



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 35 OF 2018**

**BETWEEN**

**NICHOLAS KIBET KOSGEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the original conviction and sentence of Hon. N. Wairimu, PM dated 25<sup>th</sup> April 2018 at the Magistrates Court at Eldoret in Criminal Case No. 276 of 2016)***

**JUDGMENT**

1. The appellant, **NICHOLAS KIBET KOSGEI**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act*** (“the Act”). The particulars of the offence were that on 18<sup>th</sup> January 2016 in Uasin Gishu County, he intentionally caused his penis to penetrate the vagina of JC, a child aged 11 years.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. In his grounds of appeal, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt and that the evidence against him was contradictory and that the testimony of the child did not implicate him in the offence. Counsel for the respondent submitted that the prosecution proved its case beyond reasonable doubt and the appellant was positively identified.
3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.
4. After a *voire dire*, the child, PW 1, was sworn and she testified that she was in class 4. On 18<sup>th</sup> January 2016 at about 7.00 am, she was going to school when a man began following her. She narrated how the man grabbed her by the neck, dragged her into the nearby forest while threatening to kill her in case she screamed. He removed her pants and removed his trousers then proceeded to insert his penis into her vagina causing her to experience pain. Thereafter, instead of going back to school, PW 1 went home and on the way she met her uncle, PW 4. She narrated to him her ordeal. PW 4 put her on a motorbike and asked the rider to take to her mother. PW 1 testified that she positively identified the appellant to the motorcycle rider whereupon the appellant was arrested.
5. The child’s aunt, PW 2, recalled that on the material day, she was called by PW 4 and informed that PW 1 had not gone to school and was at home. He also informed her that the appellant had been arrested and taken to the police. She went to see PW 1 and noted her pant was blood stained and so were her private parts. He clothes were also muddy.
6. The clinical officer, PW 3, who examined PW 1 on 18<sup>th</sup> January 2016 and prepared the P3 medical form, testified that PW 1’s pant had blood stains and when he examined her private parts and observed a tear on the lower side of the vagina. The hymen was broken and bleeding. The vaginal swab revealed epithelial and pus cells. He concluded that there had been penetration. He also examined the appellant and observed bruises on the lower lip and an injury on the right forehead. He had torn trousers and a blood stained shirt.
7. PW 4 recalled that on the material morning as he was taking cows to graze, he met PW 1 crying. She was dressed in school uniform which were dirty with mud. She told him that she had been sexually assaulted and that she could identify the person but she did not say who he was. As they were talking, he met a boda boda rider whom he told to take the child to her mother. After they parted, he was called by PW 1’s mother and informed that the culprit had been apprehended by members of the public.

8. The investigating officer, PW 5, confirmed that the appellant was brought to the police station on 18<sup>th</sup> January 2018 at 8.00 am by members of the public. He appeared to have been beaten by members of the public. Thereafter PW 1 was brought by the mother. She recorded their statements and issued the P3 medical form. She produced her clinic card showing that the child was 11 years.

9. In his sworn defence, the appellant denied that offence. He complained that he had been framed after he went to demand money for the tomatoes he sold to PW 1's grandmother and had reported the matter to the village elder.

10. Since the issue in this appeal is whether the prosecution proved its case beyond reasonable doubt, under **section 8(1)** of the **Act**, the prosecution must prove that an accused did an act of penetration with a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

11. PW 1 gave clear and concise evidence on how she was subjected to penetration. Her testimony was corroborated by PW 4 who met her immediately after the ordeal and whom she told at the first opportunity. He saw her in a state of distress. Likewise, PW 2 saw her in a state of distress and when she looked at her private parts, she was bleeding. The clinical officer, PW 3, who examined PW 1 on the same morning confirmed penetration after examining the vaginal and noting the bruises on the vagina and the puss and epithelial cells.

12. The key question in this case is whether the appellant was identified as the perpetrator. In the judgment, the trial magistrate expressed the view that, "*It is difficult to determine if the complainant knew the accused before the incident since the accused claims that she did and the complainant said she did then says she didn't and PW 3 said the complainant had gone to live in the area after the accused had left employment ..... the circumstances under which the accused was arrested and who identified him for arrest are scanty although the complainant stated that the accused was arrested by boda boda operators which the accused corroborates what the complainant said.*"

13. I agree with the trial magistrate that the testimony of PW 1 was contradictory on whether she knew the assailant. What is evident though is that the incident took place early in the morning and given the proximity and time of interaction when the felonious act was committed, were circumstances favourable for positive identification. Thus she was able to inform PW 4 who she met immediately after that she would be able to identify the assailant. Unfortunately, the prosecution did not call the boda boda rider who carried PW 1 when he identified the appellant who was then arrested.

14. The identification of the appellant was basically a dock identification which our courts have generally held is worthless. This does not mean that the court can never rely on a dock identification. In **Muiruri & Others v Republic [2002] 1KLR 274** the court noted that the trial court may proceed to convict;

*[I]f satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.*

15. The gap left between the time the assailant molested PW 1 and the time when the appellant was arrested cannot be filled by speculation on how PW 1 identified the appellant. In my view, the boda boda rider was an essential witness without whom the identification could not be tested and could not be termed as watertight.

16. Having re-appraised the evidence, I am constrained to reach the conclusion that the appellant's identification was not free from error. The conviction is not safe consequently, I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**SIGNED AT KISII BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at ELDORET this \_\_\_ 3<sup>rd</sup> \_\_\_ day of \_\_June \_\_\_ 2019.**

**H. A. OMONDI**

**JUDGE**

Appellant in person.

Ms Mokuia, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.