounts to fifteen (15) days. Anything could have transpired during this period and no evidence is adduced on record by the prosecution explaining why there was no prompt medical examination of the Complainant.

24.

25. This court reiterates the submissions of Counsel for the State that the pregnancy was conclusive proof of penetration.

26.

27. This court finds that there is doubt that arises from the P3 Form as to when “penetration” read “conception” could have occurred. Conception could have taken place before the incident or after the incident during the window period of 15 days.

28.

29. Where there is any doubt that arises the Appellant ought to be given the benefit of doubt.

30.

31. This court finds merit on this ground of appeal number (ii).

32.

33. After re-assessing and re-evaluating the evidence on record this court finds that the prosecution failed to prove beyond reasonable doubt that the Appellant was guilty of the offence of defilement.

34.

CONCLUSION:

For the reasons stated above the appeal is hereby allowed.

The conviction is hereby quashed and the sentence set aside.

The Appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

1.

2.

Dated and delivered at Eldoret this 24th day of January 2013

A.MSHILA

JUDGE

Coram: Before Hon. A Mshila J

CC: Oscar

Counsel for the State: Munene

Appellant: Present in person.

Language: Kiswahili

**A. MSHILA
JUDGE**