



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 52 OF 2017

NN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court Criminal Case (S.O.) No. 6 of 2017 by Hon. John Aringo (RM) on 23/10/17)

J U D G M E N T

1. NN, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30th day of July, 2017** at **Ngaie Sub-Location of Kyuso Sub-County** within **Kitui County** intentionally caused his penis to penetrate the vagina of **MM1** child aged **9 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30th day of July, 2017** at **Ngaie Sub-Location of Kyuso Sub-County** within **Kitui County** intentionally touched the vagina of **MM1** child aged **9 years** with his penis.
3. After being taken through full trial he was found guilty, convicted and sentenced to **life imprisonment**.
4. Aggrieved he appeals on grounds that can be condensed as:
 - Medical evidence adduced was not sufficient.
 - Witnesses who testified were family members and the enmity between the mother of the Complainant and Appellant was overlooked.
 - There was no eye witness to the allegation that the Appellant told the minor to remove pants and applied oil on her vagina then inserted two (2) fingers into her vagina.
 - The Appellant's alibi defence was overlooked.
5. Facts of the case were that on the **30th July, 2017** the Complainant was at home with his sibling PW2 **MM2** when the Appellant their grandfather sent PW2 to go and herd goats while he assigned the Complainant duties of washing utensils. As soon as she finished, he called her. She entered the house only to be told to lie on the bed. He proceeded to molest her sexually and gave her cooked maize. She went and reported the matter to her grandmother. PW3 **AK**, the Complainant mother who was away returned at **5.00 p.m.** Prior to reaching the house she saw the Complainant leaving the house of the Appellant. She went to the house and found the Appellant holding a biker and her slippers. She followed the Complainant, examined her and subsequently took her to hospital, where she was examined and treated. The matter was reported to the police. PW5 **No. 100987 P. C. (w) Eunice Kaburu** investigated the case and caused the Appellant to be charged.
6. Upon being put on his defence, the Appellant stated that the allegations were mere propaganda. That on the **10th June, 2017** he found PW3 cultivating his parcel of land and when he confronted her, she said she would take it. That on **30th July, 2017** he went to buy something and returned home at **4.30 p.m.** When he returned home he found children playing, he ate with them and they asked for maize which he promised to give them the following day. They insisted and he told them to enter the house where they got groundnuts. As soon as they left he saw PW3 driving livestock. She stood 4 metres away and asked her daughter what she was doing but the child left without saying anything. She followed her and by the time they got home it was at night. The following day they went to hospital and that they must have used money to obtain a fake report. He was arrested on the **2nd August, 2017**.
7. The Appeal was canvassed by way of written submissions. It was urged that the trial Magistrate fell into error by reaching a finding that there was penetration and it was recent. That medical evidence was not sufficient to establish defilement because the victim was examined and found with a red, inflamed genitalia with a recent tear and in addition there was presence of epithelial cells, yet, he was not examined.

8. That it was not clear if the alleged penetration was by fingers or penis since the penetration envisaged is by a male organ. In this regard, he cited the case of **Charles Kibe Mwangi vs. Republic (2015) eKLR** and **JMR vs. Republic (2006) eKLR** and that the alibi defence put up was overlooked.

9. It was urged for the State that: medical evidence adduced established actual penetration having occurred; the issue of a grudge having existed was not mentioned throughout the proceedings; that the alibi defence was in respect of having been away from home until **4.00 p.m.** Further, it was argued that he admitted having found the children playing at home and having given them groundnuts instead of maize that they had asked for and also having admitted that he saw their mother standing some 5 meters away.

10. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

11. Medical evidence in the instant case was adduced by PW4 **Francis Saku**, a Clinical Officer who examined the Complainant on **31st July, 2017**. At the outset, the Complainant was taken to **Neema Nursing Home** and was referred to **Kyuso District Hospital**. On examination she had an inflamed vaginal opening and a recent tear on the right side of the hymen. There was whitish discharge on the vagina, and upon being tested in the laboratory it showed the presence of epithelial cells. The recent tear to the hymen in his opinion was evidence of some penetration.

12. The contention of the Appellant is that he was not examined to establish he had epithelial cells. The Complainant herein was a child aged 9 years. PW3, her mother stated that she was born on the **21st March, 2008** and the question of age was not in dispute. (**Also see Mwalongo Chichoro Mwajembe vs. Republic (2016) eKLR**).

13. **Section 2** of the **Children Act** defined a child of tender age as:

““child of tender years” means a child under the age of ten years;”

14. In the case of **Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135** it was stated thus:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

15. **Section 124** of the **Evidence Act** provides thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

16. The Complainant was a child of tender years whose evidence could be acted upon without any other evidence if the trial Magistrate found her to be truthful. In his Judgment the trial Magistrate stated thus:

“The victim/minor is still quite young and though her testimony was in parts and at times even hesitant, she came across as forthright in a child’s own way. She was shy but the substance of her testimony came out clearly.”

17. Having found her to be forthright can be interpreted to mean that she was candid and sincere. Which means that the trial Court believed her to be truthful. In her testimony she identified the Appellant as the perpetrator of the act that caused penetration into her genitalia. The Appellant admits that she was at his house. He even ate with her and others but according to him the children left after he gave them groundnuts. PW3 found them and ultimately left with them.

18. PW2 a younger brother to the Complainant, a child, stated that the Appellant told him to go and herd goats and by the time he was leaving the Complainant was washing utensils. In her testimony the Complainant (victim) stated that the episode took place after she finished washing utensils. The Appellant called her and told her to lie on the bed. He closed the door and inserted two (2) fingers into her vagina having told her to remove her pants, prior to inserting his penis into her vagina after applying oil to her vagina he then told her to leave his house and go home.

19. PW3 on the other hand stated that while on her way home having returned from herding livestock noticed the victim walking with difficulty as she left the Appellant’s house. She went to his house and found the Appellant holding the child’s biker, and she also noticed the child’s pair of slippers. When she confronted the Appellant by seeking to know what he had done, he did not respond. That is what prompted her to go and examine the child and on noticing some discharge, took her to hospital. Medical evidence adduced following the examination of the child at **Neema Nursing Home** on the same day and subsequently the following day at a public hospital confirmed the fact of recent penetration. The evidence of the child that the Appellant was the perpetrator of the act that caused penetration of her genitalia was confirmed by PW3 who saw her leaving her house of the Appellant and noticed the discharge in her genital organs soon thereafter.

20. The Appellant faults the trial Court for not reaching a conclusion whether penetration in the circumstances was by way of the use of fingers or penis or both. **Section 2** of the **Sexual Offences Act** defines penetration as follows:

““penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

While “an indecent act” is defined thus:

““indecent act” means an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;”

From evidence adduced by the Complainant, prior to insertion of his genital organs into the victim’s, the Appellant did an indecent act of using his fingers which is part of his body to come into contact with the Complainant’s genital organs. However, since the act resulted into penetration by insertion of the genital organs which caused a tear to the hymen, the trial Magistrate did not fall into error in reaching the finding that the Appellant committed the act as stated in the main Count.

21. Witnesses who testified were from the same nuclear family. These are witnesses who were present at the same and different times during the sequence of various acts as admitted by the Appellant and were competent to testify. **(See Section 125 of the Evidence Act).**

22. It is urged that the Appellant’s alibi defence was overlooked. His allegation was that he was away. An alibi defence would be an excuse that the person accused did not commit the act he is accused of because he was not at the place where the offence was committed having been elsewhere. In his defence all he states was that he arrived at the location in question, his home at **4.30 p.m.** He admitted having been with the children and even seen their mother although he denies having committed the act that caused penetration into the victim’s genitalia. In that regard the Court was not expected to even consider the alleged alibi defence.

23. It is contended at the Appellate stage that there was enmity between the Appellant and PW3, the victim’s mother. He alluded to an incident that occurred on the **10th June, 2017** where he allegedly found PW3 cultivating his farm and she vowed to take his land. He brought up the allegation in cross examination that was denied by the witness. However, he did not expound on how the threat was connected to the defilement case of a child of tender years.

24. From the foregoing, I am satisfied that the trial Court did not fall into error in reaching the decision to convict the Appellant.

25. On sentence, the Appellant was sentenced to **life imprisonment**. In the case of **Jared Koita Injiri vs. Republic (2019) eKLR** the Court of Appeal states as follows:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

26. In mitigation the Appellant stated that his old mother aged **80 years old** depended on him for sustenance and he pleaded for leniency. The victim was his granddaughter, a child who trusted and obeyed him. In the circumstances I set aside the sentence meted out and substitute it with **thirty (30) years imprisonment** to take effect from the date of conviction and sentence by the trial Court.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of July, 2019.

L. N. MUTENDE

JUDGE