



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 26 OF 2018

MAURICE LOIRET ETABOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 77 of 2017 by

the Senior Resident Magistrate – Hon. C.M. Wekesa delivered on 8th August 2018 at Lodwar)

JUDGEMENT

1. The Appellant MAURICE LOIRET ETABO was tried, convicted and sentenced to fifteen (15) years for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 8th day of May 2017 in Turkana Central Sub-county within Turkana County, intentionally caused his penis to penetrate the vagina of S.L. a child aged thirteen (13) years. 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** of which he was acquitted.

2. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-

- a) *Vital prosecution witnesses were not called to testify.*
- b) *He was convicted on the basis of fabricated, contradictory and unreliable evidence.*
- c) *His constitutional rights were violated.*
- d) *The prosecution case was not proved to the required standard.*

3. When the appeal came up for hearing before me the Appellant who was unrepresented filed written submissions which he relied upon while Mr. Mongare the learned Public Prosecutor opposed the appeal and supported the conviction.

SUBMISSIONS

4. On behalf of the Appellant it was submitted that he was arrested and tried as a scapegoat for his cousin 'Rasta' whom the police were looking for. It was submitted that vital prosecution witnesses including the Head Teacher of [Particulars Withheld] Primary School were not called to testify so as to link him to the offence. It was stated further that the evidence of PW1 the complainant was contradictory as she spoke of the report card from [Particulars Withheld] Primary School while she was already a pupil at Riverside Academy. It was submitted that the P3 form was not produced by the maker. It was his contention that he was HIV positive while the status of the complainant was not established to confirm penetration. It was the Appellant's contention that the age of the complainant was never established.

5. On behalf of the prosecution it was submitted that the prosecution called sufficient witnesses to prove its case and that the medical evidence was properly produced having laid down the basis for the inability of the maker to testify. It was contended that none of the Appellant's constitutional rights were violated.

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 **PW1 S.L.** a minor and a pupil at [Particulars Withheld] Academy aged thirteen (13) years was at the sister's place at [Particulars Withheld] and was on the way to her aunt's place at [Particulars Withheld] when the Appellant who was her teacher at [Particulars Withheld] Primary School met her and asked whether she had received her report to which she answered in the negative. He then asked her to follow him and they boarded a motor cycle to Nakwamekwi. They stopped at a house which the Appellant said belonged to his father where the Appellant removed her clothes and defiled her having threatened her with a knife. It was her evidence that she met one Ada on the road whom she informed what had happened. She then took her to her mother's house who then called the mother of the complainant. In cross-examination she stated that the Appellant taught her in Lodwar Mixed Primary School in term one the year 2016.

8. **PW3 NGASIKE KIONGA** a clinical officer produced the P3 form on behalf of **Ben Kemboi** and confirmed the age of the complainant at thirteen (13) years and upon examining her confirmed that the hymen was torn, the labia external genitalia and vagina walls were bruised. He concluded that there was penetration. In cross-examination he confirmed that there were sperms seen in the vagina of the complainant through high vaginal swab. **PW2 A.L.** the mother of the complainant confirmed her age as fourteen (14) years having been born on 2/1/2004. She stated that she was called by someone at Kanamkemer where the complainant told her that the Appellant who was her teacher in class six had defiled her. She stated that the complainant was going to school when she was attacked.

9. **PW4 PC GIBSON KURIA** testified on behalf of the investigating officer who had gone on transfer and stated that the Appellant went with the complainant to Nakwamekwi on a motor cycle and took her to some house where he defiled her. When put on his defence, the Appellant testified that on 4/5/2017 he received a phone call from his cousin named **John Emuria** on the ongoing police recruitments. He therefore left Muli Children's Home at Yatta for Lodwar and arrived on 7/5/2017 at 6.00 a.m. He proceeded to Natitol before going to Lodwar Town. On 8th he went to Nadapal where his younger sister was staying upto the 9th when he was at Kibabii University until 5.00 p.m. before proceeding home at 8.00 p.m. when he heard noise and proceeded to the scene where he found his cousin had been apprehended by people. The following morning at 6.00 a.m. someone came to the house looking for his cousin known as 'Rasta' whom they did not find. He was therefore arrested and taken to the police station before he was charged.

10. In convicting the Appellant the trial court had this to say:-

"It is evident from the evidence on record that the assailant was well known to her, she recognized him by his name and also the fact he was her teacher, having taught her at Lodwar Mixed Primary School, from the above. This fact is discerned from their conversation which revolved around her report card. The accused made her believe that he was in possession of the report card and lured her to a deserted house and defiled her. I am satisfied that the evidence on record is that of recognition..."

ANALYSIS AND DETERMINATION

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

- 1) *Whether the Appellant was properly identified.*
- 2) *Whether there was adequate evidence linking the Appellant to the commission of the offence charged.*
- 3) *Whether the Appellant's defence was considered.*

12. The only link between the Appellant and **PW1** the complainant was that he was her teacher at [Particulars Withheld] Primary School. It was upon the prosecution to prove beyond any reasonable doubt that the Appellant was the complainant's teacher at [Particulars Withheld] Primary School. From the evidence on record it is clear that there was no evidence tendered to prove that the Appellant was such a teacher. I have weighed this against the Appellant's defence and having noted that the evidence of the complainant though not require corroboration, was inconsistent and contradictory as to where she was going to when she met the Appellant, whether it was to visit her sister or to go to school or to her aunt's house. There is therefore a gap in the prosecution case as regards whether the Appellant was **PW1's** teacher and the benefit of this doubt should have been given to the Appellant.

13. On the evidence linking the Appellant with the offence:- as submitted by the same very vital prosecution witnesses such as Ada and her mother who rescued the Appellant and the arresting officer were never called. In his Judgement the trial court found as fact that those witnesses were never called to testify and no reason was advanced by the prosecution as to why they failed to appear but declined to find adverse inference on the prosecution case. On the authorities of **CALEB OWARE MAENDE v REPUBLIC [2010] eKLR** where it was held that it is not that it is not always the case that a witness who has not been called to testify would have given adverse evidence. I am however of the considered opinion that the gap in their testimony raised a doubt in the prosecution case the benefit of which should have been given to the Appellant.

14. On the Appellant's defence, having raised an alibi defence, it was for the prosecution to disapprove the same and not for it to cast doubt on the prosecution case as held by the trial court. Whereas there is evidence on record that the complainant **PW1** was defiled, having re-evaluated the evidence tendered before the trial court, it is clear that there is a doubt in the prosecution case whether it was done by the Appellant whose defence I find probable. I would therefore grant the same the benefit of doubt and find merit on the appeal herein which I hereby allow, and set aside the conviction and quash the sentence herein.

15. The Appellant should therefore be set free forthwith unless otherwise lawfully held and it is so ordered.

16. Before penning off, I would state for record purposes that this matter was not properly handled by the investigating officer and the prosecution as there were gaps which they ought to have covered before charging the Appellant in court.

Dated, delivered and signed at Lodwar this 3rd day of April, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*