



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 85 OF 2018

BETWEEN

EDWIN KIPNGETICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in KISUMU S. O Criminal Case Number 14 of 2016

by Hon. M. Agutu (SRM) on 29th November, 2016)

JUDGMENT

Background

1. **EDWIN KIPNGETICH (Appellant)** herein has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed against **M.A.O** a girl aged 12 years on 13th June, 2016.
2. The prosecution called 5 witnesses in support of the charges. **PW1** the complainant stated that on 13.06.16, she was going to a place of worship when the Appellant whom she knew before that date, chased and upon catching up with her defiled her. She stated that Appellant was apprehended by G4S officers who handed both of them to police who escorted her to hospital where she was examined.
3. **PW2 SHEM ODERO OTIENO** and **PW3 HESBONE SAKAWA** security guards with KK Security stated that they had parked on Cairo road within Milimani Estate in Kisumu when they saw some people lying beside Busia road. That they went to the scene and arrested Appellant and complainant and handed them over to police.
4. **PW4 FREDRICK OWINO** a clinical officer examined complainant on 13.06.16 and found her with no lacerations. The hymen had a healed tear but that the complainant who had been defiled twice previously had mucous substance in her genitalia which was evidence of penetration. He produced complainant's P3 form and Post Rape Care Form as **PEXH. 1** and **PEXH. 4**.
5. **PW5 PC LYNETT MBALA**, the investigating officer upon receiving the complainant and Appellant from PW2 and PW3 who stated they found Appellant defiling the minor escorted Appellant and Complainant to hospital. She produced complainant's age assessment report which showed she was between 13 and 14 years as **PEXH. 6**.
6. In his sworn defence, the Appellant stated that he was arrested for relieving himself in the bush and that he found complainant with PW2 and PW3 and together they were taken to the police station where he was charged with an offence that he did not commit.
7. In a judgment dated 29th November, 2016, the Appellant was convicted and sentenced to 15 years' imprisonment.

Appeal

8. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 23.08.18. From the grounds of Appeal and submissions filed on 05.11.19, the Appellant asserts that the prosecution case was not proved beyond any reasonable doubt.

9. When the appeal came up for hearing on 05.11.19, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 05.11.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submissions also filed on 05.11.19.

Analysis and Determination

10. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

11. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under ***the Act***. These are the age of the victim, penetration and identity of the offender.

12. Complainant's age assessment report **PEXH.6** established that she was between the age of 13 to 14 years.

13. Section 2 of ***the Act*** defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."

14. **PW4**, a clinical officer examined complainant on 13.06.16 which was the same day when she was allegedly defiled and found her with no lacerations. The hymen had a healed tear allegedly because complainant had been defiled twice previously. On the basis of mucous substance in complainant's genitalia, the clinical officer concluded that there was evidence of penetration. On the same basis, the trial court held that the prosecution case had been proved.

15. With respect, I am not convinced that the mucous substance in itself proves penetration. The prosecution ought to have gone further to establish the link between the mucous substance and the Appellant which they failed to do.

16. In view of the foregoing analysis, I find and hold that the prosecution case was not proved to the required standard and that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, I order that appellant shall be set at liberty forthwith.

DATED AND SIGNED THIS 11th DAY OF *December* 2019

T. W. CHERERE

JUDGE

In the presence of-

Court	Assistants	-	Amondi/Okodoi
Appellant	-	Present	in person
For the State - Ms. Gathu			