



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 01 OF 2019

BETWEEN

THOM KIRIMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. M. Nafula, SRM dated 23rd October 2018 at the Magistrates Court in Ogembo in Criminal Case No. 59 of 2018)

JUDGMENT

1. The appellant, **THOM KIRIMA**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** ("the **Act**"). It was alleged that on diverse dates between 23rd June 2018 and 25th June 2018 in Gucha South Sub-County within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of CKJ, a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Act** based on the same facts. The appellant was convicted and sentenced to 10 years' imprisonment.
2. Before I proceed to consider the grounds of appeal, I remind myself 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 that she was 13 years old attending school in class. In her sworn testimony she recalled that on 23rd June 2018, she met the appellant while she was on her way from church. He threatened her with a knife, took her to his place and proceeded to sexually assault her over a period two days.
4. The complainant's grandmother, PW 3, recalled that on 23rd June 2018, PW 1 went to church but did not return home for 2 days. She went to report the issue to Etago Police Station. She was informed by PW 4 that the appellant had been seen with PW 2 and he took her to his home where they found PW 2.
5. PW 4 recalled that he had seen the appellant was with PW 2 holding her hand on 23rd June 2018 at Etago Stage. PW 3 told her that she was looking for PW 2 whereupon he took her to the appellant's home where they found PW 2. He recalled that PW 2 told him that she had been sexually assaulted.
6. The Investigating Officer, PW 5, recalled that on 25th June 2018, PW 2 was brought to the police station by PW 3. He issued a P3 form and escorted PW 2 to the hospital. The P3 form was produced by PW 1. He confirmed that the doctor who examined PW 2 and prepared it was on study leave. According to the report, the doctor observed that the hymen was freshly torn, the inner vaginal wall had a tear with some blood clots and there was also a blood clot on the opening of the vagina.
7. In his unsworn statement, the appellant denied the offence. He told the court that he was arrested by a village elder on 26th June 2018 and taken to Etago Police Station and arrested for the charges facing him.
8. 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 that the sentence was harsh and excessive. In this written submissions, the appellant contested the conviction on the ground that the prosecution did not prove the offence beyond reasonable doubt. He contended that PW 1's testimony was uncorroborated and inconsistent and that an essential witness

was not called to testify.

9. The respondent supported the conviction and sentence on the ground that the prosecution had proved all the elements of the offence.

10. 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.*"

11. 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 did not express her view on whether PW 1 was telling the truth hence her testimony ought to be corroborated. The testimony of PW 1 was that she was sexually assaulted by the appellant over a period of two days before she was found by PW 3. PW 2's testimony was corroborated in material respects by PW 3 who confirmed that she had disappeared for a period of two days until she was found. The fact of penetration was also supported by the medical evidence showing that PW 2 had a tear on the vagina and blood clots in the genitalia. I am therefore satisfied that PW 2 was subjected to an act of penetration.

12. The other issue for consideration is the identity of the appellant. From the evidence of PW 2, the appellant was a stranger who took her to his home as she was leaving church. His identity was not tested by a description of the appellant and confirmed by a properly conducted identification parade. However, there is the evidence of PW 4 who stated that on the day PW 2 did not return home, he saw him holding hands with PW 2. Secondly, PW 1 was found by PW 3 and PW 4 in the appellant's house. PW 5 confirmed that the house in which PW 2 was found belonged to the appellant. In his unsworn testimony, the appellant did not give any explanation why PW 1 was at his home. The totality of the evidence leads me to conclude that the appellant was the person who subjected PW 2 to an act of penetration.

13. Finally, the age of the child was established by the clinic card which showed that she was 14 years old. In the circumstances, the prosecution proved the offence of defilement.

14. Before I conclude this judgment, I note that the trial magistrate did not specify the offence for which she convicted the appellant. Having found that the act of penetration was proved, the appellant ought to have been convicted of the offence of defilement under **section 8(1) and (3)** of the **Act** and sentenced to the mandatory term of 20 years' imprisonment. On the other hand, if the appellant was convicted of the alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Act**, the minimum sentence of 10 years' imprisonment would apply. In this case though, the trial magistrate did not allude to the commission of an indecent act.

15. **Section 169 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

16. The trial magistrate failed to comply with **section 169(2)** of the **Criminal Procedure Code** as she did not state or specify the counts on which the appellant was found guilty and convicted yet he faced a principal and an alternative charge. In dealing with this aspect of the appeal, I am guided by the view expressed by the Court of Appeal in **James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR** as follows;

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

17. From the totality of the proceedings and evidence, I am satisfied that the appellant did not suffer any prejudice since he was in fact sentenced for the alternative count despite the principal charge being proved by the prosecution. Since the respondent did not cross-appeal on this point, I affirm the conviction but I will not disturb the sentence. It is also affirmed.

18. The appeal is dismissed.

DATED and DELIVERED at KISII on this 4th day of March 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

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