



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 42 OF 2012

(BEING AN APPEAL AGAINST THE ORIGINAL CONVICTION AND SENTENCE BY THE HONOURABLE J. KASAM, RESIDENT MAGISTRATE AT SOTIK IN CRIMINAL CASE NO. 26 OF 2012 IN THE JUDGMENT DELIVERED ON 12.07.2012)

ROBERT KIPKEMOI LANGAT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(BEFORE HON. JUSTICE BYRAM ONGAYA THURSDAY 24TH OCTOBER, 2013)

JUDGMENT

The appellant is Justus Robert Kipkemoi Langat. He was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. In alternative the appellant was charged with the offence of committing an indecent act with a child contrary to sections 11(1) of the Act. He was convicted as charged in the main count and sentenced to 10 years imprisonment.

The appellant has appealed against the conviction and sentence. His grounds of appeal include that:

- a. the honourable trial court convicted the appellant on account of contradictory evidence ;and
- b. the alleged defilement was not confirmed by a medical professional.

The appellant submitted that after the occurrence of the offence PW1 testified that she went home and informed her mother PW3. On the other hand, PW3 testified that she was informed by one J about not allowing her children to play at R's home and it is upon inquiry by PW3 that PW1 informed PW3 about the defilement. The appellant questioned why PW1 had failed to inform her mother about the offence on the material day of its alleged occurrence. The appellant further submitted that the medical report did not confirm that defilement had taken place. The appellant finally submitted that the mother of the complainant was the appellant's business rival and the case had been fabricated against him to throw him out of the business.

The learned state counsel Ms. Magoma opposed the appeal on behalf of the respondent. She made the following submissions:

- a. The medical report produced in court confirmed that the minor PW1 had been sexually assaulted.
- b. The prosecution witnesses and the P3 form confirmed that the defilement had taken place.
- c. The appellant at the trial never testified about the problems and the business rivalry as submitted before this court.
- d. In the circumstances the appeal was not merited and the court should dismiss it and uphold the

conviction and sentence.

This court has considered the submissions made for the parties and examined the record and judgment by the honourable trial court. The following are pertinent observations:

- a. PW1 testified that the appellant defiled her on a Friday around 4.00pm. She went home, informed her mother who took her to Kapkatet hospital for examination.
- b. PW2 was the clinical officer. He testified that he examined PW1 on 5.5.2012 (it was a Saturday). His testimony was that PW1 had bruises on her external genitalia, the hymen was intact, the internal genitalia was normal, spermatozoa was absent and his finding was that PW1 had been sexually assaulted as per the P3 exhibit 1. The P3 shows that the offence was allegedly committed on 4.5.2012 at 5.00pm and was reported to the police on 5.5.2012.
- c. PW3 being PW1's mother stated that she discovered the defilement from PW1 on 5.5.2012 after one J had advised her not to allow her (PW3's) children to play at R's home. PW3 further testified that she did not know the appellant till PW1 identified him at the time of the arrest. It was her testimony that J refused to come to court to testify.

In view of the foregoing record of the trial court, the court makes the following findings:

- a. The clinical officer PW2 found that the hymen was intact, the internal genitalia was normal, spermatozoa were absent and this court finds that there was no evidence of penetration. The offence of defilement was not established.
- b. PW3 testified that Joyce advised her not to allow her children to play at R's home. Upon receiving the information she inquired from PW1 what had happened. The appellant's name is Robert and is not explained how J's information linked the appellant to what may have allegedly happened to PW1. The evidence of J was never taken and the prosecution did not explain why this crucial witness was not called.
- c. PW3 states that the appellant was a neighbour but she did not know him until PW1 identified him at the time of arrest. Such evidence cannot be trusted because the natural and reasonable flow of things was that once PW1 disclosed the commission of the alleged offence to PW3, PW3 would have gained knowledge of the appellant's identity as a neighbour long before going to hospital and making the report to the police.
- d. Taking the evidence of PW1 and PW3 into account, it is not clear whether PW3 discovered the occurrence of the alleged offence on 4.5.2012 or on 5.5.2012.

In the circumstances of this case, the court finds that the prosecution evidence suffered serious gaps to link the appellant to the offence as charged. The court finds that the offence was not established beyond reasonable doubt and the appellant should benefit the doubt in the prosecution's case.

Accordingly, the appeal is allowed, the conviction is quashed, the sentence is set aside and the appellant is set at liberty unless otherwise lawfully held in custody.

Signed, dated and delivered in court at **Kericho** this **Thursday, 24th October, 2013.**

BYRAM ONGAYA

JUDGE