



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 44 OF 2017

AKUTA ESEKON ESKUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 81 of 2016 by the Principal Magistrate – Hon. M.K. Mwangi delivered on 5th October 2016 at Lodwar)

JUD GEMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the night of 16th February 2016 in Turkana central Sub-county within the Republic of Kenya intentionally caused his penis to penetrate the vagina of **RA** a child aged 8 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the night of 16th February 2016 in Turkana central Sub-county within the Republic of Kenya intentionally touched the buttocks and vagina of **RA** a child aged 8 years using his fingers.

3. He pleaded not guilty, was tried, convicted and sentenced to life imprisonment on the main charge and being dissatisfied with the said conviction and sentence filed this appeal and raised the following grounds of appeal as summarized herein:-

a) He was not medically examined so as to connect him with the offence.

b) The prosecution case was fabricated and full of contradictions.

c) He was not given adequate time to prepare for his defence.

d) The sentence passed was harsh.

4. When the matter came up for hearing before me the Appellant who was not represented filed handwritten submissions which he relied upon while Mr. Mongare the learned prosecutor made oral submissions in opposition to the appeal. On behalf of the Appellant it was submitted that vital prosecution witnesses mentioned by **PW1** and **PW2** were not called to testify and be cross-examined and therefore adverse inference should have been made against the prosecution on the principles set out in **BUKENYA v UGANDA [1972] EA 594**. It was further contended that all the prosecution witnesses were members of the same family who made up the case against the Appellant due to an existing grudge between **PW3** and the Appellant. It was stated that the prosecution case was not proved to the required degree.

5. On behalf of the prosecution it was submitted that there was no evidence tendered before the court in support of the Appellant's allegation that he was falsely accused. It was contended that whereas the medical evidence linking the accused to the offence of defilement is welcome, it is not necessary for the same to be examined as was stated in the case of **KASSIM ALI v REPUBLIC MOMBASA COURT OF APPEAL CRIMINAL APPLICATION NO. 84/2005**. It was submitted that under **Section 124** of the **Evidence Act** the court can still convict an accused person on the evidence of the victim alone if the court believes the said evidence.

6. On not being given adequate time to prepare for his defence it was submitted that the case was heard on 25/2/2016, 30/3/2016 and 30/8/2016 with Judgment being reserved for 14/9/2016 giving the Appellant adequate time to prepare. The Appellant did not raise the issue of alleged debt owed to him by **PW3** in his defence before the trial court. It was finally stated that though the sentence was lawful the same should have been enhanced.

7. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving an allowance that it did not have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO v**

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

PROCEEDINGS

8. The prosecution case was that **PW1 RA** a minor was at home when the Appellant whom she knew by name took her to the store where fishing nets are kept and defiled her and as he was in the act the uncle of the complainant came to the store and saw them and caused him to be arrested. This evidence was corroborated by **PW3 JE** who went for the nets at the store and found the Appellant therein with the complainant naked. It was his evidence that he had employed the Appellant and had before that attempted to rape his wife. **PW2 EA** the mother of the complainant corroborated **PW3’s** evidence and confirmed the age of the complainant to be eight (8) years. She stated that when she went to the store where the complainant had been defiled she found her naked with her shorts at knee level. The accused (Appellant) was then locked at the store while the complainant was taken for medical assistance.

9. **PW4 EKIBON JONATHAN IKIRI** a health care worker examined the complainant and corroborated her evidence. He stated that on examination of her genitalia the same had spermatozoa, vaginal walls were bruised confirming forceful penetration. **PW5 PC FRANKLINE MWAI** issued the complainant with P3 form and accompanied her to the clinic. When put on his defence the Appellant stated that he was an hotelier employed by one Christine and while going home from work was arrested by KPR officers for no reason.

DETERMINATION

10. From the record of appeal and the submissions herein, it is clear that the accused person was placed at the scene of the crime by **PW1** the complainant, **PW2** her mother and **PW3** the father. He was known to the three witnesses having been employed by **PW3** as a fisherman and therefore there was no mistaken identify. His submission that he was falsely accused as a result of unpaid dues is an afterthought as he did not put it to **PW3** during cross-examination neither did he raise the same in his defence before the trial court and therefore cannot be admitted by this court on appeal.

11. It is clear from the record that the prosecution case against the Appellant was proved beyond reasonable doubt as all the ingredients of the offence, that is to say penetration and the age of the complainant were proved beyond reasonable doubt and therefore find and hold that the Appellant’s conviction was safe.

12. It therefore logically follows that the appeal herein lacks merit and is therefore dismissed both on conviction and sentence and the trial court’s determination is affirmed. The Appellant has a right of appeal and it is so ordered.

Dated, delivered and signed at Lodwar this 5th day of March, 2019.

J. WAKIAGA

JUDGE

In the presence of:-

_____ for the Respondent

_____ for the Appellant

Accused _____

_____ Court assistant