



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 29 OF 2018

HARRISON LONYUDUK.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No. 15 of 2017 by the Senior Resident Magistrate - Hon. C M Wekesa delivered on 23rd August, 2018 at Lodwar)

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to section 9 (1) of the sexual offences Act No.3 of 2006 and an alternative charge of indecent Act with a child contrary to section 11 (1) of the said Act.
2. He pleaded not guilty, was tried convicted and sentenced to serve ten (10) years imprisonment on the alternative charges.
3. Being aggrieved by the said conviction and sentence he filed this appeal and in his home grown grounds of appeal raised the following:
 - a) He was convicted in the absence of crucial witnesses eg. PW3
 - b) Prosecution case was based on hearsay evidence
 - c) The age of the complainant was never proved
 - d) His defence was rejected without cogent reasons.
4. When the appeal came up for hearing before me, the appellant who was unrepresented filed written submission which he relied upon while Mr. Mongare learned state counsel opposed the appeal. On behalf of the appellant as is common with all appeals from Lodwar Prison submitted that the trial court did not record his defence correctly in violation of his rights to free and fair trial and that the case was made up by PW2 so as to disinherit him from his “paternal plot” he submitted further that the age of the complainant was not proved beyond reasonable doubt as there was no medical evidence to confirm the age.
5. It was contended that there was material contradiction in the evidence of the prosecution witnesses as regards the clothes the complainant was wearing and that the conditions of his identification was not safe to sustain his conviction on the same as the strength of the moon light was not given.
6. On behalf of the prosecution it was submitted that the condition was conducive for identification since there was sufficient moon light. It was contended that the evidence of PW1 was corroborated by that of PW2 and that the appellant was caught red handed.
7. This being a first appeal, this court is under legal duty to reevaluate the evidence tendered before the lower court and come to its own conclusion though giving allowance that unlike the trial court did not have the advantage of seeing and hearing witnesses see **OKENO – V – R [1972] EA 32, 36**

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal Mruwala – V – R [1957] EA 570) it is not the function of a first appellate court to merely to scrutinize the evidence to see if there was some evidence to support the lower courts 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 Peter V Sunday post [1958] EA 424”

8. The prosecution case was that PW1 ME a child of tender age who was found intelligent enough testified that together with other children were sleeping outside their home at 10.00pm when the appellant who was sleeping in “Gachi” went to where they were sleeping and lay on top of her legs, he pushed her skirt and removed her inner pants completes causing her to scream while calling her mother PW2 and according to her inserted his penis inside her vagina. She stated that the appellant was her neighbor whom she knew very well.

9. **PW2 SK** corroborated the evidence of PW1 whose screams at night attracted her and saw the appellant lying on top of PW1 who tried to run away but she managed to get hold of him. She then called PW3 RL who advised that they take the appellant to the police. She was able to recognize the appellant through the aid of a torch (spotlight). She stated that PW1 informed her that the appellant had raped her. She was able to identify the clothes the appellant was wearing. This evidence was corroborated by PW3 who stated that he found PW2 holding the appellant when she responded to the screams. His further evidence was that PW1 explained to him that she felt pain and that is why she screamed. He had known the appellant since child hood and identified him by recognition.

10. **PW4 PC WALTER KARUMBA** testified on behalf of the initial investigator and when the appellant was put on his defence stated that he was a boda boda operator. On 7/5/2017 he took a customer to Morulem and returned home when he saw the complainant coming and told him to accompany him to the police station on an issue concerning land and was locked at the station before being charged.

11. From the record of appeal in submission herein I have identified the following issues for determination in this appeal.

a. Whether the appellant was properly identified

b. Whether the age of the complainant was established

c. Whether the prosecution case was proved beyond reasonable doubt

12. On the issue of identification of the appellant PW1:- PW2 and PW3 knew the appellant very well. The complainant knew that he was sleeping in the material date in a “**Guch**” a make shift for purposes of resting. There was adequate moon light which enable her recognize the appellant. PW2 apprehended the appellant and this evidence was corroborated by PW3. It is therefore clear that the appellant was identified by recognition. They were all familiar with the appellant who used to sleep in their home. Whereas PW1 stated that there was moon light which enable her see the appellant, PW2 stated that he wanted water. The complainant was aged ten (10) years and her evidence as to what happened was very clear and therefore find that the identification of the appellant was free from possibility of court as was stated in the case of **WAMUNGA – V – R (1989) KLR 426**.

13. Whereas the age of the complainant was not established save for her evidence in chief that she was ten (10) years and there was no medical report tendered to confirm her age, I have taken into account the fact that the appellant was charged with the offence of attempted defilement under section 9(2) and indecent act with a child under section 11 (1) of the sexual offences Act where the age of the child is not material in determining the sentence and therefore lack of proof of age was not fatal to the prosecution case.

14. On whether the prosecution case was proved beyond reasonable doubt; it is clear from the evidence on record that the appellant was placed at the scene by PW1, PW2 and PW3 and in his defence he placed himself with the complainant when he stated that

“I remember on 7/5/2017 I was carrying a customer taking her to Morulem and when I came back I stayed at home, then saw the complainant coming, he came and told me to accompany him to the police station.”

15. The appellant raised the issue of land dispute but did not put the same to either PW2 or PW3 in cross-examination and therefore find the same as an afterthought which was rightly rejected by the trial court.

16. I therefore find that this appellant’s conviction was safe and therefore reject his appeal herein as lacking merit. I must however state for record purposes that the evidence tendered before the court was enough to sustain a conviction on the charge of attempted defilement but since the appellant was not given an adequate warning. I shall not interfere with the trial courts finding thereon.

17. On sentence the appellant was sentenced to imprisonment of a term of ten (10) years which is the minimum sentence under the section in which the appellant was convicted and since the sentence is at the discretion of the trial court I find no fault thereon.

18. I therefore for reasons stated hereon dismiss the appeal herein on both conviction and sentence and affirm the trial courts judgment and it is so ordered accordingly.

19. The appellant has right of appeal.

Dated and delivered at Lodwar this 4th day of April, 2019

J WAKIAGA

JUDGE

In the presence of:-

Mongare for Respondent

Harrison Lonyuduk - Appellant

Richard - Court assistant