



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 90 OF 2017

[FORMERLY ELDORET HCCRA NO. 145 OF 2016]

JOSPHAT MUHAVI LISENGERE.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Kabarnet Cr.Case no. 233 of 2016 delivered on the 15th day of December, 2016

by Hon. S.O. Temu, PM/

JUDGMENT

1. Upon conviction, the appellant was on 15/12/2016 sentenced to imprisonment for life “as so prescribed” for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act with particulars that he “*on the 6th day of March 2016 at [particulars withheld] location in Baringo Central Sub-county within Baringo County did unlawfully and intentionally caused his penis to penetrate the vagina of M.J a girl aged 7 years in contravention of the Act*”.

2. The appellant raised an issue of insufficiency of evidence to prove the charge against him, in his Grounds of Appeal filed on 29/12/2016, as follows:

“**GROUND OF APPEAL**

1. That, the trial magistrate erred in both law and facts by convicting me without observing that the complainant contradicted her former statement she had tendered or recorded with the police contrary to section 163 (1) (c) of the Evidence Act.

2. That, the trial Court erred in both law and facts by convicting me on prosecution case not proved beyond reasonable doubts as identification and recognition was not proved as required by the law.

3. That, the trial magistrate erred in both law and fact by conviction me on prosecution case marred by discrepancies and inconsistencies between the evidence of the complainant and her grandmother's.

4. That, the trial Magistrate erred in both law and fact by convicting me while relying on the evidence of the doctor who examined the complainant and noticed that the labia majora and minora were normal hence penetration was not proved beyond reasonable doubt.

5. That, the trial magistrate erred in both law and fact by convicting me without observing that voire dire examination was not conducted as provided by the law.

6. That, the trial Court erred in both law and facts by convicting me without considering my defense hence rejecting it without giving any convincing reason as provided by section 169 (1) of the C.P.C.”

Corresponding written submissions were filed.

3. The DPP in oral submissions before the Court at the hearing opposed the appeal as follows:

“Appellant

I have written submissions. I do not wish to add anything.

DPP

Appeal is opposed. Appellant was convicted of defilement contrary to section 8 (1) (2) of the S.O.A and sentenced to serve life imprisonment on 15/12/16.

Pw1 was a minor aged 7 years at the time of the offence. An age assessment report produced before the Court.

She testified that on 06/3/16, she was in the house where she used to live with the grandmother (Pw2). The complainant went to the said house at about 11.00pm and knocked on the window. He went through the window while Pw2 the grandmother of Pw1 was not in the house. She had gone to drink alcohol.

Pw1 testified that she knew the appellant and she was able to identify him as the kerosene lamp was on. Pw1 testified that she had known the appellant for some time as he used to herd cattle and that he had defiled her severally before that date. She knew the appellant as Josphat or Baba Korir.

Appellant got hold of Pw1 before defiling her on bed. Pw1 further stated that Pw2 came later and found the appellant in the house. That night she (Pw2) spend the night with the appellant in another room.

The complainant informed Pw2 what had happened and Pw2 warned her not to tell anybody. Pw5 is a Court clerk at Kabarnet Law Court testified that on 11/3/16 at about 7.00am as she was going to work she had picked some pupils who were going to Kiboino Primary school and noted that the complainant was walking with difficulty as she was getting into the vehicle. On inquiring the complainant observed that she had been defiled by Baba Korir the appellant and had been told by the grandmother not to tell anybody.

Pw5 informed the children officer Kabarnet about the incident and both visited the complainant in school. The complainant repeated to say that she had been defiled by Baba Korir in the presence of Pw5, the children officer and the teacher.

Pw5 further testified that the complainant had informed her that the appellant used to pass through the window every time that he went to defile her.

Pw5 is a doctor who examined on complainant. He stated that the complainant had told her that she had been defiled severally by Baba Korir.

On examination, the complainant was walking with difficulty and had pain in the private parts. External genitalia was normal but the hymen was broken. There was blood from the vagina which was an indication there was penetration.

The urine sample had blood.

We submit that evidence was overwhelming and it was difficult for a minor of tender years to lie against the appellant and she was truthful. The appellant was sentenced to serve life imprisonment as per the law and I urge the Court to dismiss the appeal on conviction. Court may review the sentence in accordance with Muruatetu Supreme Court case.

Appellant in reply

I wish to say something about my health. I have been unwell and I have not been treated in prison. I pray for assistance to get medical treatment. I do not respond to the DPP’s submissions.”

Analysis of evidence

4. The complainant gave unsworn evidence, the trial Court having determined upon *voire dire* that “*the minor to give unsworn statement but she can be cross-examined*”. She described the incident subject of the charge and was cross-examined as follows:

“PW1

My name is M. J.

I am resident of [particulars withheld].

I am 7 years old.

I can't remember the date I was born.

I am pupil at [particulars withheld] Primary School at Nandi.

I used to be pupil at [particulars withheld] Primary School.

I know the accused herein. He used to take care of goats at Tarkok's home.

Tarkok is not in Court today.

At about 11 pm I had heard a person on the bed. I was asleep then.

I used to stay alone in that house.

My parents are at home.

I used to stay with Tarkok but she had gone to drink alcohol on that day.

I had closed the door on that day.

The person had come into the house through the window.

The lamp which use kerosene was on the said day.

I had seen the accused when he came in through widow as I had heard him knock the window.

The said person is called Josphat and Baba Korir.

I had screamed for help.

I was wearing my home clothes. I was not wearing any pant.

The accused had removed his clothes that is the shirt and trouser.

The accused had blocked my mouth and he asked me to keep quite.

The accused had lied on me and Tarkok had come and she talked with the accused and she gave him food and he left.

When the accused lied on me he had removed his thing and he inserted it into my thing.

The minor points to her private parts.

I use my thing to urinate.

I had felt pain when he placed his thing on me.

The accused used to do that to me severally.

I had informed madam Kemboi about it.

Tarkok had found the accused in the house when he committed the act.

I had informed Tarkok what had happened and she asked me not to tell anybody.

I did not go to school the following day as my grandmother Tarkok had asked me to go to the river with the accused.

I was walking with pain.

The accused had then untied the goats and he left.

The accused had then untied the goats and he left.

The accused had slept in the house that night and he slept with Tarkok.

The house had four rooms.

I was sleeping in one room and Tarkok in another room.

I was taken to hospital at Kabarnet by Irene the Children Officer and I was treated.

The treatment notes and P3 are identified in Court and marked as MFI P1 & P2.

The P3 is dated 16/3/16.

I did not go back to Tarkok's home.

I am now staying at Nandi with Mama mukubwa. I was taken there by Diana.

I stay with mama mkubwa Caro.

Accused is identified I Court.

CROSS-EXAMINATION BY ACCUSED

You are the one who committed the offence.

You had informed me that you are called baba Korir.

You stay alone.

You had closed the widow when you came in.

Grandmother had asked me not to tell anybody about the incident.

S.O. TEMU, PM

Prosecutor – No Re-Examination.

5. Pw2 the complainant's grandmother while denying having been told anything about the incident by the complainant confirmed that the complainant called the appellant Baba Korir and that he stayed alone in his house.

6. Medical evidence by Dr. Paul Karithi Ndwati Pw3 confirmed that the complainant had been penetrated as the hymen had been broken and there was blood flowing from her vagina in testimony as follows:

“PW3

My name is Doctor Paul Karithi Ndwati.

I am based at Baringo County Referral Hospital.on 11/3/2016 one child MJ was brought to the hospital by one social worker.

She was 7 years old.

She stated that she had been defiled by her neighbor by the name Baba Korir.

The child stated that the incident had taken place severally.

I saw the child 7 days after the last incident.

She had changed her clothes.

Upon examination the child was walking with difficulties as she was in pain at her private parts.

She had no injuries on her head or other parts of the body.

Upon examination on the child's private part.

The external genital was normal.

The hymen was broken.

There was blood flowing from her vagina which was an indication that there was penetration.

I was not able to established the weapon used.

I had taken samples for her vagina which confirmed that there were no sperms but there was blood.

She had no any infections.

The urine test confirmed traces of blood.

I had concluded that there was penetration.

I filled the P3 on 16/3/16.

I wish to produce as an exhibit.

The P3 is produced as exhibit P1.

The treatment notes dated 11/3/16 are produced as exhibit P2.

I had also filled post rape care form on 11/3/16 and I wish to produce them as an exhibit.

The lab notes are also in Court dated 16/3/16.

The PRC is produced as exhibit.

P3 and lab notes are produced as exhibit P4.

S.O. TEMU, PM

CROSS-EXAMINATION BY ACCUSED

When I cross examined the patient her hymen was broken which confirmed that there was penetration.

The child was brought to hospital on 11/3/16 but she had been defiled on 6/3/16.

The child was in pain and she was walking with difficulties.

She had injuries to her private parts.

S.O. TEMU, PM

RE-EXAMINATION

There was bleeding from the complainant minor's private parts."

7. Pw4 the Clinical Officer at Kaptimbor conducted age assessment on the complainant and concluded she was 7 years old after taking "*an X-ray on the left wrist which revealed that the plates of the bones were firmly joined*" and she had 24 permanent teeth with no pubic hair or breasts.

8. Pw5 was a Court clerk at the Kabarnet Court who happened to have given a lift to some pupils of Kiboino Primary School and noticed one child who walked to the motor vehicle with difficulties, as follows:

"PW5

My name is Daisy J. Ngetich.

I am resident of Keiyo at Emsea area.

I am working at Kabarnet Law Court as a clerk.

On 11/3/16 I was from home coming to work at 7:20 am.

When I reached Ainamoi I had given a lift to some pupils who study at [Kparticulars withheld] Primary School.

There was one child who walked to the motor vehicle difficulties.

I had asked the child what was wrong before she boarded the motor vehicle and she stated that she had been pierced by a thorn.

When we reached [particulars withheld] the children had alighted.

I had also alighted to see where the child had been pierced.

When I look at the child legs they were all fine.

I ask her to tell me what the problem was and she stated that she had been defiled by a known person by the name of Baba Korir and that she had been asked not to say anything to do with the incident by her grandmother.

She stated that the said Baba Koriri used to cut grass at their home.

I asked the child's names and she stated that she was M and she was in class two and I had asked her to go to school and I went to work.

I had then rung the Children Officer one Irene and I informed her what I had seen and I asked her to go and help the child.

The said Officer had come to Court and I informed her and she also informed the gender desk Officer Aguva and we went to [particulars withheld] Primary School to see the said child.

The Children Officer had introduced herself to the Deputy Head Teacher.

The child was summoned and she stated what had happene.

The child's stomach was then swollen and she stated that she has not eaten anything.

The child was asked to take us to her home and she took us to one house and she pointed to us her home and house.

The Children Officer had taken the child to hospital together with the gender desk police officer.

When we reached the child's home we had seen a house but we did not alight from the car that we were in.

One house was made of iron sheet all round and the other roof of the house was made of bricks.

S.O. TEMU, PM

CROSS-EXAMINATION by accused

The child had informed us that the person who defiled her used to enter their house using a window when her grandmother was drunk.

She stated that the person used to enter into the house sometimes using the door.

She stated that the man used to go to the house at night when her grandmother was away.

The child had stated that she had informed her grandmother about the incident and the said grandmother had warned her against say anything about it.

I did not take photographs on the child.

I did not see the child's grandmother.

S.O. TEMU, PM

Prosecutor – No Re-Examination.”

Pw5's evidence confirmed Pw1's statement of report to the grandmother and the instructions by the latter not to tell about the incident. The witness set in motion the intervention by the Children Officer and the Gender Desk Police Officer.

9. Pw6 was the Investigating Officer who took over the matter from the officer who investigated the case and she confirmed the Investigation

Officer's intervention with PW5 and the Children Officer leading to the booking of the matter, arrest and prosecution of the appellant.

10. In his defence, the appellant gave an unsworn statement denying the charge and, making submissions rather than give evidence, invited the trial Court to the scene and establish "*whether a person can enter into the house through it*" as follows:

"DW1

My name is Josphat Muhavi.

I am resident of Moi's bridge but I stay at Anaimoi.

I was working at Anaimoi as herdsman.

The charges are not true

I was arrested 11/3/16 over allegations that I had passed through the widow and entered into the house.

That widow is small and nobody can enter.

The complainant stated that the grandmother was at the house when I defiled her.

The complainant stated that she had informed the grandmother that she had been defiled but the grandmother had denied that in Court.

I did not see the clothes that the complainant was wearing.

I don't know why the complainant had changed clothes and they were not brought to Court.

I want the Court to go and see the said widow whether a person can enter to the house through it.

That is all."

11. The trial Court took up the invitation and visited the scene and made observations as follows:

"COURT VISIT

28/10/16

Coram Before – S.O. Temu (PM)

Court Prosecutor – Macharia

Court Clerk – Shillah

Accused – present

The Court made a visit to the home where the accused used to stay and the complainant.

At the scene there was a new permanent house which was occupied but it was still under finishing.

We also found that the accused used to stay a few meters from the house where the complainant used to stay with Pw2."

12. On the evidence the trial Court found the charge of defilement proved as follows:

"The Court had a chance to visit the area and it was clear that the accused used to stay next to the home where the complainant used to stay with her grandmother.

I thus do find the minor was telling the truth as to who defiled her as she narrated without any contradiction or hesitation and I thus find that indeed it was the accused that had defiled the complainant and that her grandmother has tried to conceal but luck was not with them as good Samaritan had noticed the child's walking style which resulted to the disclosure of the unfortunate act of defilement.

The defence tendered did not contradict the prosecution's case but it gave the Court a chance to see where the accused used to stay and the complainant and that indeed the complainant was staying in unfinished house when the incident took place.

The complainant minor was examined through x-rays and observation and she was found to be 7 years and thus she was a child below the age of 12 years.

Having stated the above I do find that indeed the complainant minor was defiled as there was penetration which caused injuries to her vagina and the defilement was caused by the accused herein.

I thus find the accused guilty and I convict him for the offence of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act no. 3 of 2006 as charges under count I.”

Determination

13. As observed by the trial Court also, the minor complainant’s evidence is confident and consistent with the evidence of Pw5 to whom she related the incident when probed on account of her discomfited walking and with the findings of the medical officer Pw3 who found blood flowing from her vagina and hymen broken. The confirmation of the grandmother Pw2 that the complainant called the appellant Baba Korir supported her identification evidence of the appellant and the Court’s visit to the scene established the close proximity of the appellant’s house to the complainant’s house lending credence to the complainant’s evidence that the appellant used to come to their house while the grandmother was absent and defile her. She told Pw5 that the appellant would sometimes come in through the window and sometimes through the door

14. Pw2 denial as to having been told by her grandchild that the appellant had defiled her is not surprising at all as the evidence of the complainant that the grandmother used to sleep in the same house as the appellant and that she would go off on drinking sprees leaving the child alone was damning on her. The Court is distressed that the person who was supposed to protect her grandchild is the very person who by her drunken escapades exposed the child to preying by the appellant and then actively participated in a cover up scheme both out of Court by instructing the child not to tell about the incident as well as before the Court by her testimony in denial. She really ought to have been declared an hostile witness and cross-examined by the prosecution.

15. The Court finds the offence of defilement proved and the age of the complainant having been assessed at 7 years, the matter falls within the ambit of section 8 (1) (2) of the Sexual Offences Act. The appellant whom the complainant called Baba Korir was shown to have been the assailant and there was no issue of identification as the complainant clearly recognizes the appellant by name, and being their immediate neighbor was a person who was well known to the complainant and Pw1 was clear in report to the Court official Pw5 that it was Baba Korir as she called the appellant herein (as conceded by her grandmother Pw2) who had defiled her.

Orders

16. Accordingly, for the reasons set out above, the Court upholds the conviction by the trial Court for the offence of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act.

17. On the clarification by the Supreme Court in *Muruatetu v. R* [2017] eKLR as to constitutionality of the mandatory sentences, I would reduce the sentence of imprisonment for life by the trial Court “as so prescribed” to one of a term of 20 years from the date of sentence in trial Court.

Order accordingly.

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.