

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 153 OF 2010

(An appeal against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 714 of 2009 [M. I. G. MORANGA, SRM] dated 29th July, 2010)

ERICK LABAN IMBWAKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 16th May, 2007 at [particulars withheld] in Kakamega East District within Western Province unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of P A, a girl aged 8 years. In alternative, he was charged with indecent act with a girl contrary to Section 11 (1) of the same Act. The particulars were that on the same day and place, unlawfully and intentionally contacted his genital organ namely penis with her genital organ namely vagina of P A a girl aged 8 years. After a full trial, he was convicted on the main count and sentenced to life imprisonment. He has now appealed to this court. He filed initial grounds of appeal and supplementary grounds of appeal. He relied on the supplementary grounds of appeal. The learned counsel for the State

Mr. Oroni for the State supported the conviction and sentence.

Briefly, the facts of the case are that the complainant, PW1 P A a girl of about 8 years woke up in morning of 16th May, 2007. She dressed up and left for school. She used to live with her grandmother. On the way to school, she met the appellant who pulled her to sugarcane plantation. He whipped her and lost consciousness. When she regained consciousness, she noticed that her inner ware was blood stained and she was bleeding. She went back home and reported the incident to her grandmother. A report was then made to the police and the appellant who used to work for that grandmother, was arrested and charged with the offence. This was after the complainant was taken to hospital for treatment. When put on his defence, the appellant gave a sworn statement.

He was cross-examined. He stated that he was arrested when he went to claim his money from the complainant's mother. He maintained that he had worked for the complainant's mother and was to be paid Kshs.7,000/=.

This being a first appeal, I am duty bound to re-evaluate the 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 evidence is that complainant, who was a minor aged 8 years, was the only eye witness who identified the appellant as the culprit. She was a single identifying witness In the case of Nzaro -vs- R. [1991] KLR 70 the Court of Appeal stated as follows -

“Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleged to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused person in reliance of the correctness of identification or identifications.”

I am also aware under the Evidence Act, in sexual offences, the evidence of a minor, if believable, does not require corroboration. Is the evidence of the complainant (minor) believable? The complainant PW1 stated that she lived with her grandmother. She did not give the name of that grandmother. She stated that after the incident, she went and reported to the said grandmother. That grandmother did not give evidence in court. It is the mother of the complainant PW3 C N and PW2 F M, who gave evidence in court on the incident. They did not mention the grandmother. They are the ones who took the complainant to hospital and reported the incident to the police. The police did not do any further investigations other than take the appellant to court.

The Clinical Officer, PW5 Kizito Sifuna had to be issued with a warrant of arrest to come to court and testify on the issue. He was not a willing witness.

The appellant on the other hand gave a detailed defence describing his relationship as an employee of PW3, and that an amount was owing to him from her. According to him, the debt was the reason why he was implicated in this case.

In my view, from the evidence on record, a reasonable court could not find that the single minor identifying witness was truthful. If indeed she was truthful, then the grandmother would have come to court to testify. She did not. If she was truthful, PW3 and PW2 would have said that the complainant lived with the grandmother and that that was where she first reported the incident. None of them said so. The appellant's defence on the other hand was detailed and was given on oath. His evidence regarding the grudge which arose from the debt owing was not controverted in cross-examination. This created reasonable doubt about his guilt. In my view, the conviction of the appellant was not safe. The evidence of the complainant was doubtful. The evidence of the prosecution did not establish beyond any reasonable doubt that the appellant committed the offence.

Consequently, I find that this appeal has merits. 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 22nd day of November, 2013

George Dulu

JUDGE