



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 34 OF 2017

ROBERT CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, Robert Cheruiyot was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 13th of November 2013 in Transmara District of Narok County, the appellant caused his penis to penetrate into the vagina of RC a girl aged 4 years. The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006 ('the Act'). The particulars of the offence were that on the 13th November 2013 in Transmara District of Narok County the appellant unlawfully and indecently assaulted RC a girl aged 4 years by touching her private parts namely vagina.

2. The appellant was convicted and sentenced to life imprisonment. The appeal is against the conviction and sentence.

3. I will proceed to analyse the evidence in its entirety, weighing any conflicting facts and reach my own conclusion as is required of a first appellate court. In doing so I will bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses testify. (*See Okeno v. Republic (1972) E.A. 32. and Kariuki Karanja v Republic [1986] KLR 190*)

4. At the trial the prosecution called 4 witnesses. Pw1 (WC) the complainant's mother, Pw2 (AK) the complainant's father, Pw3 PC Evans Munene the arresting officer and Pw5 Mitei Nicholas the doctor. Pw1 testified on the 13/11/2013 at 11am she left her child RC who is 4 ½ years with M. She went to fetch water at the river. On returning M told her that the appellant had asked her to give RC drinking water to take to him in a certain house. That when M wanted to wash the child she saw a lot of sperm coming from the child's vagina. She checked the child and saw sperms. The child's pants too had sperms. She checked the child's vagina and saw it was red, there was no blood. When she talked to the child she said the appellant defiled her. The child was in pain. She took the child to Lolgorian hospital. The appellant was at the scene at his home. She asked him why he had harassed the child and he denied. The doctor examined the child and noted sperms. The police arrested the appellant. The appellant was his herds boy. She informed the court that the child who was in court could not talk and that she fears people.

5. Pw2 AK testified that on the 13/11/2013 he returned to his home at 12pm and found his wife Pw1 carrying RC. He was informed the appellant had defiled the child. He told Pw1 to rush the child to hospital as he looked for the appellant. He did not find him at home later he found the appellant arrested him and took him to the police. At the police station they saw some stains on his underwear, it was taken by the police. The appellant had worked for him for 4 years.

6. Pw3 testified that on the 13/11/ 2013 at about 6pm whilst at their patrol base Pw1 reported a case of defilement of her child RC by their herds boy the appellant. She gave her a P3 form and advised her to take the child to hospital. At 8.30pm the same day the appellant was taken to their base by members of the public.

7. Pw4 testified that he filled the p3 form of RC who was sent to their hospital on the 13/11/2013. On examining the hymen he found it was reddish in colour. Due to trauma on explanation and although the hymen was intact there was a white discharge. They took a swab and found sperms. They did not subject the sperms to further exam like DMT. They concluded that although there was no penetration beyond the hymen there was penetration beyond the vaginal wall up to the hymen and there was also ejaculation. On assessment of the child he found her to be 5 years. He produced the P3 form and the age assessment report.

8. At the close of the prosecution case the appellant gave a sworn statement. He told the court that he was a herdsman and worked in [particulars withheld]. That he came from the farm while tired and he was arrested. He does not know why he was arrested. He was a herdsboy and he asked the wife of the complainant for his money because he needed to pay someone. He needed to find some money for his siblings and parents because his older brothers are drunkards. Since his arrest his things at home are deteriorating. He left school to help his siblings. He does not know anything about the offence.

9. The trial court before delivering its judgment decided to call RC and M to testify. RC gave an unsworn statement after voire dire. She testified that the appellant used to herd their cattle. The appellant did bad manners to her in Geoffrey's house on the bed. That he had done bad manners to her before.

10. Pw6 a minor aged 11 after voire dire gave an unsworn statement. She testified that on the 13/11/2013 she was home her parents were not home. She was with Chela and Victor. The appellant called Chela take water to him. RC did so she took the water to him at Geoffrey's house. She saw RC come from the said house. She found her dressing. She had whitish discharge on her thighs. RC told her that the appellant had told her that they should sleep together. The appellant was their herdsman. She washed RC's head and legs. RC was taken to hospital after she went back home.

11. I have considered the appellant's grounds of appeal and the prosecutions response. The issue is whether the prosecution proved its case. To prove the offence of defilement under section 8 (1) of the Act, the prosecution must prove penetration to a child and that it was done by the appellant. Section 2 of the Act defines Penetration as, ***'the partial or complete insertion of the genital organ of a person into the genital organs of another.'***

12. It was the evidence of Pw3 the doctor that the complainant's hymen was intact it was red and his conclusion was that there was penetration beyond the vaginal wall but not beyond the hymen. The medical report confirms that there was penetration.

13. The next issue is whether the complainant's age was proved. Pw1 said that RC was 4 ½ years old. Pw2 too. Pw3 the doctor testified the complainant's age was 4 ½The complainant was a child of 4 ½ years old. The trial court stated in the judgment that the court saw the child and was satisfied that she was indeed of tender years. The child was a child within the meaning of the Children Act.

14. The next issued is whether the prosecution proved that it is the appellant who committed the act of penetration. Pw5 the complainant identified the appellant and testified that he did bad manners to her in Geoffrey's bed. Pw5's evidence was corroborated by Pw6 who testified that she saw RC go to the house after the appellant asked for water. This was during the day. When she went for RC she found her dressing and there was whitish discharge on her thighs. She informed her mother who noted it was sperms. The doctor confirmed that the whitish discharged was sperms deposits. Pw1 the mother of the complainant found the appellant at the scene. This sequence of events clearly point to the appellant as the one who defiled RC. The appellant was known to all of them. He was placed at the scene by Pw1, Pw5 and Pw6.

15. The trial court considered the appellant' defence, the trial court found that the same was lacking in credibility. The appellants defence was that he was owned money. Whilst cross-examining Pw1 and Pw2 he did not mention that he was owed money. He raised it with Pw4 the officer. His defence in my view was an afterthought and did not displace the prosecution evidence which showed that it is the appellant who defiled Pw5.

16. The appellant has raised the issue that other witnesses were called after he was put on his defence. The magistrate explained before summoning Pw5 the complainant the child and M who was with Pw5 that there were crucial witnesses who were not called. He stated that in good conscience he could proceed to write the judgment in the absence of the evidence of the said witnesses. He then moved himself under section 150 of the Criminal Procedure Code and ordered that the complainant and M be called.

17. Section 150 of the Criminal Procedure Code provides as follows;

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

18. Pw5 was the child the complainant. I note that when she was first presented in court her mother Pw1 informed the court that she could not talk and that she feared people. She was an important witness. Pw6 was the person she was on the material and whose evidence too was vital. The record shows that the appellant was allowed to cross-examine the said witnesses. The appellant was also given a chance to add to his defence. I find that the trial court observed the provisions of Section 150 of the CPC as required in law. What happened was not prejudicial to the appellant.

18. The appellant has also raised the issue that exhibits taken from him were not produced. In my view the fact that the said exhibit were not produced was not prejudicial to the prosecution case as there was sufficient adduced to prove their case. Section 8(2) provides that, a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. I find that the prosecution proved their case beyond reasonable doubt. The conviction is affirmed and the sentence too. The appeal is dismissed.

Dated and delivered at Kisii on the 1st day of February 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant in Person

Mr. Otieno for the State/Prosecution

Rael Court clerk