



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO. E017 OF 2021
BETWEEN
DAVID MWONJATI..... APPELLANT
AND
REPUBLICRESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O No.32 of 2018 in the Principal Magistrate's Court at Tigania by Hon. P.M.Wechuli (SRM) on 30.11.2020)

JUDGMENT

The charge

1. **DAVID MWONJATI (Appellant)** has filed this appeal against sentence and conviction on a charge of sexual assault contrary to section 5(1)(a) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on diverse dates between 1st August, 2018 and 04th September, 2018 by inserting fingers to penetrate the vagina of **EN** a child aged 7 years thereby occasioning her bruises.

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of its case. The prosecution case as narrated by the **EN** complainant is that Appellant put her on the bed and pricked her vagina. Jennifer Muthoni complainant's teacher stated that complainant had pain when urinating and upon being questioned said that her father had inserted fingers in her vagina. On 05.09.2018, complainant whose age was estimated to be 4 years was examined. Her hymen was intact but she had bruises around the vaginal region. She produced the P3 form as PEXH.1. Complaint was investigated by PC Njoki and Appellant was subsequently arrested and charged.

Defence case

3. In his unsworn evidence, Appellant conceded that complainant was his daughter and that he used to bathe her but denied defiling her. His mother stated she used to assist Appellant take care of the child and denied that she was defiled.

4. In a judgment dated on 05.03.2021, Appellant was convicted and sentenced to 10 years imprisonment.

The appeal

5. Aggrieved by this decision, the Appellant lodged the instant appeal. From the supplementary grounds of appeal and written submissions Appellant raises grounds but mainly that the prosecution case was not proved.

Analysis and Determination

6. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of the Appellant the State having not filed any.

7. The age of the complainant who was the primary witness was estimated by the clinical officer to be 4 years old. The decision of the Court of Appeal in **Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR** fortifies the fact that there is no requirement that age can only be proved by way of a Certificate of Birth and that other evidence such as medical proof, the testimony of the victim's parents or guardian and observation can establish the age of a victim.

8. Section 5. (1) of the Act that Appellant was convicted under provides as follows:

Any person who unlawfully -

(a) penetrates the genital organs of another person with -

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

9. The clinical officer noted that the bruises were on the complainant's vaginal area. Bruises. Google defiles the vagina as the closed muscular canal that extends from the vulva — the outside of the female genital area to the neck of the uterus (cervix). The clinical was not helpful for he failed to explicitly point out if the bruises were in or outside the vagina. From the foregoing coupled with the fact that the hymen was intact, I find that the prosecution did prove beyond any reasonable doubt that there was evidence of penetration which is defined by Section 2 of **the Act** as partial or complete entry into the genital organ of another person.

10. The evidence on record as analysed by the trial court reveals that Appellant touched complainant's vagina with his fingers.

11. Section 2 of the Act defines "indecent act" as an unlawful intentional act which causes- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

12. The penalty for indecent assault is found under Section 11 of the Act which provides that:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

13. Appellant was therefore lawfully sentenced to serve 10 years' imprisonment. Section 333(2) of the Criminal Procedure Code provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

14. It is worthy to note that the Appellant was in custody throughout the trial having been arrested on 15.09.2018.

15. From the foregoing, the Appeal fails except that the 10-year sentence imposed on the Appellant shall commence from 15.09.2018 when he was arrested.

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki