



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 57 of 2011

EKUTAN EWOI ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

(Being an appeal from the original conviction and sentence of T. Nzioki – SRM. in Criminal Case No. 463 of 2010 delivered on 10th May, 2011 at Lodwar.)

J U D G M E N T

The appellant, **Ekutan Ewoi**, was charged with defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act. Alternatively, he was charged with indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

It was alleged that on 9th July, 2010 at *{particulars withheld}* Turkana West, the appellant defiled E. L., a girl aged 16 years or that he unlawfully committed an indecent act by touching her genital organ.

The appellant appeared before and was tried by the Senior Resident Magistrate at Lodwar after denying the charges. Ultimately, he was convicted on the main count of defilement and sentenced to thirty (30) years imprisonment. This appeal is a result of his dissatisfaction with the conviction and sentence.

The appeal is based on the grounds contained in the petition of appeal filed herein on 23rd May, 2011. The grounds were argued by way of written submissions presented by the appellant at the hearing of the appeal. He appeared in person.

The learned prosecution counsel, **Mr. Chelashaw**, opposed the appeal on behalf of the Republic. He submitted that the appellant's constitutional rights were not breached as alleged and that there was sufficient evidence of identification against the appellant from PW1. The learned prosecution counsel also submitted that there was no breach of section 200 of the CPC as the trial was commenced afresh without objection from the appellant and that there was generally sufficient evidence for the appellant's conviction which was proper.

On sentence, the learned prosecution counsel was of the view that it was harsh as the minimum sentence provided by law is fifteen (15) years imprisonment.

Having considered both submissions by the appellant and the Republic, the role of this court is to revisit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

The prosecution called a total of seven (7) witnesses whose evidence may be summarized as follows:-

On the material date at about 1.00 p.m., the complainant, **E. L. (PW1)**, accompanied her mother to a river to fetch water. Thereafter, at about 7.00 p.m., they were on their way home but the complainant's mother remained behind at a market. The complainant proceeded on her own and on the way met the appellant who called her by her name. She knew him. He uttered shocking words and then held her by her waist. She tried to scream but he gagged her mouth with a cloth piece and fell her down. He assaulted and dragged her to a hill where he defiled her until morning hours. They were found at the said hill by the appellant's parents. The matter was reported to the chief and eventually the police.

C. N. (PW2), an elder sister to the complainant learnt from their mother that the complainant had gone missing. They later proceeded to the home of the father of the appellant and gave him the information. He later traced the complainant together with the appellant.

A police reservist, **Lokope Ekalapata (PW3)**, was at the chief's office when the complainant reported her ordeal to the chief. The chief ordered the reservist and others to fetch and arrest the appellant who was a known person. He (appellant) was found in his house and arrested.

Elim Lopolio (PW4), also a police reservist, participated in the arrest of the appellant.

Joseph Chebii Kaino (PW5), a clinical officer at Kakuma Mission hospital examined the complainant on 12th July, 2010 and completed the necessary P3 form which he signed. He did not find any medical evidence of defilement but found evidence of assault causing bodily harm.

P.C. Gene Aila (PW6), based at Kakuma police station investigated the case and preferred the present charges against the appellant.

Jeremiah Lodea Ewoton (PW7), also a clinical officer at Kakuma Mission Hospital assessed the complainant's age and placed it at 16 years.

The appellant's defence was a denial. He said that he was at his place of work on 12th July, 2010 loading sand into trucks when he took a break and decided to drink "changaa" (illicit liquor). He was thereafter arrested by police reservist while crossing a road. He was taken to Kakuma police station where he was held in custody without being informed of his crime. He was later charged in court with the present offences which he had nothing to do with.

In convicting the appellant, the learned trial magistrate was satisfied with the evidence adduced against the appellant by the prosecution witnesses and disbelieved the appellant's defence.

A fresh consideration of the evidence by this court reveals that the fact of defilement was overruled by the medical evidence adduced by the clinical officer (PW5) despite the complainant's evidence to the contrary.

The only revelation arising from the medical examination of the complainant was that she was assaulted and occasioned actual bodily harm and not sexually assaulted. However, there were credible indications that the appellant and the complainant were found together by the appellant's father by name A. who was not called to testify. As to whether the two engaged in sexual intercourse at the time was unproven even in the face of strong suspicion. Indeed, it was also unproven that the appellant engaged in an indecent act against the complainant.

It is therefore the opinion of this court, that the appellant's conviction for the offence of defilement was erroneous.

Instead, he ought to have been convicted of assault causing actual bodily harm contrary to section 251 of the penal code.

Consequently, the appellant's conviction by the learned trial magistrate for defilement is quashed and substituted for a conviction for assault causing actual bodily harm.

The sentence of thirty (30) years imprisonment imposed by the learned trial magistrate for defilement is hereby set aside and instead the appellant is sentenced to the term already served for assault causing actual bodily harm.

Ordered accordingly.

[Delivered and signed this 14th day of May, 2013.]

J.R. KARANJA.

JUDGE.