



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.146 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.35 of 2015 by: Hon. A.W. Mukenga – R.M.)

S N K APPELLANT

- V E R S U S -

REPUBLIC RESPONDENT

J U D G M E N T

S N K, the appellant, was convicted for the offence of defilement of a girl contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 7/10/2015 in Laikipia County, intentionally and unlawfully caused his genital organs, namely, penis to penetrate the genital organs of namely vagina of **R M M** a child aged 6 years.

In the alternative, the appellant, faced a charge of committing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act in that on 7/10/2015 in Laikipia County, intentionally and unlawfully touched the genital organs of **R M M** a child aged 6 years.

No finding was made on the alternative charge. The appellant was sentenced to serve life imprisonment.

Dissatisfied with both the conviction and sentence the appellant lodged this appeal based on the following grounds:

- 1. That the delay in filing the complaint of the offence is unexplained;**
- 2. That there was no medical evidence linking the appellant to the offence;**
- 3. That there were glaring contradictions in the prosecution evidence;**
- 4. That the prosecution failed to call some vital witnesses;**
- 5. That the offence was not proved to the required standard;**
- 6. That the sentence was harsh.**

The appellant prays that based on the above grounds, the conviction be quashed and sentence set aside.

The appellant also filed submissions in support of the appeal and submitted that the whole case is a frame up because there was a grudge between him and PW2 and no wonder the complainant's father and grandmother refused to testify and the investigating officer had to be arrested in order to come to court.

Mr. Mutembei, learned counsel for the State opposed the appeal arguing that the charge of defilement was proved to the required standard in that PW1 told the court that the appellant who lived with them carried her to his bed promising to give her something and that he did 'tabia mbaya' to her private parts which made her feel pain; that the complainant reported the matter to PW2, her mother who in turn took her to hospital and the doctor confirmed that a defilement had taken place.

Counsel also submitted that the complainant was born on 1/9/2009 and was therefore 11 years old at the time of the act and she positively identified the appellant as 'Baba N and therefore well known to PW1. PW2 confirmed that the appellant was her brother in law.

This being a first appeal, it is the duty of this court to examine all the evidence tendered before the trial court afresh and draw its own conclusions and determinations. In doing that this court must bear in mind that it did not have the advantage of seeing and observing the witnesses.

The prosecution called a total of four witnesses. The complainant, **R M** who testified as **PW1** gave unsworn evidence after the trial court determined through *voire dire* examination that she did not understand the meaning of the oath. PW1 told the court that when her mother had gone to Kampi, the appellant who she referred to as '**Baba N** promised to give her something, took her to his bed and did '*tabia*' to her and she felt pain in her private parts which she pointed out to the court.

Thereafter the appellant warned her not to tell anybody or he would beat her and that she should leave because her mother was calling her. PW1 knew the appellant as Baba N who lives at her grandmother's place; PW1 told her mother what happened and she was taken to hospital.

PW2 A W is the mother of the complainant. When PW2 was bathing PW1 on 7/10/2015, she noticed a discharge from her vagina and on enquiring from PW1 what happened, PW1 explained that the appellant promised her a sweet, took her to the bed and did '*tabia*' to her and told her not to tell anyone. PW2 took PW1 to hospital where she was treated and was referred to St. Martin for counseling. PW2 also reported at the police station where PW2 was issued with a P3 form. PW2 identified the appellant as an older brother to her husband and lived in the same compound with them. PW2 denied that there was any conflict between her and the appellant before this incident.

Dr. Joseph Kamau Kinyua (PW3) of Nyahururu District Hospital examined the complainant on 15/10/2015 and found the hymen to be broken, with an old tear, no visible injuries on the genitalia; urinalysis showed pus cells and he formed the opinion that PW1 had been defiled.

PW4 PC Ancent Kioko Musyoki testified that he received a report of the incident from PW1 and 2 on 14/10/2015, referred them to hospital for treatment. He produced PW1's immunization card as PExh.No.2; PW4 re-arrested the appellant at the police station from CPL Kinyua.

When called upon to defend himself, the appellant in his unsworn defence stated that he was arrested on 16th by police officers, taken to the police station and on 19th October, was taken to court but charges were not read to him; that police took his money and phone, but the OCS returned his phone but not the money. He said that he was charged because of the grudge between him and PW2 and because the police wanted to keep his money.

The complainant's clinic immunization card was produced in evidence as an exhibit and the date of birth thereon is 1/11/2009. As of 7/10/2015 when PW1 was allegedly defiled, she was just about 6 years old. She was therefore a child of very tender age.

To prove an offence of defilement, the prosecution must establish beyond any doubt that there was penetration, the identity of the perpetrator and the age of the victim. As found above the complainant was only 6 years old.

PW1 was categorical, that it was '**Baba N** who lived with her grandmother who took her to his bed and did '*tabia*' to her. Although PW1 did not say what the specific time it was, it seems it was daytime because the mother had gone to Kampi and the father to the clinic. PW2 confirmed to the court that the appellant is her brother in law and therefore an uncle to PW1. PW1 therefore knew the appellant very well and pointed him out in court as the person who defiled her.

The trial court found that since the incident took place at day time, there is no way that the complainant would have mistaken the appellant for another. I am also satisfied that the complainant ably identified the appellant, her uncle as the assailant.

Whether there was penetration of the complainant; Section 2 of the Sexual Offences Act defines penetration as "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

PW1 being a child of tender age could not even describe what happened to her except call it '*tabia*' and demonstrated in court by pointing to her private parts as the place it took place. PW2 by chance came to discover the act when washing PW1 and noticed the discharge from PW1's vagina. PW2 said that this was on 7/10/2015, that because doctors were on strike, PW1 was not seen till 12/10/2015 about 5 days later. I note that PW3 saw PW1 at Nyahururu hospital and found an old scar to the hymen and no hymen but there were pus cells and PW1 was put on treatment for sexually transmitted infection (STI). PW3 formed the opinion that PW1 was defiled. Like the trial court I have no doubt the complainant was defiled.

The appellant alleges that he was framed because of an existing grudge between her and PW2. He however never alluded to the nature of the grudge nor did he put any question to PW2 regarding the said grudge. I believe the defence is but a sham and the failure by PW1's father and her grandmother to testify is not evidence of any grudge. It is not uncommon for members of a family to take sides when such incidents occur.

As regards the delay in taking up the issue against the appellant, PW1 explained that on 7/10/2015 when she discovered the incident, Doctors were on strike and she took PW1 to the doctor on 12/10/2015. PW3 did confirm that he treated the complainant on 12/10/2015. PW4 then issued the P3 form on 14/10/2015 and PW3 then filled the P3 form on 14/10/2015. The delay in bringing the charges against the appellant is ably explained and no ill or sinister motive can be read in it.

As to whether the prosecution failed to call vital witnesses, i.e. the father of PW1 and grandmother, it is the discretion of the prosecution to call all the witnesses they believe are relevant to their case. Of course, it is the duty of the prosecution to call all witnesses who will assist the court arrive at a fair determination of the case but not leave out important witnesses for an oblique motive.

In ***Bukenya v Republic (1972) the E.A.*** Court of Appeal stated as follows:

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence to draw an inference that the evidence of these witnesses, if called, would have tended to be adverse to the prosecution.”

In this case, there is no evidence that PW1’s father or grandmother witnessed the offence or knew anything about it. If they were called, they may have just been coming to give hearsay evidence. That ground has no basis and must fail.

The other complaint was that no medical evidence linked the appellant to the offence. Under Section 124 of the Evidence Act, there is no requirement for corroboration in such an offence. It is sufficient if the court believes the complainant and other available evidence. In the case of ***Kassim Ali v Republic CRA.84/05***, the Court said:

“....the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.” Medical evidence was not mandatory in this case.

Having evaluated the evidence afresh, I found no contradictions in the evidence as alleged by the appellant. The court considered the defence and found it to be an afterthought and not believable. I find that the offence of defilement was proved beyond any doubt. I find that the trial court properly directed itself and this court has no reason to fault its findings. The conviction is sound and this court upholds it.

As regards the sentence, the complainant was only 6 years old. Section 8(2) Sexual Offence Act, provides for a mandatory sentence of life imprisonment. The sentence is therefore lawful and this court has no discretion to vary it. In the end, the appeal is without merit and is dismissed in its entirety.

Dated, Signed and Delivered at NYAHURURU this 10th day of April, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Soi- Court Assistant

Appellant - present