REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.12 OF 2017

(Appeal Originating from the conviction and sentence in Kericho SO No.19 of 2010 by Hon. Hon. S. Mokua –CM)

BKS.....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

1. The appellant was convicted in the magistrate's court at Kericho of defilement contrary to section 8(1) as read with section 8 (2) of the sexual Offences Act No.3 of 2006. The particulars of the offence being that on 10/02/2010 in Kericho District within Rift Valley Province intentionally and unlawfully caused his penis to penetrate the vagina of a child aged 5 years. He was as a result sentenced to life imprisonment.

2. Aggrieved by the decision of the trial court, he has come to this Court on Appeal. He filed his appeal in 2017 however, before the appeal was heard, he filed supplementary grounds of appeal which he relied upon that-

1. He pleaded not guilty to the charge.

2. The magistrate erred in law and fact in relying on the identification of PW1 without considering that the said evidence was shallow and contradictory.

3. The learned magistrate erred in believing the evidence of PW1, without considering the existence of a grudge between PW2 and the appellant.

4. The trial magistrate erred in relying on the exhibit namely a panty which was not positively identified in court as there were two different colours.

5. The learned magistrate erred by dismissing his defence without any cogent reason.

3. The appellant also filed written submissions, which I have read and considered. At the hearing of the appeal, the appellant relied on the written submissions filed and elected not to highlight the same.

4. The learned Prosecuting Counsel Ms Keli opposed the appeal and submitted that the identification was not shallow, but was positive- as the complainant knew the appellant as an uncle and described how he picked her from school and defiled her. With regard to a grudge between the appellant and PW2, counsel contended that the complaint was an afterthought, as it was not mentioned during defence. That infact PW2 was the person who helped the appellant settle at James Finlay Estate farm.

5. Counsel argued further that with regard to the colour of the panty of the complainant, people described colours differently and that in any event PW4 stated the panty had semen stains. Counsel concluded by stating that the unsworn defence of the appellant was considered by the trial court, and the appeal should thus be dismissed.

6. This is a first appeal and as a first appellate court, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences. See the case of **Okeno -vs- Republic [1972] EA 32.**

7. I have re-evaluated the evidence on record. The prosecution called a number of witnesses PW1 was the complainant, PW2 SK was the mother of the complainant, PW3 PC Safi Bare was the investigating officer and PW4 Misoi Isaac was a Clinical Officer. The appellant

tendered unsworn testimony in his defence, and the trial magistrate found that the prosecution proved its case, but the appellant says they did not.

8. In criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person does not have any burden to prove his or her innocence. He or she can raise a reasonable doubt, the benefit of which has always to be given to the accused person.

9. The accused has argued about contradictions in the evidence of the complainant PW1. He has not pointed at those contradictions. This is a case where because of change of magistrates, and the fact that the accused was initially not represented, PW1 and PW2 were recalled and a fresh trial conducted. I find no contradiction in the evidence of PW1.

10. The accused has also complained about the identity of the panty of the complainant. He feels that there was a contradiction in its description. Having perused the evidence on record, I find no conflict in the evidence on the description of the panty of the complainant. It was a panty that had red stripes. Though the Clinical Officer (PW4) said that the panty had semen, he did not say how he established that whatever marks were on the panty were semen. It was in any event not his specialty to establish whether it was semen. Such could only be established through a laboratory expert at a hospital, or by the Government Analyst. I do not think that the existence of semen on the panty was established.

11. The appellant has talked of a grudge existing between him and PW2, SK, the mother of the complainant. The Prosecuting Counsel has said this complaint was an afterthought as it was not raised in cross-examination. From the evidence on record, counsel for the appellant in cross-examination did not raise any issue of a grudge between PW2 and the appellant. In his unsworn defence however, the appellant stated that PW2 persuaded him to leave his job at James Finlay and he refused, and that she threatened him and he was soon thereafter arrested. That was his version of their relationship with PW2. He did not however mention about living with or being the husband of the sister of PW2 – where the complainant and himself slept on the night in question.

12. The complainant was found with injuries in her private parts, but no traces or appearance of traces of semen were found. The complainant said that the appellant sexually defiled her at least twice that night. The appellant denies this, but omitted completely to mention the events of that day or night in his defence. He was aware of the allegations levelled against him in the charge, and he was also represented by counsel, but did not say anything about what he did that day or night of the serious allegations.

13. Under the provisal to section 124 of the Evidence Act (Cap.80), the evidence of a minor victim of a sexual offence need not be corroborated to sustain a conviction. The complainant PW1 gave detailed evidence on what happened that night and was cross-examined but did not contradict herself. The appellant did not say anything in his defence to those allegations levelled against him, and instead, talked about persuasion of PW2 for him to leave his job, which had nothing to do with the alleged offence. In those circumstances, I agree with the trial court that there was sufficient reason to believe the uncorroborated evidence of the minor victim of the sexual offence PW1.

14. The appeal thus has no merits, as the prosecution proved their case to the required standards.

15. I dismiss the appeal on conviction. The sentence is also lawful. I uphold both conviction and sentence.

Dated at Kericho this 12th day of November 2019.

George Dulu

JUDGE