REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 70 OF 2017

[FORMERLY ELDORET HCCRA NO. 109 OF 2015]

EDWARD WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 133 of 2015 delivered on the 14th day of August, 2015 by Hon. E. Kigen, RM]

JUDGMENT

1. The appellant was convicted for the offences of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act and for assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced, respectively, to imprisonment for life in Count I and for 2 years in Count II.

2. The particulars of the offence of defilement were that he had on 14 day of February 2015 at 00.300 hrs in Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of MM, a girl aged 11 years in contravention of the Act. Alongside this count, he also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

3. On Court II, the appellant faced the particulars of the offence that he on 14th day of February 2015 at 003 hrs in Baringo Central District within Baringo County unlawfully assaulted SK thereby causing her actual bodily harm.

4. By his amended supplementary grounds of appeal of 11/9/17, the appellant challenged the findings of the trial Court on the grounds set out as follows:

> *a. That the learned trial Magistrate convicted me on Prosecution evidence which was full of contradictions and not credible.*
>
> *b. That the learned trial Magistrate convicted me on defilement whereas on the prosecution witness that was not proved beyond reasonable doubt.*
>
> *c. That the learned Magistrate made an error by failing to note that the medical analysis was not done by a medical expert.*
>
> *d. That the trial Magistrate erred in both Law and fact by failing to note the particulars on the charge sheet were not found well.*

5. The appellant filed written submissions in response to which the DPP made oral submissions and judgment was reserved. For determination are principally 2 issues whether the offences of defilement and assault were proved beyond reasonable doubt and whether the appellant was properly identified as the person who committed the offences

Determination

6. In accordance with the duty of the first appellate Court, the Court has re-evaluated the evidence presented before the trial Court in order to form its own conclusion before considering whether to uphold or quash the finding of the trial Court. (See ***Okeno v. R*** (1972) EA 32).

Proof of defilement

Age of the appellant

7. The trial Court examined the Pw1 and found that *"the minor is about 11 years. She knows the meaning of truth but does not understand the meaning for giving evidence under Oath and she will therefore be affirmed."* PW1 herself testified that she was 11 years old. The Age Assessment Report produced as PEX no. 3 certified the complainant's age at 11 years following physical examination observation that *"she has not yet developed any secondary sexual characteristics"*, radiological examination observation that *"x-ray of the right wrist joints reveals ossification is not yet complete"* and dental examination observation that *"she has a total of 28 (twenty eight) permanent teeth."*

I would find the age of the complainant as a minor aged 11 years old proved beyond reasonable doubt.

Penetration

8. PW1, the complainant testified on the incident subject of the charge as follows:

> *"I recall on 14/2/15, I was in the house asleep with the child at about midnight the accused came knocked the door and told me that he had been sent by grandmother to bring us milk. I opened the door where the accused covered my mouth and nose and pushed me to the bed and removed my clothes and inserted his penis into my private parts. Suddenly my grandmother came and called me. Accused told me to keep quiet, at that time he was still doing bad manners. The accused had knocked the door from inside when he pushed me to the bed."*

9. The above evidence of the complainant is testimony of defilement but having been given without oath is required to be corroborated by the material evidence, unless the Court believes for reasons to be recorded, pursuant to the proviso to section 124 of the Evidence Act that the victim of the Sexual Offence is telling the truth. This Court did not see or hear the complainant giving her evidence, and I therefore warn myself to seek corroboration for the unsworn evidence of the minor complainant in terms of section 19 of the Oaths and Statutory Declarations Act and section 124 of Evidence Act.

10. The complainant's grandmother (PW2) testified how she found the appellant hiding between the bed and the mattress, when she went to look on her grandchildren upon coming from work at a local bar as follows:

> *"I am SK from* [particulars withheld]. *The complainant is my grandchild, while the accused was my neighbour. Our rooms are next to each other. There are six rooms but I have rented two. House No. 1 and No. 4 are mine. The accused lives in house No. 5. I live in the 1st house with my husband and the 2nd house is where my children sleep. I recall on 14/2/2014. I had come from work in one of the local bars at about midnight. I knocked the door and called the children for about 30 minutes and they did not respond. I went round the window and called where the small child who is about 3 responded and asked him to as M to open door. I became worried and called the neighbours who broke the door. I shone the torch where I saw the minor who was crying then on asking her why she did not open the door. On checking I saw the accused hiding in between the bed and mattress, he kicked me and the phone fell. He kicked me severally and my neighbor Benard came and took the phone torch which was on the ground. Upon shining it he said "isn't this Kevoh", the said Benard arrested the accused with the help of other neighbours".*

I would find the evidence of PW1 that the accused was *"hiding in between the bed and the mattress"* to corroborate the complainant's evidence of defilement.

11. In addition, the medical evidence of the clinical officer PW4 supports the complainant's evidence as follows:

> *"I have a P3 form for MM 11 years old filled on 15/2/15 who had come on allegation of having been defiled and assaulted by a person known to her. I treated this patient on 14/2/15 and given ref No. 40803/15.on examination had swellings on the right hand next to the wrist as well as the left hand. Had bruises on the right hand and painful on palpation.*
>
> *The injuring had taken some time. Inflicted by a blunt object. By the time she had not sought medication anywhere. I established the degree of injury as harm. Had a broken hymen and vagina was hyper anaemic and had whitish discharge. HIV tested negative Gonorrhoea tested negative. Vaginal swab showed presence of epithelial cells. Urinalysis showed presence of pus cells. Having considered the above, I considered there was sexual penetration".*

12. The unsworn evidence of DW1 appellant is a mere denial of the charge as follows:

> *On that day I closed the bar at 11.30 pm and proceeded home with two ladies on reaching home we found the complainant at home, using my torch I realized it was her. She asked me if I had arrive.*
>
> *We entered the house and later left for a short call where I met S and she hit me on the head. I was taken to the station but I don't know my mistake. The girls came to my rescue and we went to the station where I recorded my statement.*

13. On the evidence of PW1 and PW4, I would find the penetration of the complainant to have been proved and the offence of defilement of an 11th year old girl proved.

Offence of Assault causing actual bodily harm

14. PW2 in testifying of her assault said had on discovering the accused hiding in between the bed and the mattress, he had kicked her severally, a fact corroborated by PW1 in the testimony that:

"[The accused told me to keep quite as he would kill me or stab me and that if any grandmother asks what I was doing I tell her that the accused had come to take the keys.

My grandmother not hearing my voice called the neighbours who came and broke the door. The accused uncovered my mouth and went to hide between the mattress and the bed. My grandmother slapped me for not opening the door. She opened the mattress and found the accused hiding. The accused kicked my grandmother who fell on the ground, the phone fell on the ground, they fought and the accused fell on the ground where the neighbours shouted "this is Kevoh" our neighbor baba Maina, Mama Benard Mama Nerea, Chalvu were also present".

15. The injuries sustained by the complainant in count II (PW2) were also confirmed by the clinical officer, PW4 in his testimony that:

"On the same date 15/2/15, I saw a patient by the name S who had come on alleged of having been assaulted by somebody known to her. Had injuries on the left thumb and right big toe. On 14/2/15 I gave ref No. 80863. On examination had swellings and painful palpation on her front neck region. Had pain on the mid back. Had swellings on the left thumb. Right big toe, the injuries had taken a few hours inflicted by a blunt object. I classified the degree of injury as harm".

16. The appellant's defence appear to confirm a confrontation with PW2 as follows;

"We entered the house and later left for a short call where I met S and she hit me on the head. I was taken to the station but I do not know my mistake".

The appellant does not explain why the complainant in count II S (PW2) would have hit him on the head.

17. I find on the evidence before the trial court that the offence of assault causing actual bodily harm was proved beyond reasonable doubt.

Whether appellant identified as the perpetrator of the offence

18. By all accounts of the witnesses the incident subject of the criminal charge herein took place at midnight in a non-lit house where PW2 the complaint child's grandmother had to use her mobile phone torch light to see her way around.

19. In accordance with authorities, the court warns itself of the danger of convicting on identification evidence where circumstances favouring positive identification may be difficult. The circumstances in the present case were no doubt difficult and may not favour identification, if the same were by only one witness. See ***Murube v. R*** (1986) KLR 356.

20. As regards the appellant PW1, the identification of the appellant was by voice recognition which carry as much weight as visual identification (See ***Choge v. R*** (1985) KLR and ***Njeri v. R*** (1981) KLR 156) and *"voice identification can be better and free from error if it takes place at night and if the persons were known to each other".*

21. From the setting of the place where the offences occurred as described by the witnesses PW1, PW2 and PW3, the appellant occupied house No. 5 in a block of one-roomed houses numbered 1 to 6 where the complainant in count I and count II, respectively occupied houses 4 and 1, and the witness PW3 house No. 2. The complainant in count I had known the appellant for about 8 months as she came into the plot in September 2014. PW3 also testified to have been neighbours with the appellant for 1 year. PW2 the grandmother of PW1 also confirmed that the appellant was their neighbour. The appellant was well-known by the witnesses.

22. PW1 opened the door for the appellant because he said that he had been sent by PW2 to bring the children milk. She recognized the appellant's voice. The appellant had also spoken to her in the house while telling her to keep quiet or risk being killed or stabbed, and to tell her grandmother, if she asked, that the accused had come for keys. The conversation was ample opportunity for the witness, who had known the appellant for 8 months, to recognize him by his voice. Indeed, the appellant did not deny meeting the witness, he only said that she had spoken to him as follows:

"On that day I closed the bar at 11.30 pm and proceeded home with two ladies on reaching home we found the complainant at home, using my torch I realized it was her. She asked me if I had arrived. We entered the house and later left for a short call where I met S and she hit me on the head".

23. The appellant was also recognized by PW3 who went to find out what the commotion was about and testified as follows:

"I know the accused he was a neighbor in the plot. I live in house No. 2 while he lives in house no. 5. The children lived in House No. 4. We have been neighbours for about 1 year. I recall on 14/2/15, I was at home at home after work while asleep at night about midnight. One S living in house No. 1 came entered her house and proceeded to house No. 4 where her children were asleep. She knocked door severally but there was no response, she came asked her husband what time the children had slept. She went back and called the children but there was no response. She called the younger child who responded that M was in his house. The grandmother called M but she did not respond. I heard her hit the child and thereafter I heard commotion where I went to check. On reaching the door it was dark and using the light of my phone I saw blood on the floor. The complainant's mother was struggling with [accused] and she managed to push him to the ground. The accused fell on the doorstep by the time the neighbours were awake. We decided to go to the police station and on reaching Kabarnet Secondary went to police when we meet together to the station. The accused indicated that he had gone to collect his keys".

24. Evidence of recognition is, of course, more reliable than that of mere identification. See ***Anjononi v. R*** (1980) KLR 59. In this case, the evidence of appellant's involvement is buttressed by his arrest at the scene and escort to the police. He also did not deny the confrontation with PW2 whom he said had hit him on the head.

Conclusion

25. I find that the appellant was properly identified as the assailant of both the complainants in count I (PW1) and count II (PW2), by voice recognition of PW1, visual recognition of PW2 and PW3 and the ensuing arrest at the scene.

26. I, consequently, find that the appellant was properly convicted of the offences of defilement contrary to section 8 (1) as read with 8 (2) of Sexual Offences Act and assault causing actual bodily harm contrary to section 251 of the Penal Code as charged in count I and count II, respectively.

27. As the two offences were, although committed in the same incident, against different complainants and none being an ingredient of the other, unlike in the case of a robbery with violence and assault causing actual bodily harm as in ***Anjononi v. R*** (1980) KLR 59, the appellant was properly convicted and sentenced for the two offences. I, consequently, and respectfully disagree with the submissions by the DPP that the sentence of imprisonment for 2 years assault causing actual bodily harm in count II should be held in abeyance. It might have been the case, if the case was one of capital offences for which the death penalty was imposed on the first count.

Order

28. Accordingly, for the reasons set out above, the court upholds the finding of the trial court in convicting the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act and assault causing actual bodily harm contrary to section 251 of the Penal Code.

29. The sentences of life imprisonment in count I and imprisonment for 2 years in count II are within the law and there is no justification on the test of ***Wanjema v. R*** (1971) EA 493 to interfere with the said sentences.

30. The appeals from conviction and sentences herein are dismissed.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent