



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 10 OF 2018

JAMES LOBOLE ESTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 74 of 2017 by the Senior Resident Magistrate – Hon. C.M. Wekesa delivered on 5th April 2018 at Lodwar)

JUDGEMENT

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 diverse dates between 1st December 2016 and 31st December 2016 in Turkana Central Sub-county within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of CA a child aged 16 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 diverse dates between 1st December 2016 and 31st December 2016 in Turkana Central Sub-county within Turkana County intentionally touched the vagina of CA a child aged 16 years with his penis.
3. He pleaded not guilty, was tried, convicted and sentenced to serve fifteen (15) years imprisonment on the main charge. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-
 - a) *The prosecution case was not proved beyond reasonable doubt as vital prosecution witnesses were not called.*
 - b) *His defence was dismissed without cogent reasons.*
 - c) *He was not properly identified.*

4. When the appeal came up for hearing before me the Appellant who was not represented filed handwritten submissions which he relied upon while Mr. Mongare appeared for the prosecution and opposed the appeal. In addition to the written submissions the Appellant submitted fresh evidence that he was charged with the offence as a result of an outstanding plot dispute between him and the father of the complainant for which the court ordered Social Inquiry Report to establish the same the outcome of which I shall comment on in the body of the Judgement.

SUBMISSIONS

5. On behalf of the Appellant it was submitted that since the offence is alleged to have occurred in the dark, the conditions prevailing were not ideal for his identification and was therefore convicted on the basis of mistaken identity under difficult circumstances as the source of lighting was not indicated. It was submitted that the date of the commission of the offence and the age of the complainant was never proved and neither were exhibits connecting him with the offence produced in court. It was stated that the prosecution case was based on hearsay evidence.
6. On behalf of the prosecution it was submitted that all the relevant and vital witnesses to prove the case against the Appellant were called and there was no contradiction in the prosecution witnesses evidence. It was submitted that lack of DNA test is not fatal to the prosecution case as there were other material evidence to support the conviction of the Appellant.
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 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.”

8. The prosecution case was that on 31/12/2016 **PW1 SA** was in the toilet at 7.00 p.m. when the Appellant known to herself as a mason within the plot went to the toilet and defiled her. Though it was dark she knew the Appellant’s voice and was able to recognize him through the voice. She did not tell her mother until it was detected that she was pregnant. It was her evidence that when she tried to scream the Appellant covered her mouth. She stated that the incidence happened on 31/12/2016 and did not tell her mother until 27/4/2017 as she did not know that she was pregnant.

9. **PW2 DOO** an uncle of the complainant was on 27/4/2017 called and informed that **PW1** was pregnant and upon interrogation she said that it is the Appellant who had defiled her in December and that the Appellant was responsible. Upon his arrest the Appellant allegedly confirmed that he knew the complainant as his girlfriend. **PW3 NGASIKE JOHN KIONGA** a clinical officer produced P3 forms confirming that the complainant was twenty two (22) weeks expectant and that she was aged fifteen (15) years at the time of trial.

10. **PW4 PC GIBSON KURIA** investigated the matter and presented the complainant’s birth certificate in court confirming her age and that having been threatened the complainant did not report the matter since the Appellant was living with her in the same plot. When put on his defence the Appellant only gave an account of 27/4/2017 the day of his arrest. He stated that on 15/11/2016 he had differed with the complainant’s guardian on why he had been given a bigger plot and denied having committed the offence.

ANALYSIS AND DETERMINATION

11. From the proceedings, grounds of appeal and submissions I have identified the following reasons for determination:-

- 1) Whether the Appellant was falsely charged as a result of a dispute with the complainant’s uncle and guardian.***
- 2) Whether the Appellant was properly identified.***
- 3) Whether the prosecution case was proved beyond reasonable doubt.***

12. On the issue of false accusation;- the Appellant raised the issue in his defence and since the trial court had not dealt with the same in her Judgement, I ordered for a Social Inquiry Report to establish the truth or otherwise thereof and it was confirmed that the said allegation was not true. This is weighed against the evidence on record which confirms that the complainant and her guardian were staying in rented houses belonging to the Appellant’s grandmother in whose house the Appellant was living. I therefore find and hold that there was no dispute as regards a plot and therefore the Appellant’s alleged defence is an afterthought without merit.

13. On whether the Appellant was adequately identified;- the evidence of **PW1** is that the Appellant was usually within the plot. She knew him as a mason. Though it was dark the complainant knew his voice as he used to bang the gate at night while drunk. He threatened the complainant thereby making it difficult for her to report. **PW2** confirmed that the Appellant was known to him and would come to his house to charge his phones. He confirmed that the Appellant was a drunkard thereby corroborating the complainant’s evidence. At her age there is no reason why the complainant would have made a false allegation against the Appellant who did not challenge **PW2’s** evidence that upon his arrest he confirmed that the complainant was his girlfriend which is corroborated by the complainant’s account that on the material day the Appellant first kissed her before defiling her. I am therefore satisfied that the Appellant was properly identified.

14. On whether the prosecution case was proved beyond reasonable doubt;- the fact that the complainant was four (4) months pregnant confirms that there was penetration. The age of the complainant was confirmed by the production of the birth certificate and whereas DNA testing would have strengthened the prosecution case, I am satisfied that there was adequate material placed before the trial court to convict the Appellant and therefore his conviction was safe.

15. On sentence the age of the complainant was proved to be 16 years and under **Section 8 (4) of the Sexual Offences Act No. 3 of 2006** the sentence provided for upon conviction is a term not less than fifteen (15) years. Since sentencing is at this trial court’s discretion I find no fault with the sentence given to the Appellant and affirm the same.

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

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

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ - *Court assistant*