



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 10 OF 2019

(Formerly Kitale HCCRA no. 117 of 2013)

BETWEEN

KENNEDY AURA APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal arising out of original conviction and sentence dated 27.3.2013 by Hon. M. M. Wachira, Resident Magistrate in Kapenguria PMCR Cr (SO) Case no. 1104 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was tried, found guilty and convicted of the offence of *defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006*, the particulars of which are that in the month of April 2012 in West Pokot County, the appellant caused his penis to penetrate the vagina of E.A, a girl aged 14 years. Upon conviction, the appellant was sentenced to twenty (20) years imprisonment.

2. During the ensuing trial, the prosecution called four witnesses. When placed on his defence at the conclusion of the prosecution case, the appellant gave unsworn evidence. He did not call any witnesses.

The Appeal

3. Being aggrieved by both conviction and sentence, the appellant brought this appeal on grounds:-

a) THAT the learned trial court erred in law and fact by failing to appreciate that PW1 and PW2 were not credible witnesses.

b) THAT the learned trial court erred in law and fact by failing to appreciate that the case against the appellant was poorly investigated.

c) THAT the learned trial court erred in law and fact by failing to appreciate that the evidence on record was not sufficient to sustain a conviction.

d) THAT the learned trial court erred in law and fact in basing its judgment on mere opinions which needed material corroboration.

4. This being the first appeal, this court is under a duty to reconsider and evaluate the entire evidence afresh with a view to reaching its own conclusions in the matter. Without this process, this court would have no reason for either affirming or rejecting the trial court's findings. This court has however to remember that in its appellate jurisdiction it has no opportunity of seeing and hearing the witnesses who gave evidence, and to make an allowance for the same. For this propositions, generally see *Mark Oururi -vs- Republic [2013] eKLR*.

The Prosecution Case

5. EA, a minor who was affirmed after being taken through a voir dire examination testified that she was 14 years old. She also testified that she had attended [*particulars withheld*] Primary School up to class 5, and that the appellant used to be their neighbour. She also testified that she used to assist the appellant with house chores such as washing utensils and clothes. On the day in question, EA met the appellant as she made her way to the river to look for vegetables. The appellant asked her to go and assist him in washing utensils. The two of them reached the appellant's house where EA washed the utensils as she had done on other occasions before.

6. When EA finished the assignment, the appellant pushed her onto his beddings and then defiled her. Before he defiled EA, the appellant removed both her underwear and skirt after he had removed his own clothes. After the episode, EA went home, though she did not immediately tell her family members what she had experienced with the appellant.

7. Sometime later (EA did not say exactly how long after the incident) EA started vomiting. When she went to Kapenguria District Hospital for check up, she was informed she was pregnant. On discovering her status, EA's mother took her to the Police Station at Murkwijit and at the police station EA told the police how she had become pregnant. The appellant was later called to the AP Post at Murkwijit and arrested.

8. During cross examination, EA testified that she and the appellant were alone in the house when the appellant defiled her. She also confirmed her statement in chief that she went to the appellant's house only after he asked her to go and help him wash utensils. EA also testified that it was the appellant who made her pregnant in April 2012.

9. EA's mother, CN testified as PW2. She confirmed that EA was her third born daughter and that the girl gave birth on xxx. In cross-examination, PW2 testified that when she noticed EA growing big, she beat her and that is when EA admitted she was pregnant and that it was the appellant who was responsible for the pregnancy.

10. Number 85163 PC Peter Kiprono of Kapenguria Police Station testified as PW3. He is the one who received a report from Murkwijit AP Post on 7.10.2012 regarding the appellant who had been arrested. Both the appellant and EA were taken to him at Kapenguria Police Station, after which EA was taken to the hospital for treatment. PC Kiprono issued EA with a P3 form (identified by EA as PMFI-1) for filling by the hospital.

11. Later, PC Kiprono visited the appellant's house at Murkwijit as well as the river where EA was going to get vegetables just before the incident occurred. The appellant was charged after recording the witness statements.

12. During cross examination, PC Kiprono told the court that according to EA's statement, EA was defiled around April 2012. He also stated that though there may have been no eye witnesses, she believed what EA told him.

13. PW4 was Danson Litole, Clinical Officer at Kapenguria District Hospital. On 8.10.2012, he received EA, a 14 year old girl at the hospital for examination. On examination, he established that EA's hymen was broken through penile penetration. EA was also pregnant. He produced the P3 form as Pexhibit 1.

14. Danson also carried out an age assessment on EA during which he confirmed that EA was 14 years old. He could however not say who was responsible for EA's pregnancy.

The Defence Case

15. The appellant gave unsworn evidence and told the court that he was a farmer and a resident in Murkwijit area. He recollected being summoned by APs on 8.10.2012 at around 2.00pm. He reported to the AP Post and at 5.00pm he was escorted to Kapenguria Police Station. He denied committing the offence. He stated that EA's allegations were a pack of lies. The appellant did not call any witnesses.

Issues for Determination

16. The issues for determination on this appeal are as provided under **section 8(1) of the Sexual Offences Act**, to the effect that any person who commits an act that causes penetration with a child is guilty of an offence termed defilement. **Section 8(3)** on the other hand stipulates that a person who commits an offence of defilement with a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. In effect therefore, the prosecution was under a duty to prove that there was penetration and further that EA was a child. The prosecution was also under a duty to prove that it was the appellant who caused the penetration.

17. The term penetration is defined under **section 2 of the Sexual Offences Act, no. 3 of 2006**. "**to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.**" Genital organs are said to include "**the whole or part of male or female genital organ and for purposes of this Act includes the anus.**"

Submissions

18. Both parties to this appeal made their respective rival submissions which I have carefully considered. I have also carefully considered the trial court's judgment and the grounds of appeal.

19. The appeal was opposed on grounds that the evidence adduced by the prosecution proved the case against the appellant beyond any reasonable doubt. Miss Kiptoo, prosecution counsel urged the court to dismiss the appeal.

Analysis and Determination

a. Whether there was penetration

20. From the evidence on record, I am satisfied that penetration was proved. EA testified that on the material day the appellant threw her onto his beddings, removed her underwear and shirt and proceeded to do bad manners to her. He had also removed his clothes. According to EA, the appellant put his urinating thin (penis) into her urinating thing (vagina). The appellant denied those allegations and stated they were lies. EA stated that the bad manners (which the courts in this country have interpreted to mean defilement) were done to her in the month of April, 2012.

21. PW2 testified that around early October 2012, she noticed that EA was growing big and after beating her, EA admitted she was pregnant. The pregnancy was confirmed by PW4, Danson when he examined EA on 8.10.2012. Clearly EA would not have become pregnant in those circumstances without penile penetration.

b. Whether the age of complainant was proved

22. EA testified that she was 14 years old. Danson also carried out an age assessment and confirmed through Pexhibit 2, that EA was 14 years old. The evidence regarding EA's age was not controverted by the defence and I have no reason not to accept it as being truthful.

c. Whether the appellant was the defiler.

23. The only available evidence on this issue is that of EA, who, after being defiled kept the matter to herself from April 2012 until October 2012 when her bulging tummy drew her mother's wrath. After being beaten, EA told her mother as well as the police that it was the appellant who made her pregnant in April 2012. During his cross-examination of EA, the appellant suggested that one Ken, could have been responsible for EA's pregnancy. EA refuted the said allegation and told the court that what she had stated about the appellant defiling her was the truth.

24. One of the appellant's grounds of appeal is that both EA and her mother were not credible witnesses, and that their evidence therefore needed corroboration. The proviso to section 124 of the Evidence Act stipulates as follows:-

“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.”

25. In his judgment, the learned trial magistrate, in dealing with EA's evidence stated in part:-

“The complainant was very consistent as she explained what happened even during cross-examination by the accused. She said that she knew the accused well since she used to assist him in washing clothes and utensils. On the material day she testified that the accused met her on the way and asked her to go and assist him wash utensils. PW1 said that it was the first time accused did that to her. I find PW1 to be telling the truth and there is nothing on record to make me not believe her evidence. I believe her evidence. The accused on his part denied committing the offence. The accused hardly challenged the evidence by the prosecution and mostly by the complainant. Therefore, looking at the evidence adduced as a whole I do not believe the evidence by the accused person.”

26. Thus the trial court which had the opportunity to hear EA and observe her demeanor stated he believed her. That EA remained consistent in her testimony even under intense cross-examination. On my part, I see no reason to hold a contrary opinion of EA as a credible witness.

Issue of Sentence

27. The appellant was sentenced to twenty years in jail. He has not raised any concerns regarding the said sentence, but even if he had, I would find no reason to interfere with the same. The appellant used tricks to get EA to go to his home, and when he was satisfied that EA could trust him when she was at his home either washing clothes or utensils for him, he pounced on her and did bad manners to her. The appellant's defence, in my considered view, did not punch any holes in the cogent evidence adduced by the prosecution.

Conclusion

28. From the above analysis, I find and hold that the appellant's appeal lacks merit. The same be and is hereby dismissed in its entirety

29. Right of appeal within 14 days of the date of this judgment

30. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 16th day of October, 2019

RUTH N. SITATI

JUDGE

In the Presence of:-

Appellant present in person

Miss Kiptoo present for respondent

M/S Hellen Kaspan – Court Assistant