



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 5 OF 2017

KK.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 80 of 2015 delivered on the 19th day of April 2016 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant who was convicted and sentenced to imprisonment for life for the offence of incest contrary to section 20 (1) of the Sexual Offences Act, appeals from the decision of the trial Court on the following grounds:

1. *Medical Evidence was not positive and did not prove defilement.*
2. *Age was not proved. No material/documentary proving the same.*
3. *Prosecution Evidence was obtained by intimidation and forcing witnesses to testify before Court. Unlawful practice.*
4. *No Forensic Evidence availed as required by section 36 SOA No. 3/2006*
5. *Appellant was prejudiced by his mode of arrest/prejudicial arrest.*
6. *False confessionary evidence exaggerated by Pw3 without tangible nor cogent confessionary statement availed.*
7. *Life-imprisonment is "Inconsistent to the 2010 Constitution"*
8. *Appellant was not explained of his rights to Counsel/Advocate*
9. *Appellant was denied opportunity to sum-up submissions under 210 CPC.*
10. *Appellant his defence was not considered as the law required.*
11. *The case was not reported on OB/First Reports SEE pg 3.*

The appellant filed corresponding written submissions.

2. The DPP opposed the appeal on oral submissions made at the hearing as follows:

"Miss Macharia

Appeal opposed. Appellant convicted for offence of incest contrary to section 20 (1) of the Sexual Offences Act. He was sentenced serve life imprisonment. Complainant was a girl aged 6 years at the time of the offence. The relationship between complainant and appellant is not in dispute as the father of complainant was the biological brother of the appellant as per PW2, PW4.

PW1 testified that on the material date she was on her way to the grandmother's house to fetch fire when she met the appellant.

The appellant pulled her into the bush and defiled her. He removed his private parts and inserted into her. She told him that she was feeling pain but refused to stop. The evidence is corroborated by PW2, aged 15 years, who gave sworn evidence. He testified that on the material date at around 5.00pm he was going to fetch cows for the grazing when he saw Pw1 and the appellant in the bush. Appellant was lying on the complainant and both of them were taken and the complainant was screaming. None of them saw PW2 and he rand called out Baba E. The appellant ran away when he saw PW2 and Baba E approaching. PW2 had caught the appellant red-handed.

Evidence of PW2 corroborated by PW3, a clinical officer for Mogotio Hospital. He testified that on examination, the complainant had bruises on the lower limb and chin her vaginal examination, she had inflammation and pain of the vulva. He produced treatment chits, P3 form and Post-Rape Care form which showed that the complainant had been defiled.

In his defence, the appellant pleaded alibi. This was a mere denial and an afterthought as it was not raised early enough when the case was proceeding.

The complainant and PW2 identified the appellant as he was their relative. He was a cousin to PW2 and ...to PW1. It was also in broad daylight and the two witnesses saw him well.

The prosecution has proved its case and we urge the Court to consider the age of the complainant and dismiss the appeal.

3. The issue for determination is whether the offence of incest or indecent act in the alternative were proved against the appellant. The complainant, a girl aged 6 years, (PW1) gave unsworn evidence upon a voire dire examination as follows:

“PW1

I come from [particulars withheld] where I live with my mum, C, C and B. I school at [particulars withheld] in class 1. I am six years old. In January while at home with mum, C and C and B and V. I know accused he used to live at [particulars withheld] place. I had gone to [particulars withheld] place to fetch fire and I met accused while going to ‘[particulars withheld]’ and he pulled me to the bush and he had held my hand and he removed shirt and my pant and he did bad manners to me at my private parts (points out) and he removed his private parts and inserted into mine. I told him its enough as I was feeling painful, but he refused to stop. I screamed then I cried and he then ran away as baba E and K were coming and they took me and they had seen the accused while he was defiling me. When they arrived I had not put on my skirt and pant after which I put on and they took me home where they informed my mother and I also told her what had happened, my father was in the hotel. Father and K took me home where they informed my mother and I also told her what had happened, my father was in the hotel. Father and K took me to hospital in Marigat and the doctor examined me. K (accused) used to stay with his grandmother who is also my grandmother who lives next to us.

Cross examination by accused

Accused has his house next to grandmother and I do not know if grandmother is your mother.”

4. PW2, another minor aged 15 years gave sworn evidence upon finding a voire dire that he understood the meaning of oath and importance of telling the truth, as follows:

“PW2

I come from [particulars withheld] village [particulars withheld] where I reside with my parents and I school at [particulars withheld] Primary in class seven. I know K K who is my cousin as my father is brother to his father. Father of complainant is biological brother of accused hence complainant is my cousin and we live next to each other.

On 28.01.2015 around 5:30 pm I was going to fetch cows from grazing and in the shortcut in the bush I heard sound of a child saying “leave me to go” and I then decide to check well and I was shocked to see the young child who is J.K and while K (accused) was lying on her and I could see clearly and the child was screaming from down and both of them were naked and the child was sleeping down and he was on top of her and I ran to report and I went to inform E C a brother to my father and he is also known as baba E whom I found at home and when I told him he accompanied me to where they were and when accused heard us he was living. I found the child in shock and had put on his shirt and was still putting on other dresses and she was trying to run away and I ran to get hold of her and take her to the mother. E said accused had run away while saying he was going to commit suicide. When he arrived he saw accused well. We took child to her mother one mama C and E arrived shortly saying accused had run away saying he was going to commit suicide.

I informed complainant mother of what had transpired. I then left to fetch cows and later in the evening he heard he had been arrested by members of public in the next village and the next day I came to record my statement in Mogotio. I have never had any differences with K nor if he had any with family of complainant.

Cross-examination

E C said you wanted to go strangle yourself. I saw you in the bush while defiling the child around 5:30 pm.

Re-examination

I saw him well and where I was standing was ten metres away and there was enough light and not a thicket and when I saw them at first he did not notice me as he was busy in the act and I doubt if he saw me hence I went to inform baba Erick.”

5. PW1, the complainant herein was the niece to the appellant and to PW2 whose father was a brother to the appellant’s father and the complainant’s father was brother to the appellant, as related by PW2, and the complainant’s father PW4.

6. PW3 Clinical Officer at Mogotio sub-county Hospital confirmed the injuries on PW1 as follows:

“PW3

Working at Mogotio Sub-County Hospital as Clinical Officer and with five years’ experience. I have a medical chit for a six year old girl from Kimose seen on 29.01.2015 around 3:30 pm while with history of being defiled by person known to her on 28.01.2015 at 6:00 pm the treatment chit is from Mogotio Health Centre and she said it was not the first time but could not recall the other time. She said it was not the first time but could not recall the other time. She was in a fair general condition and had bruises on lower lip and chin and on vaginal examination she had inflammation and pain of vulva and could not examine inside due to pain and there was no discharge.

Lab investigations on HIV was negative and urinalysis have no positive results. We put her on drugs – HIV drugs, antibiotics and counseling and parents advised her to Police. I personally authored the treatment chit which I wish to produce MFI – 1 exhibit 1.

I have a PRC form filled on any sexual offence filed on 29.01.2015 at Mogotio Health Centre OP935/2015 same history and her pictures of examination showing part of vulva swollen and wish to produce the same which is given as MF 12 – p exhibit 2.

P3 form of the same patient six year old, with same history and on examination head and neck-bruises on lower hip and the chin. No injuries in other parts of body probable type of weapon was rough surface and injuries were one day old and we put her on medication and I classified injuries as grievous harm because she was a young child and psychological torture and was hard to retain her to her normal life. The nature of offence was defilement of a minor and had no vaginal discharge but were swollen and tender.

He also examined the male accused, his private parts but had no injuries nor bruises and when we talked to perpetrator he agreed to have committed the act. I signed P3 form on 29.01.2015 and I wish to produce P3 form MF 13 P exhibit 3. Before offence I used to know accused.

Cross-examination by accused

On examination your private parts had no injuries.”

7. When put on his defence, the appellant set up an alibi defence as follows:

“DW1

*I come from [particulars withheld] and I used sell charcoal. **On material date I was at Emining herding cattle on 27th January 2015 when I received a telephone call from my brother that I was needed at home and I went home at 7:30 pm** when I was arrested at Kimose by a mob who beat me and I was escorted up to Mogotio where I stayed for three days then brought to Court. I have nothing to say in relation to evidence of the child.”*

Analysis of evidence

8. Against the evidence of PW2, the complainant’s cousin aged 15 years who witnessed the alleged defilement of PW1, the appellant’s alibi must be rejected as no reason is ascribed as to why the PW2, the accused’s cousin could have lied in testimony against him that he had seen the accused.

“Lying on [the complainant].....the child screaming from down and both of them were naked and the child was sleeping down and he was on top of her”.

There was no issue of mistaken identity as it was at 5.30pm and the appellant is the witness’s cousin with whom PW2 “lived next to each other”.

9. However, an issue arises as to the exact nature of the sexual assault. The medical evidence of PW3 was that “on examination she had inflammation and pain of vulva and could not examine inside due to pain and there was no discharge”. This evidence coupled with the testimony of the complainant that she had “screamed then I cried and he then ran away as Baba Erick and Kibet were coming” may suggest that the appellant had not achieved penetration of the complainant, and, consequently, the offence of defilement may not have been complete. The appellant as the accused must be given benefit of the doubt as penetration, partial or complete, was not proved. It may have been in case of attempt.

10. However, from the evidence of PW1, her cousin PW2 and the clinical officer’s finding on examination, there was complete offence of attempted defilement, and also indecent act charged as the alternative count.

11. The offence of attempted defilement under section 9 (1) (2) of the Sexual Offences Act and indecent act contrary to section 11 (1) of the Act both attract the same punishment of imprisonment for a term of not less than 10 years. As the accused was already charged with the latter offence in the alternative, he shall on the facts be convicted of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Orders

12. Consequently, the appellant's conviction and sentence of imprisonment for life for the offence of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act are quashed and set aside.

13. The appellant is convicted on the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, and sentenced to serve imprisonment for a term of 10 years from **19/4/2016**, when he was sentenced by the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.