



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 147 OF 2018

BETWEEN

NICHOLAS ONDATI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. D. Ogal, RM dated 2nd November 2016 in Hamisi Magistrates Court Criminal Case No. 32 of 2016)

JUDGMENT

1. The appellant, **NICHOLAS ONDATI**, was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to **section 8(1)** as read with **8(3)** of the Sexual Offences Act ("the **Act**"). It was alleged that on diverse dates between 9th and 14th December, 2015 at Tambua Location of Vihiga County, the appellant intentionally caused his penis to penetrate the vagina of JK, a child aged 15 years.
2. As this is a first appeal, I am required to examine all the evidence afresh and reach an independent conclusion bearing in mind that I neither heard or saw the witnesses testify in order to assess their demeanor.
3. The complainant, PW 1, testified that she was in class 6. She recalled that on 9th December 2015 at about 10.00 am, she was heading to fetch firewood when she met the appellant. He called her to his house and when she got there he pulled her to the house locked her then proceed to sexually assault her. She explained in detail how the appellant committed acts of penetration over a period of five days until the appellant went to her mother and asked her to collect P.W.1.
4. PW 2, the complainant's mother, testified that on 14th December 2015, the appellant came to her home and told her she had custody of PW 1 and that she should go and pick her from his house. PW 2 in the company of one RN went to the appellant's house where they found PW 1 who was not walking well and was in state of distress. They took the child to hospital.
5. At the hospital, the child was examined and treated. PW 3, the Clinical Officer, testified that the child was brought on 16th December 2015. When he examined PW 1, she was in pain and her private parts had a smelly discharge. The vagina walls were bruised and painful and the hymen torn. PW 3 concluded that penetrative sex had taken place.
6. The Investigating Officer, PW 5, confirmed that he received the complaint from PW 1 and issued the P3 form. He also produced the birth certificate. PW 4, an administration police officer, testified that the appellant was arrested by members of the public on 8th January 2016.
7. In his sworn defence, the appellant denied the offence and alleged that the issue was as a result of a land dispute.
8. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of 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."
9. I have reviewed the evidence and I find that the testimony of PW 1 was clear and credible in so far as it set out her ordeal in the hands of the appellant. PW 1 knew the appellant and stayed in his house over that period leaving little space for mistaken identity. Her testimony is not required to be corroborated under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, however there is ample corroboration in several respects.
10. The evidence of PW 2 is that the child had disappeared and it is the appellant himself who came to inform her of PW 1's whereabouts.

Although the appellant complains that the prosecution did not call RN who was with PW 2, this was not necessary as it would neither add or subtract to the testimony as it is the appellant himself who led the PW 2 to find PW 1.

11. Further, the medical evidence of PW 3 confirmed that there was penetration. There is no other reason for the injuries on the vagina other than the fact that PW 1 was subject to sexual assault when she was in the appellant's home.

12. The appellant defence was without foundation, it was a mere denial and no hint of grudge emerged as the PW 1 and PW 2 denied such an issue in cross examination. The appellant did not attempt an explanation why PW 1 was in his house and why he went to tell PW 2 to collect his daughter.

13. The prosecution case was water tight and I therefore affirm the conviction. In addition, the child's age was proved by production of the birth certificate.

14. The sentence imposed was within the law and I do not find any reason, in light of the fact disclosed at the trial, to upset it notwithstanding that the fact that mandatory minimum sentences have been declared unconstitutional.

15. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 3rd day of September 2019.

D.S. MAJANJA

JUDGE

Appellant in Person

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