



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 198 OF 2019

DAVID KIPTOO KIPNYANGO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Complainant in this matter is said to have been 10 years old at the time of the offence. David Kiptoo Kipnyango (**the Appellant**) was convicted for defiling the Complainant in violation of section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that:-

“On the 1st August 2018 in Kapsabet Location within Nandi County intentionally and unlawfully did cause his penis to penetrate the vagina of ZA a girl aged 10 years.”

3. The Complainant (**PW2**) was born on 20.5.2009 and a birth certificate was produced in proof of this. Her evidence is that on 1st August 2018 she left home at 9.00am to play in their neighbourhood with A. After sometime she left for home using a path. Ahead of her were a lady and a man. The lady held her hand and led her to a nearby mud walled house. The Man accompanied them into the house. In the house was a boy who left.

4. That the lady tied her hands behind her back with a rope and covered her mouth with a piece of cloth. She was forced onto a mattress on the floor of the house and to lie on her back. The Appellant then defiled her.

5. That after the Appellant had defiled her, another lady came and removed her out of the house and she made her way home. She then met the village Elder but she was too terrified to tell him anything. On reaching home her mother inspected her vagina and called the village Elder who searched for the suspects.

6. As for the mother of the Complainant, she testified that on 1/8/2008, her daughter left home until about 7.00pm when the village Elder accompanied her and reported that he had found her near the home of a certain person looking distressed. She then inspected the vagina of her daughter and found that she had a discharge flowing down her legs. That she reported the matter to the Village Elder who contacted the area Chief.

7. That the area Chief visited a nearby hotel and returned with a person who the Complainant was unable to identify. That on bringing the Appellant, the Complainant identified him to the Chief in her presence by saying:-

“huyu ndio alinidunga”

8. It fell to Danson Gichangi (**PW3**) to examine the Complainant. He attached to Kapsabet Hospital. His evidence was that he saw the victim on 2nd August 2018 and on inspecting her, he found that her vagina hymen was freshly broken. It was markedly tender and reddened. That the labia (both) were broken and associated with bleeding. He returned an opinion that there was forceful vaginal penetration.

9. In his defence, the Appellant stated that he is a resident of Kamobo and had visited Kapsabet in search of a manual job. He was at first employed as a shepherd and he later hawked. He denies defiling the child.

10. In an Amended Petition, he raises the following grounds:-

i. That the learned Trial Magistrate erred in law and fact in reaching a conviction without considering that the Exhibits from the scene had not been produced.

ii. That the medical evidence was not conclusive as there was no DNA testing and matching of the discharge from the victim, and his samples.

iii. That the matter was not properly investigated by the investigating officer.

iv. That crucial witnesses were not called to clear some doubts.

v. That the learned Magistrate erred in law and fact in failing to evaluate the mode of arrest.

11. This is a first Appeal. The duty of the Court is to understand and evaluate the evidence at the trial as though it was conducting a rehearing with a view to reaching its own conclusion. As caveat, though, the Appeal Court should always bear in mind that, unlike the Trial Court, it did not hear and see the witness testify firsthand.

12. In his written submissions, the Appellant starts by accepting that the victim was indeed defiled. I think that the acceptance is well taken and this Court agrees with the Trial Court's finding that from the medical evidence the prosecution had proved the penetration of the genitalia of the victim and the only question really had to be who had caused the penetration.

13. The testimony of the victim is that she was tied using a rope and forced to lie on a mattress. The Appellant criticizes the prosecution for failing to produce not only these two items but also the underwear and dress the victim was wearing. It is of course true that the quality of the prosecution case would have improved if these items had been produced or their non-production explained. That said, since penetration had been easily established, what has to be crucial is whether the other evidence proved that it was the Appellant who was the perpetrator of the penetration.

14. Again while use of D.N.A typing could have connected the suspect to the crime, lack of it does not necessarily weaken the prosecution case because there are other ways of proving the connection. That is what I turn to.

15. According to the Complainant the incident took place in broad day light. She had walked behind the perpetrator and someone who had assisted him led her into a mud house and tied her hands. She spent considerable time with the perpetrator and the trial Court cannot be faulted for finding that:-

“She had ample time with DW1 from the time they led her to the house till she was set free from the house.”

16. The Victim, a 10 year old, gave a remarkably detailed account of what befell her on that day. In the very short cross-examination she had to face, she did not buckle and remained firm. Her mother PW1 was present when the young girl pointed out the accused person to the chief. While the Chief would have been a crucial witness in corroborating this account of the mother, his absence is not fatal to the prosecution case as the other evidence on its own is sufficiently strong to connect the Appellant to the crime.

17. In the end this Court cannot fault the conviction. And as the Appellant does not question the sentence then both the conviction and sentence are hereby upheld.

Dated, Signed and Delivered in Court at Nairobi this 1ST Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

David Kiptoo Kipnyango (the Appellant) present in Person

Miss Muhonja (D.P.P) for the State