



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO.204 OF 2017

MIKE YATICH MARACHI....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in criminal case no. 456 of 2015 in the Principal Magistrate's Court at Eldama Ravine delivered on the 17th day of May, 2017 by Hon. R. Yator (SRM)]

JUDGMENT

1. The appellant was convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) and 8(2) of the Sexual Offences Act no. 3 of 2006. The particulars were that he had “on 21st day of May 2015 within Baringo County committed an act which caused the penetration of his penis on the vagina of WJL, a child aged 6 years. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act that he “on 21st day of May within Baringo County committed an act which caused his penis to come into contact with the vagina of WJL a child aged six years.”

The finding of the trial Court

2. In convicting the appellant, the trial Court ruled that –

“Accused said he was arrested while near home of the complainant and I am thus convinced that indeed he must have been at the complainant's home considering he was arrested immediately after the incident and I thus find his alibi to be mere denial.

Though the child did not exactly state what the ‘thing’ meant that was inserted into her private parts, the Court notes her age and that she might not be conversant with the exact name that ‘thing’ is called. However, I find it to be consistent with accused inserting his penis into her vagina considering that he asked her to remove her clothes before sleeping on her and PW3 said she saw him insert his penis into her. If the child was lying down she might not have seen what exactly was inserted into her private parts. Though the doctor stated that there was no penetration he said the reddening was not normal and treatment chit confirmed bruises and I am thus convinced in particular by the evidence of PW2 and PW3 that indeed the accused did defile the child.

I thus find that the prosecution evidence is quite overwhelming and has proved its case beyond the required standard of proof and I do hereby convict the accused under section 215 Criminal Procedure Code.”

3. The appellant raised several grounds of appeal, namely, that the trial Court had erred in convicting the appellant “*without positive medical evidence of penetration;*” on fabrication evidence adduced by members of the same family i.e father, mother, son and grandmother; without proof of age of the complainant; and on contradicting, inconsistent and uncorroborated evidence.

4. The DPP did not oppose the appeal. It was urged that the evidence of the complainant was corroborated by that of Pw3 who had followed the appellant to the bush and heard him telling the complainant to remove the clothes whereupon the appellant had removed his penis and slept on her, and that Pw4 had testified that the complainant had informed her that she had been defiled by the appellant. But noting the contradictions in the medical evidence as to penetration, it was submitted that the appellant ought to have been given the benefit of doubt. It was, however, submitted that there was evidence of:

“Interference with the genitals of the complainant but penetration was not clearly proved. I therefore urge that the appellant ought to have been convicted on the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.”

The Court was accordingly urged to use its discretion to convict and sentence the appellant appropriately.

5. Of course, the appellant is entitled to have the evidence as a whole submitted to a fresh and exhaustive examination by the first appellate Court which must reach its own decision before considering whether the findings of the trial Court should be supported, see *Okeno v. R* (1972) EA 32, 36.

Medical Evidence

6. The medical chit at Esageri Health Centre indicated “no bruises seen on the vagina wall, no fluids seen or spermatozoa.” At Eldama Ravine District Hospital upon referral showed on examination bruises on both labia minora and majora, bloody spotting on VE examination and hymen intact. The P3 form indicated hyperemic labia minora. The examination at Esageri Health Centre was done on 21/5/15; Eldama Ravine on 21/5/15 and P3 form was completed on 22/5/15. Pw7 who testified on the medical evidence conceded that “there is no consistency from chits from Esageri and Eldama Ravine District Hospital. At Esageri no fluids were seen nor spermatozoa and documents are inconsistent.”

The Court cannot rely on such evidence as medical proof of defilement to corroborate the evidence of the complainant, Pw1.

Proof of penetration

7. The central ingredient of defilement is penetration, which when not proved the charge must fail. Although the act of penetration is complete when partial penetration is proved, the evidence on medical examination does not prove even partial penetration because of the contradiction between the findings on examination at the first health facility, Esageri Health Centre and the subsequent examination at the referral Eldama Ravine District Hospital. The first time examination at Esageri Health Centre found “no bruises on the vaginal wall, no fluids seen or spermatozoa.” Giving the benefit of the doubt to the accused appellant, the Court finds that penetration is not proved and the offence of defilement cannot, therefore, stand.

Offence of Indecent Act

8. It was charged that the appellant had committed an act which caused his penis to come into contact with the vagina of the complainant. In her evidence in brief, the complainant testified as follows:

PW1

I was at home with MC and BC [child cries] and GC and KL (hesitates) Kipyatich disturbed and he told me to take water for the house for drinking.

I took to him and he said we to the bush with him and he told me I remove my trouser and I was lying down and he then slept on me and MC called me. He did bad manners to me and he used his thing to do bad manners and he inserted into mine which I use to urinate and I felt pain and I did not do anything when MC called me I went home and she did not tell me anything [hesitates to talk]. I was taken to hospital by grandmother where I was examined because I told grandmother I was sick and I was brought here.

9. On cross-examination, the witness puts a doubt as to whether the appellant touched her anywhere or put anything into the private parts or injure her in any way testifying that:

Cross-examination

I school at O class 1. I know Kipyatich and I do not know where he used to live and I was at home and he told me to take water for him and I was with DK gave me soda [yellow] and cake. When I gave him water he drunk and D was not around when I gave him water to drink. When Kipyatich took me to the bush grandmother was at the shamba. I was putting on a pant while going to hospital. Accused told me to remove my trouser and I was also wearing a pant he slept on me and I was lying facing up and he putting on his clothes and he did not remove. **He did not put anything to my private parts. He did not touch me anywhere. I did not feel pain anywhere because he did not put anything inside. I went to my grandmother's place D was around while playing. I did not scream when accused defiled me and I was not injured anywhere.** My uncles were at home and I was taken to hospital for examination. After I had gone to grandmother Kipyatich came and stayed outside and I was taken to hospital. Grandmother had come from shamba and was not doing anything outside the house and I told her I was injured but I did not tell her anything but she said I was injured and **D said I come say accused slept on me.** He slept on me and that is the truth.

10. PW3, a 10 year old cousin of the complainant in unsworn statement said as follows:

PW3

In May 2015 I was at our home when W was send to our home by grandmother for a tin and I gave it to her and I came with her till grandmother's place and played together when Kipyatich asked W aka R to take water to him at his house [men's house] where he was sleeping. W is my cousin and accused is not our relative and he used to live at grandmother's place. W took water to him and when I went there he told me had send W to a neighbour and I was at his house and I was reading when accused said he was going to a neighbour to ask for tobacco and I got outside and saw where he was going and I followed him up to the bush next to fence of a neighbour and I saw him but he had not seen me and I spotted him and I heard him tell W to remove her clothes which she did and accused removed his penis and slept on her and I was standing where the dog was and they were not seeing me as accused was sleeping on the child. Complainant was down and accused on top of her and he was only wearing a short downwards he had no clothes and accused did not remove clothes his clothes. PW1 kept quiet and **I went and saw children from school who came screaming** and called out the names R and he saw PW1 come at lower side and accused had gone to the upper side. **Grandmother**

came from behind while talking and asked PW2 what accused had done to her and she said nothing and grandmother called her and took her to her house and accused was changing clothes wanting to escape and she saw grass on W's body and grandmother called her children over the phone.

On cross-examination, PW3 said:

CROSS EXAMINATION

W was sent by gogo to our home and where accused used to sleep from our home is far at end of gogo's shamba and our home is far from gogo's place. I heard accused tell W to take him water for drinking and we were playing behind gogo's kitchen and he had already come from our home to gogo's place and accused was at his house near gogo's place. Accused called out from his house and his door was open and W took him the water and I was behind the kitchen. He was asleep on the sofa set and door was open and I saw him drink the water. The new house is not far from the kitchen. I then asked him where R was and he said he had sent her to a neighbour. I did not hear him ask her to go to the bush. I did not record at Police that I heard accused tell her to go to the bush but that he sent her to the neighbour and I remained to study and I do not know where she had gone and I did not see her go. I then saw accused leaving and I suspected he was lying to me he had sent her. Accused told me I remain behind studying and he goes for tobacco at a neighbour I did not state as per statement that I heard accused tell complainant to run and hide in the bush.

I had followed accused and stood where the dog was sleeping at less than ten meters and I heard him tell her to remove her clothes and I did not do anything nor talk. Grandmother was at the shamba far from the bush and I do not know where grandmother was and I saw children from school and I informed C who was from school with other children and she ran with others while calling out for W running towards the bush. The school children called out from the fence and did not go up to the bush and the two came from different routes and arrived home at the same time. At that time gogo came when she heard the students screaming and found accused and PW1 had already arrived home at gogo's place and the students outside the house and W told grandmother accused had done bad manners to her and accused denied when asked by grandmother. Accused did not see me as he was lying down and sleeping on W. Accused changed shoes wanting to leave and he was coming slowly from the bush not running. My uncles had escape as he had hurried towards the road. I did not see if W was injured. We came with her to hospital. PW1 did not scream nor cry. Accused gave her soda at grandmother's place and I did not see her drink but she informed me of the same.

11. PW3 is not the victim of the alleged sexual offence and the exemption to the requirement of corroboration offered by section 124 of the Evidence Act does not apply to her unsworn statement. In accordance with section 19 of the Oaths and Statutory Declaration Act, the unsworn evidence of a child is subject to corroboration before it could be used to convict the accused. See **R v. Kibiba** (1979) KLR 142.

The unsworn evidence of the minor PW3 cannot be used to corroborate the evidence of the complainant (Pw1) for the provision of the law is that evidence which itself requires corroboration cannot provide corroboration for other evidence which also requires corroboration. See **Cotran, J. in Kibiba**, Supra.

Conclusion

12. Consequently, the Prosecution's case as regards the offences of defilement and alternative indecent act is only supported by the contradictory evidence of the complainant, the uncorroborated evidence of her cousin Pw3 that she saw the appellant sleeping over the child, and the inconclusive medical evidence from two contradicting and inconsistent examination reports from two health facilities. Defilement was not proved, as conceded by DPP.

13. As regards the charge of indecent act with a child, the only evidence that the appellant caused his penis to come into contact with the complainant's vagina as charged, is the unsworn evidence of the child (Pw1) that the appellant had put his penis into her private parts, which she contradicts upon cross-examination, and the unsworn evidence by the cousin Pw3 that she had seen the appellant sleeping over the child, which was not corroborated by any other evidence, as required by section 19 of the Oaths and Statutory Declaration Act.

14. PW3 allegedly informed one C who together with other school children then screamed attracting the complainant's grandmother to the scene. The said C or any of the other school children were not called as witnesses to corroborate the unsworn evidence of the minor PW3.

15. PW4 did not witness the alleged act and her statement that the complainant had told her that the appellant had defiled her was not supported by medical evidence. PW5 the complainant's uncle only helped in arrest of appellant, after he was called by Pw4 his mother.

PW6, the AP officer to whom first report was made received "one Ruth in company of accused tied with a rope and other people [who] reported that accused had defiled her grandchild". On cross-examination, the AP officer said "Ruth told us accused had attempted to defile the child". The evidence puts in doubt the whole charge of defilement and indecent act. If the report was one of attempted defilement why was the appellant charged with defilement? In addition, Ruth did not testify.

16. PW8, the investigating officer only testified to what the grandmother of the complainant told him. The doctor PW7 conceded in cross-examination that from the report and treatment charts on the child there had been no penetration and that there was contradiction between the reports of the two health facilities that examined the complainant as to the presence of bruises on the child's genitalia.

17. The appellant gave an alibi defence that he "was in Sasurwa for funeral a kilometer away".

18. In conclusion, because of the inconsistencies as to the prosecution evidence on the alleged act of defilement and indecent act with the child, the court does not feel safe to convict the appellant for the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, as urged by the DPP.

Orders

19. Accordingly, for the reasons set out above, the appellant is acquitted for both the offence of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act and indecent act contrary to section 11 (1) of the Sexual Offences Act.

20. There shall, therefore, be an order directing the release from custody of the appellant unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Assistant DPP for the Respondent.