



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 3 OF 2014

WILSON KIPKOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Criminal Case No. 150 of 2013 Republic v Wilson Kipkoech in the

Chief Magistrate's Court at Eldoret by C. M. Wattimah Resident Magistrate

dated 12th November 2013)

JUDGMENT

1. WILSON KIPKOECH (the appellant) was convicted on a charge of defilement Contrary to **Section 8(1) as read with 8(2)** of the **Sexual Offences Act**, and sentenced to serve life imprisonment.

The particulars of the charge were that on 25th November 2012 at [particulars withheld] village in **ELDORET WEST**, he unlawfully and intentionally caused his penis to penetrate the genital organ (anus) of **DKR** a aged 11 years.

2. The minor **DKR** had accompanied **KIPLIMO** and **KIPKOSGEI** to **KOSAJEI** centre, in a bid to help **KIPLIMO** look for money he lost after being sent by his mother to buy milk while looking for the money outside the hotel, the appellant who was at the hotel asked them why her parents did not buy them food. The three boys left, but the appellant followed them saying he would take them home **KIPLIMO** had a spotlight which he was using to look for the money, and the appellant got angry claiming that the former was looking at him and slapped him, though he then became reconciliatory saying he was their friend. He walked with them, then ordered them to sit down and asked for their mother's names.

3. The appellant told the boys that he wanted them to help him carry some items which were across the road, but after they crossed the road, he ordered them to sit down and told **DKR** to lie down, but the latter refused.

The appellant produced a whip – the other two boys fled off, but he managed to get hold of **DKR's** leg and defiled him.

DKR stated:

“I fell, then he started doing bad manners. He removed his dudu and put it in my anus. The dudu is his thing he used for urinating. He put it in my place where I pupu from. He was holding my mouth when I tried to escape.”

4. Apparently the other two boys ran and informed **DKR's** mother that he had been left at the appellant's mercy, and as she approached the scene, the appellant crossed the road and ran away. The minor stated he was able to identify the appellant that night because

- a. There was moonlight,
- b. The hotel had electricity.

5. **IK** (aged 14 years) at the time of testifying as PW2 gave a similar version of events saying after ordering **DKR** to lie down and the latter refusing, he and the other boy ran away but the appellant held **DKR**. They went to inform their mother what had transpired and returned with her to the scene accompanied by other neighbours, but as they approached the appellant fled.

6. **DKR** told them the appellant had done bad manners to him. He confirmed he was the one appellant had slapped. He knew the appellant as he used to be in the hotel at the trading centre.

On cross examination PW2 confirmed that it was dark on the date of question, saying the incident occurred at 9.00pm.

7. **JC** (PW5) the minor's mother produced his birth certificate showing he was born on 04.04.2001. She confirmed that her three sons had left the home at about 9.00pm to look for money which had got lost, after they had been sent to buy milk. She gave them a torch to aid the search. Later two of the children returned to say **DKR** was being held by someone at the road. She immediately left while screaming, and headed for the scene but just as she got near the site, the appellant fled into the bush.

8. She found **DKR** in a bush beside the road – his shorts were torn. A search was mounted for the appellant who was traced that very night while on the road. According to PW5, the appellant had defiled her son through the anus, and she noted some discharge from the anus.

The minor was rushed to hospital.

9. On cross examination he stated;

“I ran and screamed when I was told that you were defiling my son. I saw someone leaving that place running. I could not know who that person was...”

10. **DAVID SAMOEI** (PW4) the chief of **SUGOI** Location received a report about the incident, arrested the appellant and took him to the police post.

11. The minor was examined by **DR. KIBET**, and in a P3 form produced on his behalf by **DR. JANE YATICH** (as **DR. KIBET** was out of the country for further studies) he noted that there was redness in anus with a laceration at position 6 o'clock and a healing tear the examination having been done on 27.11.12 – the Doctor noted injury was 3 days old. On cross examination he stated;

“It was established that a bunt object was used, and due to the history we concluded that there was penetration.”

12. The matter was investigated by **PC TITUS OLAKANO (PW6)** who said when the minor was brought to the police station to make the report, he appeared weak although he had changed his clothes.

13. In his sworn defence, the applicant said he knew nothing about the matter, as on the date in question, he was in **TURBO** and boarded a matatu at 9.00 pm to go to his home situated at **KOSAJEI** centre. He got home, ate and slept.

The next day i.e 26.11.2012, he went to Mosoriot to take part in his brother's initiation until 08.01.2013 when he returned to **KOSAJEI** and was apprehended by the chief who told him that he had defiled a child.

On cross examination the appellant denied suggestion that he had run away from the area, saying he had gone for his brother's initiation ceremony. He claimed this was vendetta because he had given **JANE** maize and she owed him some debt.

14. The trial magistrate in the judgment noted that the minor's age was proved by the birth certificate which was produced as exhibit.

Penetration was confirmed:

a. By the minor's detailed description of how the appellant used his dudu, and explained that dudu meant the appellant's organ for passing urine and inserted in his anus. The court pointed out that it understood well that the minor description of dudu and place for passing pupu meant the penis and anus.

b. That the medical evidence of the minor's anus which had laceration and a healing scar with redness confirming forceful penetration.

On identification the trial magistrate observed that PW1 and PW2 testified how they interacted with the appellant and he followed them. PW1 knew him even before and had seen him under moonlight, plus the aid of a spotlight PW2 had.

15. His defence was considered and rejected as not displacing the evidence presented.

16. Being dissatisfied with the decision, the appellant appealed on grounds that;

- the evidence was insufficient and did not prove the case beyond reasonable doubt,
- the evidence was at variance with the charge sheet,
- there was contradiction as to the date of his arrest,

- no peculiar distinct physical description was given by the witnesses as regards the person they interacted with that night.

17. The appellant filed written submissions saying the evidence of PW1 could not be relied on as he was not subjected to cross examination, and that this violated his right to a fair hearing under **Art 50 (2) (K)** of the Constitution of Kenya.

That the evidence by prosecution witnesses was inconsistent because whereas at one point he was said to have disappeared after the incident, PW5 claimed he was apprehended that very night, and the chief alluded to his arrest on a different date.

18. That since the chief told the trial magistrate that he was a person of ill character who had previously been arrested this was already bad faith militating against him, to be treated as troublesome character.

In the supplementary submissions Appellant questioned the medical evidence, pointing out that no sample was taken from him as contemplated by **Section 36(1)** so as to link him to the offence and he ought to benefit from such missions.

19. In opposing the appeal, Miss Mumo on behalf of the State submitted that the case had been proved beyond reasonable doubt by the evidence of the minor and the other prosecution witnesses.

The birth certificate presented had proved his age.

The medical evidence plus the minor's testimony proved penetration, and he was able to see and identify the appellant before the incident. This was corroborated by the evidence of PW2 who confirmed their encounter with the appellant at the trading centre and that he had a spot light.

The minor indeed gave a graphic description of what transpired in the sexual encounter, it was not as though the appellant just accosted him on the way – he had initially tried being friendly to them while at the hotel where PW1 was able to see her properly as the premises had electricity.

He then offered to walk with them to their home – all a prelude to his ill intentions and when his art of seduction failed, he turned violent, slapped one of them, then produced a whip to intimidate them into co-operation.

The minor's evidence of being subjected to anal sex was confirmed by the medical findings and indeed satisfied penetration, the key ingredient in a charge of defilement. The minor's age was proved the birth certificate.

20. The contradictions in the evidence as regards date of do not touch on the material particulars and are not fatal. Infact PW5 explained in her evidence that after apprehending the appellant there was no one to hand him over to, so he was handed over to his mother who was known to her. That may then have given him the opportunity to go to Mosoriot and resurface on 8th January – whatever the case it does not dislodge the prosecution case.

Indeed his purported alibi defence ends up placing him at the scene because he says he boarded a matatu from Turbo and arrived at the trading centre at about 9.00pm.

21. The upshot is that the conviction was safe and is upheld.

The sentence is as provided by law and I confirm it. The appeal fails and is dismissed.

DELIVERED, SIGNED AND DATED AT ELDORET THIS 4TH DAY OF APRIL 2019.

H. A. OMONDI

JUDGE