



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 7 OF 2017

(From the original conviction and sentence in criminal case number 11 of 2016 of the Principal Magistrate's Court at Kapenguria)

J K APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

J K, the Appellant herein was charged in the lower court with the offence 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 this offence are that on the 11th day of June 2016 within West Pokot County, the appellant caused his penis to penetrate the vagina of E.C, a child aged 7 years.

In the alternative, the appellant faced a charge of ***Indecent Act with a child, contrary to section 11(1) of the Sexual Offences Act number 3 of 2006.*** The particulars hereof being that on the 11th day of June 2016 within West Pokot County, the appellant intentionally and unlawfully touched the buttocks of E.C, a child aged 7 years.

The prosecution case is that the appellant is the father to the complainant and PW-3 is her mother. The marriage between the appellant and PW-3 was not entirely a happy one; it was riddled with challenges and many times PW-3 have had to leave. However on 11.6.2016 they were living together. The complainant who was born in the year 2008 was aged then 8 years. She was a pupil at T Primary School, in class one. On this particular day, 11th June, 2016 PW-3 who is a casual labourer had left home at Makutano, and reported for work. They were living in a single room at the place. At around 1.00pm the complainant was outside the house, playing with her younger siblings. The appellant went home and called the complainant in the house. When she entered in the room he closed the door. He undressed her and then did bad manners to her. She pointed at her front genital area as the place where the appellant did it. She then added that he undressed her first. She was alone with the appellant when he did it. She tried to scream and he covered her mouth with his hand. She eventually got out of the house and he did too and vanished.

When the mother got back home at around noon she found the complainant lying outside and her younger sibling was covering her with a blanket. She asked the complainant what was wrong and she reported that the appellant singled her out from the other children and sexually abused her. The mother looked at her private parts and noted she was bleeding profusely. The mother rushed her to Kapenguria District Hospital where she was admitted from 11.6.2016 to 17.6.2016. She as well reported the matter at Kapenguria Police Station. The report was received by PW-4. He noted that the complainant was in bad shape as she was bleeding. He issued a P-3 form. At around 5.00pm he visited the scene along Mawingo Road. He saw the mattress on the bed and noted it had been cut at the area where he suspected were blood stains. PW-3 informed her that the appellant before escaping had thrown the blood stained mattress piece and the girl's clothes in the pit latrine. The police were unable to retrieve them owing to its depth. PW-4 issued arrest warrant against the appellant.

The complainant during her admission in hospital had her injuries repaired. Her hymen had been broken, with some tears and bleeding. Her P-3 form was filled. Her age was also assessed and found to be 8 years old then. The P-3 form and age assessment reports were produced in court as exhibits.

The appellant was arrested on 17.11.2016 by police officers from Endebes Police Station.

At the close of the prosecution case the court found that the appellant had a case to answer and placed him on his defence. The appellant gave unsworn testimony in which he alleged that the complainant was sexually abused by a certain Sudanese who bribed the mother and she hid her medical documents from him. Their marriage was not blissful as his wife had many sexual partners. They had even separated at

some point. He denied the charges.

The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve life imprisonment. Dissatisfied with the said conviction and sentence, he appealed to this court on the following grounds:-

1. **That he pleaded not guilty at trial**
2. **That he was not accorded a chance to defend himself and to mitigate.**
3. **That his defence was not analyzed and reasons for its rejection were not given.**
4. **That he did not well understand the language of the court during trial of which gave rise to inadequacies in his defence.**

He put in written submissions and urged this court to allow the appeal, quash the conviction, put the sentence aside and set him at liberty.

The state opposed the appeal on the grounds that all the ingredients for the offence the appellant was convicted and sentenced of, were established beyond reasonable doubt by the prosecution. These were the age of the victim, penetration and the identity of the perpetrator. Given that the girl was aged 8 years, life imprisonment was the minimum sentence provided for the offence under **section 8(2) of the Sexual Offences Act**. I was therefore urged to dismiss the appeal, uphold the conviction and the sentence.

I have evaluated the offences the appellant was charged with, the evidence that was offered by both sides in the case, the judgment by the lower court, sentence passed, grounds of appeal and submissions by both sides.

The evidence by the prosecution is not clear on which offence was actually committed, between the offence of defilement and sexual assault.

The complainant was the only eye witness to the incident allegedly giving rise to the offence, and her evidence in relation to the commission of the offence is that:-

“When I entered the house the accused closed the door. He then undressed me. He then did bad manners to me. He did it here (points at her genital area –the front part). He undressed me first.”

As this court expressed itself in a similar case, *Criminal Appeal number 6 of 2017 of Langat Dinyo Domokonyang (Appellant) versus Republic*, “**Bad manners**” is an English phrase which refers to discourteous manners that ignores acceptable social usage. Rudeness, disrespect, insolence, impertinence, bluntness, impudence, coarseness, discourtesy, abruptness, boorishness, incivility, brusqueness, churlishness, curtness, indelicacy and impoliteness, all fit in the phrase “**bad manners.**” “**Bad manners**” is a phrase of which is not carried anywhere in the Sexual Offences Act. Whenever used by a child or anyone else in evidence, it is the duty of the prosecution to ensure that the user makes it explicit to the court as to its meaning and fits it to the ingredients of the offence as disclosed in the Act. It should not be left for the court to assume or guess as to the meaning of the phrase. Offences in Sexual Offences Act are very technical in nature and whichever one is looked at can fit in the ordinary meaning of the phrase “**bad manners**”.

The offence of defilement is defined under **section 8(1) of the sexual Offences Act**. It is where a person commits an act which causes penetration with a child. Where there is no dispute that the victim is a child, as in this case, of paramount importance in the offence is the word “**penetration.**” This word (**penetration**), **under Section 2(1)(d) of the Sexual Offences Act**, means the partial or complete insertion of the genital organs of a person into the genital organs of another person. It is still not made very clear without understanding of what “**genital organs**” are. **Under section 2(1) of the said Act**, they include the whole or part of male or female genital organs and for purpose of the Act also anus. The use of the words “**genital organs**” in definition of the very same phrase “**genital organs,**” does not help much in explaining those other organs referred to, save for anus. Oxford Concise Dictionary defines “**genital**” as relating to human and animal reproductive organs. To make it clear they can be internal or external and I am certain the law refers to only the external genital organs of which is a male penis and a female vagina. In an offence of defilement, it must be established by the prosecution, and that is beyond reasonable doubt, that a male penis partially or fully penetrated the victim’s vagina and or anus. The complainant in this case told the court the appellant did to her “**bad manners**” and touched her front genital area as the place where he did it. She did not however divulge details of how he did it and with which organ. Further details given are that, “**he undressed me first.**”

These words may either mean, given the circumstances under which they were used, that he undressed her before doing it or before he himself undressed. We don’t know which of the two she meant. There is therefore not even evidence that the appellant undressed. Equally there is no evidence that the appellant drew out his sexual organ in order to do it.

The foregoing scenario draws us to a possibility, where penetration is well established, that she could as well have been penetrated with another body organ like a finger or fingers, or an object of which would give rise to a different offence termed Sexual Assault, **under Section 5(1) of the Sexual Offences Act**.

Sexual Assault is committed by any person who unlawfully:-

a. Penetrates the genital organs of another person with:-

i. Any part of the body of another or that person; or

ii. An object manipulated by another or that person except where such penetration is carried out for proper and

professional hygienic or medical purposes.

b. Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body.

Observation by PW-1 that her hymen was broken, with some tears and bleeding, simply shows there was “**penetration**,” a word of which constitutes one of the ingredients in the offence of defilement and as well in the offence of sexual assault. The prosecution was therefore obliged beyond the available evidence, to show that the penetration was by a male sexual organ. Presence of spermatozoa if high vaginal swab was done, would have been enough. Showing that a male was involved as the culprit is not enough. Nothing should be left for the court to assume. The court must be certain that the evidence discloses the offence the suspect is charged with. The evidence available in this case does not make it certain.

The offence of *defilement, contrary to section 89(1) as read with section 8(2) of the Sexual Offence act number 3 of 2006* was not proved by the prosecution beyond reasonable doubt.

I therefore do allow the appeal, conviction and sentence are quashed, the appellant is to be released forthwith unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of the appellant and Ms. Kiptoo, the state prosecutor, this 6th day of March, 2018.

S. M. GITHINJI

JUDGE

6.3.2018