



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 15 OF 2017

ELAAR NGIKOL .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 862 of 2013 by the Senior Resident Magistrate – Hon. E.N. Wasike delivered on 19<sup>th</sup> December 2014 at Lodwar)

JUDGEMENT

1. The Appellant **ELAAR NGIKOL** was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 23<sup>rd</sup> day of October 2013 in Turkana West District within Turkana County intentionally caused his penis to penetrate the vagina of **AL** a child aged 14 years old.
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 23<sup>rd</sup> day of October 2013 in Turkana West District within Turkana County intentionally touched the breasts and the vagina of **AL** a child aged 14 years old with his penis.
3. He was tried, convicted and sentenced to twenty (20) years imprisonment. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:-
  - a) *The prosecution case was not proved beyond reasonable doubt.*
  - b) *The sentence given was too harsh.*

**SUBMISSIONS**

4. When the appeal came up for hearing before me the Appellant who was unrepresented filed handwritten submissions which he relied upon while Mr. Mongare learned State prosecution opposed the appeal through oral submissions. On behalf of the Appellant it was submitted that the age of the complainant was not proved as there was contradictions thereon. It was further submitted that his identification was not safe as the conditions prevailing were not ideal. It was contended that very vital prosecution witnesses were not called to testify and the court was urged to make adverse inference to the prosecution case on the authority of **BUKENYA v UGANDA [1972] EA 594**.
5. On behalf of the prosecution it was submitted that the medical evidence corroborated the evidence of the complainant and there was no hearsay evidence tendered by **PW1** and **PW2** and that the age of the complainant was confirmed as between 12 – 15 years which attracts a minimum sentence of not less than twenty years (20) years.
6. 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 REPUBLIC [1972] EA 32** thus:-

*“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**

7. The prosecution case against the Appellant was that on 23/10/2013 the complainant **PW1 AL** was coming from the well with water when the Appellant hit her on the hip and carried her on his shoulders into the bush where he defiled her all night long. He thereafter threatened her not to tell anyone. She was later on rescued by herders who took her home. She stated that she knew the Appellant as 'Naunya'. **PW2 NKL** corroborated the complainant's evidence on how the Appellant assaulted her with a rod causing her to fall down and when she got up she ran away leaving **PW1** the complainant who was carried into the bush as the rest went to their respective homes. She reported to her parents who mounted a search for **PW1** but was not traced. It was **PW2's** evidence that she knew the Appellant having met him several times on the road.

8. **PW3 FREDRICK CHEPKWONY** the clinical officer assessed the age of the complainant at ten (10) years and confirmed that when she went to the clinic she had a brown skirt which was blood stained. On examination her vaginal wall was bruised and hymen perforated with blood stains inside the vagina confirming penetrative sexual intercourse. **PW4 AG. INSPECTOR ANN KANONO** re-arrested the Appellant from members of the public who wanted to kill him on suspicion of having defiled a child. He was positively identified by the complainant and other witnesses.

9. When put on his defence the Appellant gave unsworn statement of defence and stated that he was a goat herder. He confirmed having been to Natir II to sell goats and slept in someone's compound for two days between 23<sup>rd</sup> and 24<sup>th</sup> October 2013. He was subsequently arrested at a dance (Edong'a).

#### ANALYSIS AND DETERMINATION

10. From the proceedings and submissions herein, I have identified the following reasons for determination:-

- 1) *Whether the Appellant was positively identified.*
- 2) *Whether the prosecution case was proved beyond reasonable doubt thereby making his conviction safe.*
- 3) *Whether the sentence given was harsh.*

11. On the identification of the Appellant:- he was put at the scene through the evidence of two minor witnesses. **PW1** the complainant stated that he had seen the Appellant several times and was therefore familiar with the same. **PW2** stated that he left the complainant with the Appellant after he had assaulted her and it was the complainant's evidence that the Appellant defiled her all night long.

12. Having taken into account the ages of the two witnesses, I am satisfied that no child would come forward in court just to make a humiliating statement against her honour involving defilement unless the same actually happened. I find no contradictory evidence in the account and is satisfied that the Appellant was positively identified and placed at the scene as confirmed in his defence that he was at Natir II village on the said date.

13. On whether the prosecution case was proved beyond reasonable doubt, the age of the complainant was proved beyond reasonable doubt through the medical document. The act of penetration was proved through the evidence of **PW3** the clinical officer. The trial court who heard the witnesses had this to say on them:-

*"I find the evidence and testimonies of the prosecution witnesses to be believable, consistent and firm. Their evidence was not distorted and or rebutted by the accused person in any way.*

*On the other hand, I find the defence put forth by the accused to be an afterthought and lacked any credibility as it is full of mere denials..."*

14. I am therefore satisfied that the case was proved beyond any reasonable doubt and the Appellant's conviction was safe. It follows that the Appellant's appeal on conviction lacks merit and is dismissed.

15. On sentence **Section 8 (3) of the Sexual Offences Act Number 3 of 2006** provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty (20) years. The age of the complainant was proved to be between 12 and 13 years thereby falling into the age racket wherein the sentence upon conviction is not less than twenty (20) years. It is clear that the Appellant was given the minimum sentence allowed under the said provisions of the law and since sentencing is a discretion of the trial court I find no fault with the same and would proceed to dismiss the appeal on sentence.

16. In the final analysis I find no merit on the appeal herein both on conviction and sentence which I hereby dismiss and affirm the trial court's findings on the same. The Appellant has a right of appeal and it is so ordered.

**Dated, delivered and signed at Lodwar this 6<sup>th</sup> day of March, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ for the Respondent

\_\_\_\_\_ for the Appellant

Accused - \_\_\_\_\_

\_\_\_\_\_ - Court assistant