



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 83 OF 2017

[FORMERLY ELDORET HCCRA NO. 70 OF 2016]

KIPROP KANDIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 775 of 2015 delivered on the 2nd day of June, 2016 by Hon. E. Kigen, RM]

JUDGMENT

1. The appellant appeals from the conviction and sentence of life imprisonment for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offence Act the particulars of which are that, “on the 10th day of August 2015 at 1330 hrs at [particulars withheld] Sub-Location in Baringo North Sub-county with Baringo North County did unlawfully and intentionally cause his penis to penetrate the vagina of AC a girl aged 4^{1/2} years in contravention of the Act.”
2. The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act the particulars of which are “on the 10th day of September 2015 at around 2330 hrs at [particulars withheld] village in Baringo North Sub-County within Baringo County intentionally and unlawfully caused his penis to touch the vagina of AC a girl aged 4^{1/2} years in contravention of the Act.”
3. Upon the full trial, Court in Criminal Case No. 775 of 2015 delivered judgment on 2nd June 2016 finding the Appellant guilty as charged, as follows:

“Having looked at the evidence adduced before Court, the Court is left to determine the issues arising before it.

- a) *Whether the offence of defilement did occur on 10/8/2015.*
- b) *Whether there is evidence linking the accused to the commitment of the offence.*

Pw2 had examined a patient on 11/9/2015 who had gone to their facility and upon examination he had observed that the patient had no discharge, had swellings in the perineum region, absent hymen with swellings on the minora and majora. Higher vaginal swab showed presence of blood cells.

Pw2 had thereafter formed an opinion that there was an act of sexual penetration. It is also the evidence of Pw1 that the minor was born 22/3/2011. And that she was 5 years old thus was further corroborated by the Investigating Officers (Pw4) who had produced a Clinical Card in Court indicates that the said minor was born on 8/3/2011. I do find that indeed that the offence of defilement has been proved. As the issue of when the defilement occurred the Court will revisit the matter later.

I now move the 2nd issue as to whether there is evidence linking the accused to the commission of the offence. Pw1 stated in her testimony that she had found the accused whom she identified using light from the torch sleeping with her child he had thereafter awoken him and found his trousers open and upon examining the child, she had her pants removed and semen on her private parts. The accused had thereafter gone into hiding but was arrested.

Pw1 knew the accused well as they were relatives and lived together in the same compound. She had managed to identify him that night using the light from her torch.

Pw1 testified on behalf of the Complainant who was declared vulnerable as she could not comprehend what had transpired that night as she was asleep. Penetration is a key ingredient in any defilement case. Basing on the account of Pw1 and examination done by Pw2 I do find that indeed the said offence did occur on 10/8/2015 and penetration was evident.

I do find that the Prosecution has proved their case beyond reasonable doubt, I hereby proceed to find the accused guilty as charged for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offence Act no. 3 of 2006.”

4. The Appellant being aggrieved with this decision filed a Petition of Appeal on 15th June 2016 on the following grounds:

- a) That the trial Magistrate erred in law and fact by convicting while relying on Prosecution’s case which was not proven beyond reasonable doubt as required by the law.*
- b) That the trial Magistrate erred in both law and fact by convicting me without observing that the Clinical Officer who examined the Complainant did not proof penetration as required by law.*
- c) That the trial Magistrate erred in both law and fact by convicting me without noticing that there were a lot of contradiction of evidence adduced in Court.*
- d) That the trial Magistrate erred in both law and fact by convicting me while rejecting my defence without giving any convincing reason for the rejection as provided by the law section 169 (1) of the Criminal Procedure Code.*

Submissions

5. The appellant filed written Submissions urging insufficiency of evidence to convict; lack of positive identification; and that he was a minor at the time of the alleged offence and his sentence was unjust.

6. The Prosecution made oral submissions at the hearing on 20/6/2018 as follows:

- i) The Complainant identified Appellant and indicated that she had been defiled by him. The child was 4 years and her testimony taken through aunt who also knew the accused and curried him as a son. It was a case of recognition of a person she knew before. Accused lived with the accused in the same room. The Complainants mother caught the Appellant in the act and spoke to him.*
- ii) Arrest was by public shortly after the incident when the Complainants mother raised alarm. Mother pointed the direction he had gone and was found and arrested.*
- iii) All crucial witnesses were called and Complainant being 41/2 years evidence given by mother under section 31 (1) of Sexual Offence Act. Intermediary was an eye witness Pw3 corroborated the evidence.*
- iv) Court could observe that the child was below 10 years and allowed the mother to testify. Ingredients of defilement were brought out in trial.*

Determination

7. The issues for determination are whether the defilement of the complainant was proved; whether the age of the complainant was proved; and whether the appellant was positively identified as the perpetrator of alleged defilement.

8. In considering an appeal, a first appellate Court is required to proceed by way of a rehearing and to re-evaluate the evidence before the trial Court and make its own conclusions before making a decision whether the conclusion of the trial Court should be allowed to stand, an allowance being given to the fact that the appeal Court does not like the trial Court hear or see the witness’s demeanour in Court. See ***Okeno v. R*** [1972] EA 32.

Proof of defilement

9. According to the charge sheet, the complainant was 4 ½ years old. The trial Court which observed the child complainant declared her a vulnerable witness on account of her minor age and the complainant’s mother, PW1, testified as her intermediary. PW1 testified as follows:

“AC is my last born child. She is 5 years old born on 22/3/2011. I know the accused he is aunt’s son. I recall on 10/9/2015 we took dinner with the accused, he thereafter slept in the kitchen and I proceeded to sleep in the living room. At night I heard cows moaning and I went to check. I found the cows had left the boma and I brought them back. I proceeded to the main house and found he door closed from inside. Since I had closed the door from outside. I found a jembe placed on the door. I opened the curtain separating the bedroom and sitting room and found the accused sleeping with my child. I asked him what he was doing and he never responded. I shook him hard and woke pretending he did not know where he was. On checking his chest was open and his trousers were open. I checked the child and found she did not have a panty. I checked to see if she had wet the bed but she had not. On examining the child she had semen on her private parts.

About 3:00am I went to the neighbour’s house and borrowed her phone and called my husband who came with two other people they went to look for the accused and found him sleeping in the forest.... It took me about 30 minutes to bring the cows and tie them. I used the torch which is in my phone (Mlika Mwizi)....”

10. The medical evidence presented by PW2, Benjamin Kendagor, Clinical Officer was indicative of penetration as follows:

“Vaginal swab showed blood cells.

Microscopy showed numerous blood cells on account of the allegation and presence of laceration and excessive redness I concluded there was an act of sexual penetration. I filed the P3 form on 12/9/2015...

I also have treatment chits showing she was treated 12/9/2015 on account of having been defiled by 17 year old boy at around 11.00pm at her mother’s residence.

*Hymen was broken, both labias lacerated, perineum region [area between the **anus** and the scrotum or **vulva**] swollen but no discharge. We managed her for defilement. ”*

11. I find that the medical evidence was corroborative of the evidence of defilement given in the testimony of PW2, the mother of the child as an intermediary upon the declaration of the complainant as a vulnerable witness on account of her age.

Age of the complainant

12. Upon application by the prosecutor, the Court declared the complainant as a vulnerable witness as follows:

“Court:

Owing to the fact that the complainant a minor cannot communicate I do find it necessary to declare her a vulnerable witness under section 31 (1) (2) as read with section 31(4) (b) of the Sexual Offences Act.”

13. No Birth Certificate or other documentation was produced to prove the age of the complainant. The mother, however, testified that the complainant her last born child was 5 years old having been born on 22/3/2011.

14. The trial Court to whose observation, having seen the child, this Court must defer confirmed the complainant was “*a minor [who] cannot communicate*” and therefore declared her a vulnerable witness. From this observation of the trial Court and the evidence of the mother PW1, this Court finds that the *fact* of the age of the complainant was proved to fall within the age bracket of below 11 years the subject of the offence and sentence in section 8 (2) of the Sexual Offences Act.

Identification of the appellant as perpetrator

15. I agree with the DPP that the evidence of Pw1, the complainant’s mother and accused’s cousin is one of recognition, which as held in **Anjononi v R (1980) KLR 59**, is more reliable than that of identification of a stranger. PW1 had opportunity to identify the assailant as she was trying to raise the assailant who pretended to be asleep and when she asked him what he was doing, and the means of light from a mobile phone (Mlika Mwizi) to see the person who she recognized as her cousin, (her auntie’s son in her own words). In his unsworn evidence, while denying the offence, the appellant confirmed that he had “*stayed with the complainant’s mother for long*” and further that:

“I recall on 9/9/2015 I woke up in the complainant’s house. I washed my milk cans and went to milk the cows. I later made tea and woke the complainant’s mother, gave tea asked her for permission to go home and visit my mother but she refused. She told me if I went I should not return. I decided to go and help my mother and come back in the evening...”

16. The unsworn statement of the appellant did not raise any reasonable doubt to the prosecution evidence of recognition by the complainant’s mother as the person she found with the complainant with his trousers open and the child’s panty off when she came back from return the cows which had strayed out of the home on the material night in the night. The kitchen where the appellant had slept and the main house where the complainant and her mother slept was according to PW1 only 3 metres away and the appellant had opportunity to get into the house and defiled the child when the complainants mother was out attending to her cows for 30 minutes.

Orders

17. Accordingly, the Court finds no merit in the appellant’s appeal and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Kitilit, Prosecution Counsel for the Respondent.