



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.25 OF 2020

VINCENT KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence by Hon E. W. KARANI (RM)

in Kericho CM Criminal Case No.23 of 2018 delivered on 13/3/2020)

JUDGMENT

1. The Appellant was convicted with the offence of Defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (SOA) No.3 of 2006 and he was sentenced to 25 years imprisonment on 13/3/2020.
2. The particulars of the charge were that on 24/3/2018 at [Particulars withheld] village in Bureti Sub County within Kericho County the Appellant intentionally caused his penis to penetrate the vagina of DC, a child aged 6 years old.
3. The Appellant was charged with an alternative count of committing an indecent Act with a child contrary to section 11 (i) of the Sexual Offence Act No.3 of 2006 in that in the same material particulars as in court 1 (above), the Appellant intentionally touched the buttocks/vagina of DC a child aged 6 years old with his penis.
4. The Appellant pleaded not guilty to the charges the prosecution evidence in summary was that on 24/3/2018, the mother of the complainant escorted her to the road where the complainant boarded the school motor vehicle Registration No.KCF [xxx]P driven by the Appellant.
5. The complainant who testified as PW1 at the trial was subjected to voire dire examination and she said the Appellant who was alone in the motor vehicle drove for a short distance and stopped the vehicle and removed her biker and panty and he also removed “kitu yake ya kukojolea” (his thing for urinating) and he inserted it into her “Kitu ya kukojolea” (thing for urinating) and she felt a lot of pain.
6. The complainant further testified that the Appellant threatened her that he would kill her if she cried and therefore she did not cry. The complainant was in class one at [Particulars withheld] Academy at the time of the incident.
7. PW.2 the mother of the Complainant testified that on 24/3/2018, she escorted the Complainant to the road and the Complainant boarded the school van driven by the Appellant.
8. PW.2 said the Complainant reported to her on 28/3/2018 that she had been defiled by the Appellant. PW.2 took the Complainant to Kapkatet Hospital where she was examined by Dr. Clement Komu who confirmed that the Complainant had markings on her vaginal opening and also bruises on her labia majora and labia minora and also lower back pains as well as limping.
9. The Appellant in his defence said on 24/3/2018, he was at his home taking care of his cows and that he did not go anywhere as it was a Saturday.
10. The Appellant called one witness who was the head teacher of the school the Complainant was attending and he said pupils do not go to school on Saturdays and he also produced attendance Registers for 26th to 28th March, 2018 and further that the Complainant was in attendance at the school and she did her examinations and performed well. He said the Complainant did not go to school on 29/3/2018.

11. The Trial Court found that the prosecution had proved the charge of Defilement and convicted the Appellant and sentenced him to 25 years imprisonment.

12. The Appellant has now appealed to this Court on the following grounds:-

- (i) THAT the prosecution evidence was not sufficient to convict the Appellant on a charge of Defilement.
- (ii) THAT the charge was framed and manufactured and fabricated to meet the predetermined goal of fixing the Appellant.
- (iii) THAT the Appellant was not medically examined as stipulated by Section 36 (1) of the Sexual Offences Act No.3 of 2006.
- (iv) THAT the Trial Court rejected the defence by the Appellant.

13. The parties filed written submissions in the appeal which I have duly considered. The Appellant submitted in writing as follows:-

- (i) THAT the prosecution did not prove the Critical ingredients forming the offence of defilement and further PW.3 said the marking on the Complainant's genitalia were due to blunt object penetration and hence the same cannot be considered as penetration by a Sexual organ.
- (ii) THAT the report was made 4 days after the incident and the evidence was distorted by the delay and there is no reason why the Court was in a hurry to convict the Appellant.
- (iii) The Appellant submitted that no DNA test or medical evidence was tendered by the prosecution in support of the offence and that this was fatal to the prosecution evidence and therefore there was no medical evidence that the appellant was the culprit.
- (iv) The Appellant testified that there was no eye witness to the Defilement and therefore it was incumbent upon the Trial Court to warn itself on the danger of relying upon the evidence of single identification witness. Further that the Complainant and her mother said the Appellant is known as Cheruiyot yet there is no evidence that the Appellant goes by the name Cheruiyot.
- (v) The Appellant also submitted that on 24/3/2018, he was not at school yet the Trial Court rejected his plausible alibi defence without explanation. The Appellant submitted that the prosecution must always bear the burden of disproving the alibi which was not done in the present case.
- (vi) The Appellant also submitted that the Trial Court failed to analyze the evidence presented before it and wrongly convicted the Appellant without proof beyond reasonable doubt and further that the evidence convicting the Appellant lacked evaluation.

14. The Respondent opposed the Appeal and submitted as follows:-

- (i) THAT the Trial Court clearly analyzed the entire evidence and made conclusions based on the prosecution evidence and also the defence.
- (ii) THAT the evidence of the Complainant after voir dire examination was very clear on how the Appellant defiled her in the vehicle after being escorted to the road by the mother.
- (iii) THAT the testimony of the Complainant was corroborated by that of PW.2, the mother who confirmed that the appellant was alone in the vehicle when he picked the Complainant from the road. Further that PW.2 also produced the birth certificate of the Complainant.
- (iv) On the issue that the Appellant was not medically examined as stipulated by Section 36 (1) of the Sexual Offences Act, it was submitted that the prosecution evidence was enough to satisfy the ingredients of the charge the appellant was facing and therefore the same was not necessary.
- (v) Finally on the issue that the Trial Court ignored the defence by the appellant, the Respondent submitted that the alibi defence was considered by the Trial Court and found wanting and full of contradictions and inconsistencies.
- (vi) The Respondent further urged the Court to enhance the sentence meted upon the Appellant to life imprisonment since the Appellant was served with a Notice of enhancement of sentence.

15. This being the first appellate court, it is the duty of this court to re-evaluate the evidence adduced before the Trial Court and to arrive at its own conclusion as to whether or not to support the finding of the Trial Court while bearing in mind that the Trial Court had the opportunity to observe the witnesses. The court of Appeal in *David Njuguna Wairimu versus Republic (2010) eKLR* stated as follows ***“the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”***

16. Similarly, Justice Odunga, In *Paul Thiga Ngamenya versus Republic (2018) eKLR*, cited the case of *Okeno Versus Republic (1972) EA*

32, where the court of appeal set out the duties of the first appellate court as follows: “*An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 42*”

17. The issues for determination in this appeal are as follows: -

- (i) Whether the prosecution proved the ingredients of the offence of defilement.
- (ii) Whether the trial court considered the alibi defence by the Appellant.
- (iii) Whether the sentence should be enhanced.

18. On the issue as to whether the prosecution established the ingredients of the charge of defilement, the law requires that the prosecution proves three elements as follows:-

- (i) THAT there was penetration.
- (ii) The identification of the culprit.
- (iii) The age of the Complainant.

19. In the current case, I find that there is evidence of penetration. The testimony of PW.1 (the Complainant) was corroborated by that of PW.3, the Doctor who examined her on 29/3/2018 and said there were marks on the vaginal wall and lacerations on the labia majora and the labia minora and that the same were as a result of vaginal penetration.

20. The argument by the Appellant in the submissions that a blunt object cannot be a Sexual Organ does not hold as the Complainant’s testimony was clear that the Appellant inserted “Kitu yake ya Kukojolea” (his thing for urinating) into her “Kitu ya Kukojolea” (thing for urinating).

21. The Complainant and her mother (PW.1 and PW.2) positively identified the appellant as the person who was driving the school van when the Complainant was defiled. The Complainant said the Appellant drove for a short distance and stopped the van and defiled her inside the van whose windows were tinted.

22. The age of the victim was proved by production of the birth certificate which showed she was born 7/12/2011 and she was 6 years at the time of the commission of the offence on 24/3/2018. The definition of a child is the one assigned by the children Act i.e. any human being below the age of 18 years.

23. On the issue as to whether the Court considered the alibi defence by the Applicant, I find that the Trial Court delved on the defence evidence at length on page 8 and 9 of the Judgment.

24. The alibi defence did not dislodge the prosecution evidence. The Court also found the testimony of the child “very bold, consistent and firm”.

25. The provision to Section 124 of the Evidence Act provides that in Sexual Offences, the Court can rely on the testimony of the complainant only if for reasons to be recorded, the Court had a reason to rely on the same. I find that there is evidence that the Complainant was bold, consistent and firm and therefore there was reason for the Trial Court to rely on the testimony of the complainant.

26. On the issue as to whether the sentence should be enhanced.

I find that the Appellant ought to have been sentenced to life imprisonment. However, taking into account the Francis Karioko Muruatetu case where the Supreme Court said that it is unconstitutional to take away the discretion of the Court in sentencing, I find that it was in order for the Appellant to be sentenced to 25 years imprisonment.

27. I accordingly find that the appeal herein lacks in merit and I accordingly dismiss it and I uphold both the conviction and sentence.

28. The Appellant has a right of appeal to the Court of appeal within 14 days of this date.

Delivered, dated and signed at Kericho this 11th day of June 2021.

A. N. ONGERI

JUDGE