



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO.3 OF 2020**

**ADEN MOHAMED ABDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the original conviction and Sentence of*

*Hon. E.K. TOO Principal Magistrate Moyale*

*in Cr. Case (SOA) No.2 of 2019)*

**J U D G M E N T**

The appellant was charged with the offence of attempted defilement contrary to Section 9(1)(2) of Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 12<sup>th</sup> day of February 2019 in Moyale sub county, within Marsabit county, intentionally attempted to cause his penis to penetrate the vagina of RAK a child aged 10 years.

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(A) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 12<sup>th</sup> day of February 2019 in Moyale sub County within Marsabit County intentionally rubbed his penis against the vagina of RAK a child aged 10 years.

The trial Court convicted the appellant on the alternative count of indecent act with a child and sentenced him to serve 10 years imprisonment. The grounds of appeal are that:-

- 1. The learned Magistrate erred in law and facts in holding that the prosecution had proved the case beyond reasonable doubt against the appellant whilst there was no such evidence to prove thereby deciding the case against the weight of the evidence.***
- 2. The learned trial Magistrate erred in law and facts in ignoring a cardinal principal in criminal law and procedure that the burden of proof lies on the prosecution and that they must prove each and every ingredient of the charge beyond reasonable doubt.***
- 3. That the learned Magistrate failed to make a finding that there existed some doubts in the prosecution case, and further failed to make a finding thereof that the benefit aforesaid was to be given to the appellant and erred in law in failing to acquit the appellant as a result thereof.***
- 4. The learned trial Magistrate erred in law in failing to find that enough doubt was created to secure an acquittal of the appellant.***
- 5. That the trial Magistrate erred in convicting the appellant without considering that the medical evidence was not conclusive.***
- 6. The trial Magistrate erred in convicting the appellant without considering that the doctor's report and medical examination was contradictory and did not support the alleged offence.***
- 7. That the trial Magistrate erred in convicting the appellant without considering that no other witnesses came to court to prove what PW1 claimed and as such the evidence remained that of a single witness.***

**8. That the trial Magistrate erred in failing to consider the defence case adequately and failed to make a finding thereof.**

**9. That the Magistrate erred in law and fact in failing to believe the appellant's defence and further failed to give proper or any reasonable grounds of rejecting the appellant's defence from the evidence adduced.**

**10. The learned Magistrate erred in law and fact by failing to make due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case thereby reaching a wrong decision causing miscarriage of justice.**

**11. That the trial Magistrate erred in failing to consider the evidence as a whole before making a guilty finding against the appellant.**

Mr. Halake appeared for the appellant. Counsel submit that the prosecution did not prove its case beyond reasonable doubt. PW1 testified before Hon. Kimani. The Magistrate later recused himself. While the complainant was testifying before Hon Kimani she stated that the appellant never touched her vagina, breast or buttocks. PW4 who is a medical officer, Dr. Marsa Hassan testified that there was no presence of spermatozoa on PW1 vagina or her clothes, yet PW1 alledged that the appellant urinated on her. PW2 who is a neighbor did not witness the incident. The trial court observed in its judgement that there were inconsistencies in the prosecution evidence. The trial court entirely relied on the demeanour of the victim and based his decision on the "proviso" to section 124 of the Evidence Act. The complainant's evidence is not corroborated at all by the other evidence.

Counsel further contend that the Investing Officer did not visit the scene. No proper investigations were done. The trial court did not adequately consider the defence case. The complainant slept on the same bed with four other minors. One of the minors testified for the defence. The appellant's mother testified that she had a sexual relationship with the complainant's father but she ended that relationship. The complainant's father was out to settle scores. The trial court admitted that there were doubts in the evidence and therefore the appellant was entitled to the benefit of doubt. No reasons were given as to why the main count was not proved. Laboratory tests revealed that there was no spermatozoa. The investigating officer did not even make an attempt to interrogate the children who were sleeping on the same bed with the complainant.

The state opposed the appeal. Mr. Kihara, learned prosecution Counsel, maintains that the case was proved beyond reasonable doubt and urged the court to uphold both the conviction and the sentence. All the ingredients of the offence were proved. The court was correct by convicting the appellant on the alternative charge. A birth certificate was produced which proved the complainant's age. PW1 identified the appellant who is a neighbour and therefore identification is not in doubt. Torn clothes were produced and that proved that there was an attempt to defile the complainant. The appellant went to the room where PW1 was sleeping and therefore had the intention of defiling her. The torn clothes did establish that an act was committed which intended to defile PW1. Section 124 of the Evidence Act allows the court to convict an accused if the complainant's evidence is believable. The appellant was not charged with defilement which requires proof of penetration. **PW1** testified that the appellant touched her breasts. The breasts is part of the body which constitutes indecent act. It is further submitted that apart from one minor all the defence witnesses were not at the scene. The minor who testified for the defence is related to the appellant and his evidence does not explain what transpired that night. The issue that the complainant's father had a relationship with appellant's mother is an afterthought.

This is a first appeal and the Court has to evaluate the evidence afresh before drawing its own conclusion. **PW1** was the complainant. She testified on 5.5.2019 before Hon. M.S. Kimani. The learned Magistrate later on recused himself. PW1 was recalled later after some witnesses had testified. She informed the court that she was ten years old and in class two. On the 12.2.2019 at 9.00pm she had been requested by the appellant's mother to sleep at their house. She slept on the same bed with other children. While sleeping there the appellant switched off the lights removed his penis and urinated on her. The other children were asleep. She saw the appellant from the moonlight that was coming into the room. The appellant tore her clothes which were a dera, a long tight and a pant. She screamed and the appellant tried to run away. She went and told her father whose house is less than ten metres away. The appellant also held her breast. She knew the appellant who is their neiggbour. The house had two bedroom and they were in the same room with the appellant. The matter was reported to the police and she was taken to the hospital for examination.

**PW2 AKT** is PW1's father. On the 12.2.2019 at around 9.00pm he was in his house when he heard screams from the appellant's house. He went there and found PW1 screaming and making noise. PW1 told them that the appellant had tried to remove her underwear and had defiled her. He knows the appellant who is a neighbor and had not differed with him. There were some sperms on PW1's clothes. According to PW2 when he went out of his house he found his daughter outside. PW1 was later taken to the Police station and was examined at Moyale hospital. The appellant was arrested and taken to the Police station.

**PW3 Diba Guyo** lives in Eraya and is a neighbour. On the 12.2.2019 at around 9.00pm he was in his house and he had a party. He heard screams from many people and went to the scene that was about 100 metres away. He was told that the appellant had defiled PW1. PW1 was there crying. They were using torches for lighting. He saw PW1's clothes and her underpants were wet. **PW4 Dr. Marsa Hassan Ali** is a medical officer who was stationed at the Moyale sub county hospital. He examined PW1 on 13.2.2019. There were no bruises on the genitalia. Laboratory test showed that there were no spermatozoa in PW1's vagina. There was no penetration. There was no sperms on the clothes and genitalia. The appellant was also examined and his genetalia was found to be normal. **PW5 PC Hezbon Onyango Atinda** was based at the Moyale Police station. He investigated the case that was reported on the 12.2.2019 at 10.45pm. P.W1 was taken to hospital and a P3 form was filled. PW1's trouser was torn and he saw some watery substance which appeared to be sperms. PW1 was ten years old and he produced her birth certificate. The P3 form indicated that no sperms were detected in PW1 hymen was intact.

The appellant tendered sworn defence. He is a teacher at [Particulars withheld] Academy. PW2 had a romantic relationship with his mother and he used to sleep in their house. On the 12.2.2019 the appellant went to their house with four people from Ethiopia at about 9.00pm. He was tied with a rope on allegation that he had defiled PW2's daughter. He was put on a probox and taken to the Police. He was assaulted by PW2 and other people. PW1 testified that she had not been defiled and was later threatened by her father and changed her story. He had been a teacher for nine(9) years and there has been no negative information about him.

**DW2 Malich Dokata** lives in the same village at Eraya. On the material day he went to the scene and found the appellant crying. PW2 asked for a rope to tie the appellant and he refused to assist him. He was told that the appellant had defiled a child. He then left and went home. **DW3 Sangabo Mohamed Abdi** is the appellant's mother. It is her evidence that she had a relationship with PW2. According to her PW1 used to go to their place and play with other kids. She never slept at their place. **DW4 Mustafa Mwaura Ndegwa** lives in Butiye. On the 12.2.2019 at 9.30pm they were chewing miraa when they heard that something had happened at Eraya. He later went to the hospital and saw PW2 assaulting the appellant in front of the Police.

**DW5 SA** is a minor and an uncle to the appellant. On 12.2.2019 he was at home with other children. They were asleep. He later saw the appellant being taken away. PW2 took a rope (Kamba) and tied the appellant's hands. They were sleeping with their grandmother and they were woken up by their grandmother's noise. They did not sleep with the complainant on that date. They normally play with the complainant at school and also at her home and his home. The complainant normally visits his home and get into the house without any problem.

The trial Court convicted the appellant on the alternative count of committing an indecent act with a child. The issue for determination is whether the appellant committed an indecent act by rubbing his penis against the complainant's vagina. The trial Court held that it found the evidence of the complainant believable. The inconsistency in her evidence being referred to by the appellant's counsel is not explained in the judgment. The proceedings as well as the judgment notes that the complainant had initially testified before Honourable Kimani before the Magistrate recused himself. Part of her evidence before Hon. Kimani is as follows:-

***“He lifted it up (dress) and then removed my under wear. He then urinated on me. He urinated on me at this part (touching and showing her genital organ). He removed his penis and used it to urinate ..... the bulb which lights the room was on .....*”**

While being cross examined by the court PW1 stated as follows:-

***“The accused urinated on me. The whole amount of his urine. The accused did not attempt to put his penis into my vagina. My body got wet as a result of the urine. My dress also got wet. The accused just tore my underwear/leggings and proceeded to urinate on me. The accused never touched my vagina, breast or buttocks.”***

The record shows that the matter proceeded from where Hon. Kimani had left and therefore the above evidence is part of the record. PW1 was only recalled as the accused had retained the services of an advocate. When PW1 was recalled and while being examined by the court she stated as follows:-

***“He touched my vagina with his penis (points at the vagina). He put it. I felt bad. I felt pain.”***

While the witness was being cross examined by Mr. Halake, Counsel for the accused she responded:

***“I said that he had penetration.”***

The medical evidence of PW4 Dr. Marsa Hassan is not very clear. In his examination in chief PW4 stated as follows:

***“No bruises on the genitalia. We sported discharge and sperm deposit on the external genitalia. We found sperm stain on the child clothes.”***

While being cross examined by Mr. Halake for the accused PW4 stated as follows:

***Physical examination of the sexual offence should be done. There was presence of spermatozoa. The vagina swap did not indicate presence of spermatozoa. The laboratory confirms that there was no sperm.***

***We got a complaint from the victim.***

***I did not inform him that the finding could be shared with others. I don't have the documentation. The forms for requesting of the laboratory test. Laboratory test confirm no spermatozoa. It is not possible for urination doing an erection. I arrived at this from the history given.***

***We did not do an age assessment reports. It is not possible to ascertain the age assessment report. There was no penetration.***  
(emphasis added)

While being cross examined by the Court, the witness had this to say.

***“There were no sperms on the clothes and genitalia. As per the lab we did not check on clothes. And I did not do referral for examination.”***

The P3 form indicates that PW1 alleged that she was defiled. The medical examination did indicate that PW1's hymen was intact. There is reference to some sperms on the clothes. The medical examination was done the following day and its not clear whether the sperms on PW1's genitalia could be detected after one day.

It is evident from the evidence on record that PW1's hymen was intact. She was not penetrated. That is part of PW1's evidence when she testified before Hon. Kimani. She was emphatic that the appellant did not touch her vagina, breast or buttocks. Mr. Kihara submitted that the appellant touched the complainant's breast. Breast is part of the prohibited part under section 11(A) of the Sexual Offences Act. The alternative count stated that the appellant rubbed his penis on the complainant's vagina. There is no reference to the breast. If we go by the evidence before Hon. Kimani which evidence formed part of PW1's evidence, it is clear that the appellant did not touch the complainant's vagina, breasts or buttocks. PW1 later changed and stated that she was penetrated. The evidence on presence of sperms on PW1's genitalia is not conclusive. If PW1's vagina was not touched at all then the issue of sperms could not have arisen.

I do appreciate that PW1 was ten (10) years old. The defence evidence from the appellant is that PW1 told her father that she had not been defiled. She later changed and said she was penetrated. The first count was one of attempted defilement. Mr. Kihara submitted that the torn clothes proved that there was attempt to defile PW1. The trial court did not find the appellant guilty of the main count of attempted defilement. Therefore the torn clothes cannot be proof of indecent act of rubbing the penis on pW1's vagina. When PW1 stated that the appellant did not touch her vagina or breast or buttocks, she was responding to questions by the Court.

The trial Court held that it found PW1's evidence reliable despite some inconsistencies. I do find the inconsistencies do raise doubt on the prosecution case. If a witness testifies that she was not touched on her vagina, breast or buttocks but later changes after a period of two months and alledge that she was penetrated, one can objectively conclude that the second line of evidence was as a result of either couching or threats, more so if the witness is a minor. The evidence has to be considered in its totality. The appellant was not under any obligation to testify or call witnesses. The medical evidence does not support the complainant's original complaint that she was defiled. There are no lacerations or any mention of PW1's vagina as having been touched or interfered with. I do therefore find that PW1's evidence is doubtful and the appellant is entitled to the benefit of doubt. PW1's own evidence is contradictory. If I was to go by her second evidence, it is either the appellant penetrated her since she felt pain or that the appellant had an erection, went to her, removed her clothes and before doing anything released his sperms. Some of the sperms fell on her vagina. While being examined by the Court, Dr. Marsa said he did not find sperms on the clothes or genitalia. This line of evidence contradicts the complainant's second line of evidence. The first line of evidence by the complainant is that she was not touched on the vagina, breast or buttocks.

I am satisfied that the conviction is against the weight of the evidence of record. The prosecution did not prove its case beyond reasonable doubt. The appeal is merited and is hereby allowed. The conviction and sentence is hereby set aside.

The upshot is that the appeal is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

***Dated, Signed and Delivered at Marsabit this 20<sup>th</sup> day of July, 2020***

***S. CHITEMBWE***

***JUDGE***