



IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 10 OF 2019

BETWEEN

DENNIS OMBIRO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of

Hon. J. K. Mutai, RM dated 21st November 2018 at the

Magistrates Court in Ogembo in Criminal Case No. 32 of 2018)

JUDGMENT

1. The appellant, **DENNIS OMBIRO**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the *Sexual Offences Act* (“the Act”). It was alleged that on diverse dates from December 2014 to 10th April 2018 within Kisii County, the appellant intentionally caused his penis to penetrate the vagina of VMO, a child aged 11 years.

2. Before I proceed to consider the grounds of appeal, I remind myself of the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. The court must bear in mind that it neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.

3. The complainant, PW 2, testified on oath that the appellant was her step-father and that her mother died in 2014. She recalled that he had sexually assaulted her several times. She further testified as follows:

On Friday in the month of April 2018. He told me to remove my clothes and I refused. He assaulted me. He beat me up, then he removed my clothes by for and did some bad manners. He used blows on me. He told me that he would take me like my mother as she was late.

4. After the incident, PW 2 recalled that she immediately left the room and went to see her aunt, PW 3 with the assistance of motor bike operators. PW 3 took her to Etago Sub-County Hospital and reported the matter to Etago Police Station. When cross –examined by the appellant, PW 1 stated that the school had closed on 5th April 2018 and that during a funeral, the appellant had sexual intercourse with her.

5. The complainant’s aunt, PW 3, recalled that on 10th April 2018, she contacted the appellant at about 10.00am after he tried calling her. Thereafter at about 11.00pm, PW 2 was brought to her home by several people who told her that she had been lost. PW 2 explained to her that the appellant had been sexually assaulting her over a long period of time. She took her to hospital and reported the matter to the police.

6. PW 4, the Investigating officer, recalled that on 11th April 2018, PW 2 and PW 3 reported to the police station and were escorted to the hospital. PW 1, a clinical officer, produced the P3 medical report form on behalf of his colleague. He however testified that he was present when the examination was being done. According to the report, PW 2’s hymen was absent with a healed scar, there were also healed scratch marks on the labia majora and minora.

7. The appellant denied committing the offence in his sworn defence. He recalled that on 7th April 2018, PW 2 had come home at about 7.00pm. He inquired from her why she was late yet other children had already come home from school. When he pressed her about the matter, she decided to run away. He later found out that she had gone to PW 3’s home. He stated that he was arrested on 15th April 2018 by

members of the community policing.

8. DW 2, the complainant's other aunt testified that PW 2 used to stay with her while the appellant would visit her. She told the court that PW 2 would also stay with her after the schools closed. She was shocked by allegations made against the appellant since she was always with PW 2 from 2014 until she ran away from home. DW 3, a clan elder, testified that the appellant was a person of good character.

9. After considering the evidence, the trial magistrate was satisfied that the prosecution had proved the offence beyond reasonable doubt and convicted the appellant who now appeals against the conviction and sentence. The thrust of his petition of appeal filed on 3rd January 2019 was the prosecution did not prove the case beyond reasonable doubt. Counsel for the accused pointed out that the medical evidence was inconsistent with the testimony of PW 2 who said she had been assaulted yet there was no evidence of any assault. He submitted that the charge sheet was defective and that when it was amended, the appellant was not given an opportunity to contest the charge. Counsel further submitted that the charge referred to the offence being committed on diverse dates yet there was no evidence to support the charge.

10. The respondent supported the conviction and sentence on the ground that the prosecution had proved all the elements of the offence. Counsel contended that the evidence was that PW 2 was subjected to sexual intercourse several times. Counsel submitted that the amendment of the charge was not prejudicial to the appellant.

11. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. The key testimony implicating the appellant was the sworn testimony of a child. Under the proviso to **section 154** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the trial court may convict an accused in sexual offences on the basis of the uncorroborated testimony of a child if, for reasons to be recorded, the court is satisfied that the victim is telling the truth. The trial magistrate, after hearing the testimony of PW 1 stated as follows;

The court heard the witness and observed her demeanor. I have nothing to doubt her testimony. Her testimony was consistent and her narration was that of an aged and not muddled with malicious intent common nowadays of falsely implicating the accused.

13. Thus PW 2's testimony did not require corroboration. However, the duty of this court to look at the evidence and decide whether it supports the prosecution case. On the issue of penetration, PW 3 gave clear and graphic evidence on how over a period of time since her mother passed away, the appellant had proceeded to have sexual intercourse with her. It only in April 2018 that she finally reported the matter to PW 3.

14. The appellant's claimed that on the material day, PW 1 came late from school and when he demanded to know where she was, she ran away to her aunt. His defence appears to be inconsistent with the testimony of DW 2 who stated that PW 2 was staying with her until she ran away. When the appellant cross-examined PW 1, he did not suggest to her that she was residing with DW 2. PW 2 testified to several acts of penetration taking place since her mother died on 2004 and even when pressed in cross-examination by the appellant, she gave further details of those incidents. Understandably, the only reason she did not report the matter earlier was because the appellant promised her presents and threatened her. She also stated that she had also informed her stepmother about the sexual incidents.

15. The medical evidence also corroborated the fact that PW 2 was subject to acts of penetration over a period of time. Although the counsel for the appellant stated that the medical examination did not show that PW 2 was subjected to assault. I do not think that this diminishes the quality of the medical evidence of penetration.

16. The age of a child is a question of fact. PW 3 was attending primary school, a fact admitted by the appellant. That she was 11 years old is confirmed by the assessed age in the Post Rape Care Form. I find that not only was PW 2 a child but she was aged 11 years old. In the circumstances, the prosecution proved the offence of defilement.

17. Before I conclude the judgment let me deal with the issue of the amendment of the charge sheet raised by counsel for the appellant. The appellant was initially charged with the offence of incest contrary to **section 20** of the **Act**. The charge sheet was amended at the end of the prosecution case and substituted the principal charge of incest with that of defilement contrary to **section 8(1)** of the **Act**. The amended charge was read to the appellant and he pleaded not guilty.

18. Under **section 214(1)(i)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, a charge sheet may be amended or substituted at any time before the close of the prosecution case. It provides as follows;

214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge.

19. It is apparent that under **Sub-Section (i)** aforesaid, the trial court is required to call upon the accused to plead afresh to the amended or substituted charge. From the record, the initial charge sheet was read to the appellant and he pleaded not guilty. The new charge introduced a new offence but the facts of the charge remained the same. I find that the appellant was not prejudiced nor was there a failure of justice because the ingredients of the offence of defilement and of the offence of incest are the same except the relationship between complainant

and the accused.

20. As regards the sentence, the *Act* imposes mandatory sentences upon conviction. In the case the penetration of a child aged 11 years and below, the prescribed sentence under **section 8(2)** of the *Act* is a mandatory life sentence. In the circumstances, the sentence was in accordance with the law.

21. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at KISII on this 6th day of March 2019.

D.S. MAJANJA

JUDGE

Mr Onchwangi, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.