



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 3 OF 2017

WESLEY CHERUIYOT KOECH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in S.O Case No. 24 of 2013 Sotik PM's Court – Hon Barasa SRM)

JUDGMENT

The appellant Wesley Cheruiyot Koech was convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with S.8(2) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 4th day of May 2013–within Bomet County intentionally caused his penis to penetrate the vagina of S C a child aged 4 years.

The prosecution called seven witnesses in support of their case. The Defence called no other witness apart from the Accused who gave unsworn statement.

This is the first appellate court. It behoves it to evaluate and reconsider the evidence on record so as to arrive at its own conclusions and also bearing in mind that it did not have the opportunity of observing the demeanour of the witnesses like the learned trial magistrate had.

Brief facts

The complainant was declared vulnerable and the mother was allowed to testify on her behalf.

The complainant's mother testified to the effect that while at a funeral ceremony, she received information that her child had been defiled and the matter reported at Sotik police station. The Accused had been arrested and taken there. She proceeded to Sotik police station and in the company of police officers they proceeded to Sotik Dispensary where they took the child for treatment and examination. She further testified that the complainant was her sixth child and was aged 4 years. She referred to the clinic card for age assessment. She identified the accused as a neighbour. She further told the court that she had left the child under the care of Erick Kipkoech.

Erick Kipkoech testified as PW2. After a *voire dire* examination was conducted, the learned trial magistrate was satisfied that he was possessed of sufficient intelligence to understand the nature of an oath and he gave a sworn statement.

He did not know his age but he knew the accused as Wesley. He testified to have been on the way to the posho mill in the company of S when they met Wesley who took away S from him and proceeded to K. He had followed her from behind and saw him strip S naked and remove his trousers and lay on top of S. Later members of public went and arrested Wesley and he was taken to police station.

Philiph Kibii Langat (PW3) is a welder at Kaplong. He testified to have been at his neighbour's house at K when a child emerged running and reported that there was a man raping a small girl and she pointed the scene.

They rushed to the scene while in the company of children who were playing nearby and found the accused on top of a child defiling her.

He recognized the child as belonging to his neighbour. The child had no pants. The Accused had removed his trousers. Members of public went to the scene and tied him up.

He was put into a passing by lorry and taken to Sotik police station. The Accused and the child were later escorted to Sotik Dispensary by police officers.

Simon Sang (PW6) was a clinical officer at the time attached to Sotik Health Centre. On 4/5/2013 he examined the complainant and found that there was presence of a partially perforated hymen with local wetness and redness and was of the view that there was penetrative sexual intercourse having taken place hence defilement.

In his defence the appellant stated that he was arrested whilst on his way from work and escorted to a nearby police station. He maintained that there existed a grudge between him and the parents of the complainant. The main ingredients of the offence of defilement are:-

1. Age
2. Penetration
3. Corroboration
4. Identification.

Age assessment

The learned trial magistrate after an application by the prosecution did state that she had noted the age of the complainant as around 4 years and declared her vulnerable and allowed the mother to testify on her behalf.

G C (PW1) is the mother of the complainant. She testified that she was her sixth child and was aged 4 years old. She showed the court the complainant's Health Clinic Card. This clinic card was later produced in court by the investigating officer (PW7). It showed the date of birth as 27/2/2009. The defilement is alleged to have taken place on 4/5/2013. By calculation and deduction. The age of the complainant was 4 years at the time of the defilement. The court is satisfied that there was proper age assessment.

Penetration

Erick Kipkoech (PW2) was in the company of the complainant while on their way to a posho mill. They met the appellant who was known to them and he took her away. He followed and saw him undress her and lie on top of her.

Philiph Kibii Langat (PW3) is a welder at Kaplong was alerted by children who reported that there was a man doing bad things to a child in the bushes nearby. He proceeded to the scene and found the appellant on top of the complainant. He had removed his trousers. He was caught while in the act of defiling the child. Members of public detained him and later took him to police station. The child was taken there later.

Simon Sang (PW6) is the clinical officer who examined the child. Upon examination he observed that the hymen was partially perforated, there was fluid discharge. He was of the view that the child had been defiled. He also examined the appellant. He had red eyes and was smelling of alcohol. HIV test was negative. His urine had moderate pus cells.

The ingredient of penetration was proved.

Identification and corroboration

PW2 and PW3 saw the appellant while lying on top of the complainant. He did not have his trouser. This was in broad daylight. The appellant was known before to the prosecution witnesses. He was caught red handed. In his defence the appellant did allege that there existed a grudge between him and the parents of the complainant. He did not state the nature of the grudge. He gave an unsworn evidence and he could not be cross-examined on that issue and hence it remained a mere allegation. In the course of proceedings he did not allude to the existence of a grudge between himself and the parents of the complainant.

I am of the considered view that the appeal lacks merit. There was overwhelming evidence against the Accused. The conviction was safe and the sentence was legal. Both the conviction and sentence are upheld.

Judgment delivered dated and signed this 6/4/2018 in the presence of learned counsel for the prosecution.

Mr. Barasa learned counsel for the defence (appellant present)

Court assistant present.

M. MU YA

JUDGE

6/4/2018