



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 223 OF 2017

VICTOR NGETICH.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 185 of 2016 delivered on the 4th day of December, 2017 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act on 4/12/17.

2. The appellant appealed from the conviction and sentence by an Amended Petition of Appeal dated 15/1/2018 setting out the following grounds of Appeal:

1. The Honourable Court erred in law and fact to have convicted the Appellant of defiling the complainant in the absence of evidence proving beyond any reasonable doubt that the Appellant was present at the time the offence was committed.

2. The lower Court erred in law and fact in convicting the Appellant in the absence of an eye witness to the offence.

3. That the Learned Senior Resident Magistrate erred in both law and fact by not complying with the provisions of the Sexual Offences Act relating to evidence of vulnerable witnesses.

4. The lower Court erred in law and fact in convicting the Appellant when the evidence of the prosecution witnesses contradicted documentary evidence and was exaggerated in that PW3 witnesses estimated days of the injuries was 4 days from 23rd February 2016 and not two days from 22nd February 2016.

5. That the first person who came in contact with the complainant, never testified and tell the Court the position and condition the baby was in.

6. The lower Court erred in law and in fact in convicting the Appellant on exaggerated and unsubstantiated medical evidence as contained in the P3 form, which indicates that the complainant was examined on 22nd February 2016 and not 21st February 2016.

7. The lower Court erred in law and fact in convicting the Appellant on hearsay evidence.

8. The lower Court erred in law and in fact to have placed the burden of proof on the Appellant.

9. The sentence of life imprisonment was too harsh and excessive to a 27 year old first offender.

10. That the judgment was against the weight of the evidence on record.

3. The appellant's Counsel filed written submission dated 27/4/18 which Counsel highlighted at the hearing of the appeal as follows:

"Mr. Njoroge

I urge that the appeal be allowed. Appellant had 10 grounds of appeal. I filed written submissions on 30/4/18.

We summarize the grounds of appeal into 6 grounds.

Lack of evidence to support conviction by circumstantial evidence. The chain of events by Pw1 did not show guilt of the accused. I refer to page 3 of the proceeding and to Abanga Alia Oyango v. R No. 32 of 1990 conditions for circumstantial evidence.

Failure by Prosecution to adduce key exhibits.

A part of the complainant was not produced. I refer to page 11 of the proceedings. I also refer to page 12 of proceedings where Investigating Officer states that medical tests were done on accused but the same were never produced in Court. The white blood stained shirt that appellant was wearing was not produced.

Failure to avail eye witness – *There were people who could have been called as witnesses but were not called. Page 2 of proceedings there were 6 people. None was presented.*

Failure to conduct DNA and medical examination to prove prosecution case. I refer to section 36 of the Sexual Offences Act and section 122 (a) of the Penal Code. There was no sufficient evidence to convict so DNA was necessary.

Failure by Investigating Officer to visit the scene. I refer evidence of the Investigating Officer (PW3).

Failure to properly investigate the case.”

4. The Ass. DPP conceded the appeal and submitted as follows:

“DPP

Appeal is not opposed.

Proceedings indicated evidence of complainant was not relied. Child aged 1 year 3 months. The learned trial Magistrate did not comply with section 31 of Sexual Offences Act. The appellant was not declared vulnerable witness and an intermediary appointed. Pw1 mother testified as a witness on her own language and not for the complainant.

*Section 2 of Sexual Offences Act defined rule of intermediary. The case was poorly investigated. Pw1 testified that their children playing when appellant called complainant. **These children were not called as witness.***

She did not see what happened to the complainant as she was hanging clothes. She sent Sheila to pick complainant. Sheila was not called to shed light to where she found the complainant and whether she was still being heard by the appellant.

*At lines 26 – 27 – white short with blood stains on the lower side near the belt region. **The shirt was not produced as exhibit and neither has it taken to Government Chemist for analysis. No reason was given.***

Appellant is facing life sentence yet there were insufficient evidence with many gaps and I urge the Court to allow the appeal.”

Determination

5. Upon consideration of the evidence presented before the trial Court, I respectfully agree with the submissions of both Counsel for the appellant and the DPP that there was no sufficient evidence to prove the case beyond reasonable doubt.

6. The Prosecution’s case had many gaps as to what exactly happened to the child complainant whose evidence was not produced as it should have by an intermediary in accordance with section 31 of the Sexual Offences Act and the evidence connecting the appellant to any injury on the part of the complainant was and scanty in-complete.

7. Witnesses who were crucial to the case as the girl named S who was sent by her mother to pick the minor did not testify to explain the state of the complaint at the time and any involvement of the appellant. And as urged by the DPP the blood-stain shirts of the complainant were not produced, nor any report by Government Chemist of any analysis on the shirts.

8. On account of the lack of evidence of the appellant’s involvement, the alternative charge of the indecent act similarly be proved.

9. While Medical Examination as produced by PW4 doctor at Eldama Ravine Hospital indicated that :

“On external examination she had minimal fresh blood from the vagina, hymen broken, bruises over the labia minora. On laboratory examination through vagina swab revealed red blood cells meaning she was bleeding. HIV test was negative and no abnormality in urine analysis and no spermatozoa found on her,”

No analysis of the blood stains found on her skirt and stockings connected the appellant to any defilement. And significantly as pointed by the DPP, no reason for such crucial defilement was given.

10. PW2, the complainant's grandfather only testified on the basis of information as follows:

"on 21st February 2016 at 10.00 pm when I received information that the young child who is my grand-child had been defiled and they had earlier tried calling me and I saw C (Pw1) had tried to call me severally while I was at the Centre and I went home. A neighbor Evans Koech then called me asking what happened at my home and that I run as a child had been defiled and someone had been arrested. On the way I met accused alias Broker being escorted and I had just met my wife and Pw1 having to bring the child to hospital."

11. The wife of the witness PW4 who escorted the child and its mother to hospital did not testify.

12. The only evidence therefore of the alleged involvement of the appellant was by the child's mother who did not see the appellant do any harm to the child, as follows:

"PW1

On 21st February, 2016 I was at home with my mother RCK and my younger siblings SC, NC, VK and BK and I was from the river washing clothes and it was around 7:00 p.m. and I was coming from the river with my child (victim) and my younger sisters and I was hanging clothes when accused arrived and asked for drinking water and my mother served him the water and my mother then took jug and went to milk. It was not yet dark and you could see someone clearly. After he took water he sat on a stone outside the house and children were playing and I was hanging clothes at 10 meters and he was sat behind where I was. He then called the baby (victim) MC saying the baby does not fear him and that she is a good girl hence I did not bother. He was carrying the child while facing him and put her legs across his (demonstrates) and I went to hang at another line behind the house and I could not see well and I then heard the child screaming.

*I then asked the young children who were playing with her to for her as maybe she feared the accused. S then went and took the child and brought her to where I was, I was having a blue lessso with white flowers which I covered the child with and she continued crying while lifting both her legs up and I thought may be some insects had bit her. I then noticed blood stains on the lessso and I checked myself on the child and could not see any blood. I then decided to remove the child's pant in case the insects could have bitten her and on removing the pant I noticed she was bleeding and had stained the pant, stocking, skirt and lessso that the child was wearing. The blood was from the child's private parts and I went outside and screamed and I told my mother what could have accused done to my child and she came to the house and I went to where accused was seated and I removed a stick from the fence and hit him asking what he had done to my child. He was still sitting on the stone. I hit him on the back and mother came accused ran away. When my brothers came from school and had heard the screams I informed them accused had raped my child and we chased him together while screaming and we got hold of him at 50 meters when he fell down after tripping and I continued hitting him and said we go ahead and fetch stones so as to kill him. We beat him and he did not talk and he was wearing a white shirt which had blood stains on the lower side (near the belt region) (points out). The flowered skirt with blood stains her – **MFI-1**, stocking with blood stains – **MFI-2**.*

She was wearing the stocking and skirt only without a pant.

*My elder brothers and neighbours then came and we told them to watch over him so to go inform APS at Kipngrom and we went and reported to the AP who said we first go to hospital and the members of public got furious AP did not want to arrest and they went to arrest accused and took him to AP Chief's office and they found me there and we left him in hands of APS and I brought the child to Eldama Ravine District Hospital and a treatment chit was filled and it is the one in Court – **MFI-3** and I was charged Ksh.1,750/= and the receipt is the one in Court – **MFI-4** dated 24th February, 2016. We were then admitted in the hospital from Sunday up to Wednesday. A further treatment chit of 25th February, 2015 but its accused 2016 – **MFI-5**.*

*On Monday accused was brought to the police and we went to record our statements at Eldama Ravine Police Station and they gave us a note which we took to the hospital and it is a P3 form dated 23rd February, 2016 – **MFI-6**. The accused was also brought to the hospital and he was returned to the station and we went back to the ward. Accused is nicknamed "Broker" and I know his home in Emining Division while I come from Sirwo Division and I used to know his names, looks and even his home in Koitebes. We had never disagreed with him. My child was born on 18th November, 2014 a mother and child health book – **MFI-7** and indicated in page 12 of 40 the date of birth as 18th November, 2014.*

Cross-examined by Accused:

You had come to our home earlier to drink alcohol then you left. I saw you holding the child and I did not know what you used. We beat you as the child was bleeding. You were holding the child and I saw you well.

Re-examination:

It was the accused who carrying the child. The accused took alcohol then left but later returned and asked for drinking water. I saw him carry the child.

13. Clearly, the evidence presented before the trial Court fell short of proving the appellant's involvement in the offence of defilement for the child complainant. It was not safe to convict the appellant on the basis of such evidence, and the DPP, properly, did not oppose the appeal.

14. As urged by the Counsel for the appellant and the DPP, the Court finds that the charges of defilement and indecent act with a child were

not proved beyond reasonable doubt, and the appeal is allowed.

Orders

15. Accordingly, for the reasons set out above, the conviction and sentence of the appellant for the offences of defilement c/s 8 (1) as read with 8 (2) of the Sexual Offences Act is quashed and set aside, respectively.

16. The appellant shall, therefore, be released from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF APRIL 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Njoroge, Advocate for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.