



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 62 OF 2018

SBM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Wajir in Sexual Offence Case No. 16 of 2018 delivered by Hon. Mugedi Nyaga (RM) on 12th October, 2018)

JUDGEMENT

1. In Count I the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act 2006. Particulars being that on the 11th August 2018 around 4.00am in Eldas Sub-County within Wajir County he intentionally caused his penis to penetrate the vagina of FAM (name withheld) a child aged 15 years.

2. In the alternative he was charged with offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006. Particulars being that on 11th August 2018 around 4.00am in Eldas Sub-County within Wajir County he intentionally touched buttocks and vagina of FAM (name withheld) a child aged 15 years using his penis.

3. In Count II the appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act. Particulars of the offence being that on the 11th August 2018 around 4:00am in Eldas Sub-County within Wajir County being a male person caused his penis to penetrate the vagina of FAM (name withheld) a female person who was to his knowledge his niece.

4. He pleaded not guilty and matter went into full trial. He was found guilty and sentenced to 10 years' imprisonment.

5. Being aggrieved, he lodged instant appeal and set out ground of appeal which amount to:

I. Whether the prosecution did prove case beyond reasonable doubt?

II. Whether defence was considered?

6. Parties were directed to canvass appeal via submissions. The appellant filed but prosecution relied on evidence on record.

PROSECUTION'S CASE

7. The state line up 7 witnesses. **FAM (PW1)** testified that she was a student aged 15 years. She testified that on 11th August 2018 around 4:00 am as she was sleeping she felt some pain on her private parts. When she woke up she found man on top of her. PW1 told the trial court that the man had a torch and it was on.

8. She testified that she snatched the torch from the person and used it to identify the man. PW1 identified the person as the appellant. According to PW1 she found that the appellant had inserted his penis into her private parts. It was her testimony that the appellant had unzipped his trousers and pushed it down. She testified that she saw the appellant's penis.

9. PW1 testified that when she went to sleep she was wearing innerwear. However, when she woke up she found that the same had been pulled down. She told the trial court that after she identified the appellant, She let him off. It was her evidence that when she identified the appellant.

10. He told her to be quiet. It was her testimony that the appellant said that he thought that she was a different girl. The children that she was sharing a room with screamed. It was her testimony that she also screamed.
11. PW1 testified that the children told a person who was sleeping in a neighboring house what had happened. It was her evidence that the person was dumb and deaf. PW1 told the trial court that in the morning they informed her uncle AB and Aunt HA what had happened. It was her testimony that, her uncle called the chief of Dela Location.
12. PW1 called her mother. PW1 testified that the chief and some police officers visited them. They then went to Eldas Police Station where they recorded witness statements. According to PW1 she visited a hospital in Wajir where she was examined.
13. According to PW1, the appellant was her maternal uncle. He was borne of the same father with her mother. PW1 identified the dress, trouser and the innerwear she was wearing on the material day. She also identified the torch that the appellant had.
14. AB (**PW2**) testified that on 11th August 2018 around 6:00am PW1 went to him. She told him that while sleeping she had found the appellant on top of her. It was her testimony that she told him that the appellant had sex with her.
15. PW2 told the court that the appellant was his brother and PW1 was his niece. She explained that PW1's mother was his step sister. They shared a father. PW2 testified that on receiving the information he called Chief Daudi Abdullahi and told him what PW1 had told him.
16. According to PW2, police officers took PW1 to Eldas Police Station. PW2 and a lady called HA accompanied them. PW2 testified that they recorded statements with the police. They then took PW1 to hospital. PW2 explained to the trial court that PW1 told her that when she found the appellant on top of her she took a torch and identified him.
17. HA (**PW3**) testified that on 11th August 2018 in the morning PW1 went to her crying. She told her that around 4:00 a.m the appellant had defiled her. PW3 testified that the appellant was PW1's uncle.
18. PW3 testified that they went to PW2's house. PW2 told them that he had reported the matter to the chief. According to PW3, police officers visited them. They went to Eldas Police Station where they recorded statements.
19. SB (**PW4**) testified that PW1 was her daughter. It was her evidence that she was aged 15 years. According to PW2, the appellant is her step brother. They share a father. PW4 testified that on 11th August 2018 around 9:00 am PW1 called her and told her that the appellant had defiled her at 4:00 am.
20. PW4 told the trial court that after receiving the news she went to their home in Dela accompanied by their father. PW4 testified that they took PW1 to hospital where she was examined. It was her testimony that PW1 told her that she identified the appellant using a torch that he had.
21. BM (**PW5**) testified that she is PW1's grandmother and PW4's father. Also she was the appellant's father. PW5 testified that on 11th August 2018 she was called by PW2 who told her that PW1 had been defiled by the appellant. PW5 proceeded to Dela in company of PW5. They took PW1 to hospital.
22. Robert Otieno Ogallo, a Clinical Officer at Wajir County Referral Hospital (**PW6**) produced a P3 form that was filled by his colleague after he examined PW1. PW6 testified that genital examination revealed normal genitalia. He noted that grade 2 female genital mutilation had been done. He found that hymen was intact and no lacerations were noted.
23. PW6 testified that laboratory tests showed that the victim was not pregnant. There were epithelial cells with no spermatozoa. PW6 produced the P3 form dated 11th August 2018 as exhibit 1. He produced laboratory result form as exhibit 2 and high vaginal swap results form as exhibit 3. Finally he produced the victims consent form as exhibit 9.
24. No. 85260 PC Fredrick Ochieng of Eldas Police Station (**PW7**) testified that on 11th August 2018 around 11:10 am, AB and HA reported to him that on the material day around 4:00 am PW1 had been defiled by the appellant. PW7 testified that he was told that the appellant was PW1's uncle.
25. PW7 testified that they visited the scene of crime and recovered the clothes that PW1 was wearing at the time the offence was allegedly committed. The clothes were a dress, a tight trouser and a pair of panties. They also recovered the torch that was used by the complainant to identify the appellant. PW7 testified that the scene was a traditional Somali hut and there was a bed in the house.
26. According to PW7, PW1 recorded a statement at Eldas Police Station. They issued her with a P3 form which was filled and returned to them. PW7 testified that they escorted PW1 to Wajir County Referral Hospital for examination. PW7 testified that they established that PW1 was aged 15 years.
27. PW7 told the trial court that the appellant was arrested at Griftu. PW7 produced the aforementioned torch as exhibit 4, dress as exhibit 5, tight trousers as exhibit 6, pair of panties as exhibit 7 and a copy of the complainant's birth certificate as exhibit 8.

DEFENCE CASE

28. The trial court found the accused person with a case to answer and placed him on his defence. He elected to give a sworn statement. The

appellant denied that he committed the offence. He testified that he was arrested while riding a bodaboda. It was his defence that he was assaulted after he was arrested.

29. During cross examination the appellant admitted that he was an uncle to PW1. He also admitted that he had no issues with the prosecution witnesses. It was his testimony that he did not defile PW1. He told the trial court that he was being framed. However, he testified that he did not know the people who were framing him.

ISSUES, ANALYSIS AND DETERMINATION

30. After going through the evidence on record, and the submissions by the appellant I find the singular issue is ;

i. Whether the ingredients of offence were proved?

31. PW1 testified that on 11th August 2018 around 4:00am she was asleep when she felt pain in her private parts. When she woke up she found the appellant on top of her. PW1 testified that she identified the appellant using a torch that she snatched from him.

32. PW7 produced the torch as exhibit 4. PW1 testified that she found the appellant having inserted his penis into her vagina. It was her testimony that the appellant had unzipped his trousers and pushed it down. She testified that she saw the appellant's penis. The appellant did not challenge this evidence during cross examination.

33. In his defence he denied committing the offence. He told the trial court that he was being framed.

34. The other prosecution's witnesses did not see the appellant commit the offences he was charged with. They replied on what they were told by PW1.

35. Section 124 of the Evidence Act Cap 80 of the Laws of Kenya provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

36. The above provision allows the court while handling sexual offences to convict on uncorroborated evidence of a minor victim if the court is satisfied that the minor is telling the truth. The court is mandated to record the reasons for believing the minor is telling the truth.

37. PW6 testified that when PW1 was examined it was found that her genitalia were normal. It was his testimony that her hymen was intact and no lacerations were noted.

38. PW6 testified that laboratory tests showed that the victim was not pregnant. He told the trial court that there were epithelial cells with no spermatozoa. The findings are contained in the P3 form dated 11th August 2018 (exhibit 1).

39. The medical evidence appears not to tally with PW1's testimony. With the medical findings the trial court doubted penetration took place. PW1's genitalia were normal with no lacerations. Whereas an intact hymen does not necessarily mean that penetration did not take place. The other findings create a reasonable doubt as to whether penetration took place.

40. To sustain a conviction in an offence of defilement age must be proved. **Justice W.A. Okwany** in *Denis Onsinyo Obwoye vs Republic [2017] eKLR* authoritatively quoted **Justice Mutende** in *Joseph Kieti Seet vs Republic [2014] eKLR* where it was held that:

“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held thus:

‘In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...’”

41. **Justice Ndolo** in the case of *Dominic Kibet Mwareng vs Republic [2013] eKLR* upheld what was stated in *Hilary Nyongesa vs Republic (Eldoret Criminal Appeal No. 123 of 2009)* where **Mwilu J** (as she then was) stated that:

“Age is such a critical aspect in sexual offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of victim.”

42. In the charge sheet it is stated that PW1 was 15 years old. PW1 did testify that she was aged 15 years. Her birth certificate (exhibit 8) indicates that she was born on 20th March 2003. That makes her 15 years as at the time the offence was allegedly committed. The appellant did not challenge the evidence on age. The court finds that prosecution proved beyond any reasonable doubt that PW1 was aged 15 years.

43. PW1 testified that she found the appellant on top of her. She snatched the torch that the appellant had and used it to identify him. PW1 testified that the appellant was her uncle. PW2, PW3, PW4 and PW5 who were the appellant's relatives corroborated this. Whereas no one saw the appellant near PW1 the trial court had no doubt that he was positively identified by PW1. The appellant was at the scene of crime on the material day.

44. In summary the trial court found that the offence of defilement was not proved beyond any reasonable doubt. This is because whereas prosecution proved that PW1's age and the appellant's presence at the scene of crime, penetration was not proved.

45. The trial court considered the offence of incest act as contained in Count 2. In *W.O.O vs Republic [2016] eKLR (Siaya High Court Criminal Appeal No. 81 of 2015) Justice Makau* held that:

“The ingredients of an offence of incest are as follows:

‘Relationship within the meaning of the law and penetration.’”

46. On the issue of relationship, PW1 testified that the appellant was her uncle. PW2, PW3, PW4 and PW5 corroborated this.

47. When the appellant was cross examined by the prosecutor during defence hearing, he admitted that he was an uncle to PW1. On relationship trial court found that the relationship with the meaning of the law has been established. In other parts of the judgment the trial court found that penetration was not proved. For this reason, found that the offence of incest was not proved beyond any reasonable doubt.

48. The trial court found that the appellant was the person found on top of pw1. PW1 testified that when she woke up, she found that her innerwear had been pushed down. Also, she testified that the appellant had unzipped his trousers and pushed it down. PW1 told the trial court that she saw the appellant's penis.

49. In his defence the appellant denied that he committed the offence. He testified that he was being framed. The court did not find any reason why the appellant was framed for commission of the offence. Whereas no other prosecution witness saw the appellant at the scene.

50. The court was not given a reason to doubt the credibility and truthfulness of PW1. PW1 testified that he saw the appellant's penis. Again, this was not challenged.

51. From the testimony that was presented by PW1 the trial court had no doubt that the appellant had his penis come into contact with PW1's private parts. The only thing that did not happen was penetration. This is a clear case of indecent act with a child.

52. This court agrees with the finding of the trial court on conviction. On sentence the court awarded what is prescribed as mandatory minimum sentence thus trial court disregarded the mitigations. The appellant was a first offender and the circumstances did not disclose any degree of violence.

53. Thus, the court finds that since the minimum sentence are no longer mandatory the court finds that a lesser sentence ought to apply in the circumstances of this case.

54. Thus, the court makes the following orders: -

i. The appeal on conviction is dismissed and thus upheld.

ii. The sentence of 10 years' imprisonment is set aside and instead substituted with a sentence of 5 years to commence from the date of arrest 1/8/2018.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE