



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 39 OF 2017

ISAAC BIRECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. D.K Matutu – SRM dated 12th May, 2017 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 122 of 2014)

JUDGMENT

1. The appellant, ISAACK BIRECH, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (‘the Act’). It was alleged that on diverse dates between 24th January 2014 and 10th February 2014 at [Particulars Withheld] Village, Transmara West District of Narok County, he caused his penis to penetrate the vagina of DC, a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act based on the same facts.
2. The appellant was convicted on the principal charge and sentenced to 20 years imprisonment. He now appeals against conviction and sentence. The thrust of his appeal is that the prosecution failed to prove the offence beyond reasonable doubt. Counsel for the appellant submitted that there was no evidence of penetration in light of the negative finding by the clinical officer who did not testify as to penetration. He also condemned the trial magistrate for relying on the demeanour of the child to convict the appellant yet he neither heard or saw the child testify.
3. Counsel for the respondent conceded that there was no evidence of penetration but that there was sufficient evidence to support a conviction on the alternative count of committing an indecent act with a child.
4. As this is a first appeal, I am required to evaluate the evidence and come to an independent decision as whether to support the conviction bearing in mind that I never saw or heard the witnesses testify (see *Okeno v. Republic* {1972}EA).
5. The complainant (PW 1) was sworn after a voire dire. She testified that she was 14 years old and that on 24th January 2014, she was taken to the appellant’s house by his sister who told her that the appellant wanted to marry her. She found the appellant’s parents. She narrated what transpired on that night and for two weeks as follows;

*“We found Isaac’s family – father and mother. He left me with them. Accused was there. I was left to sit with a girl called G. M left. We sat from 6.00 p.m. We ate. The mother ate. The mother and parents went to sleep. Accused told me we go to his hut. We went. We slept in his house; we were only two of us. We slept on the floor. We slept together (**Child gets very shy and uneasy**). He did taabiya mbaya on me. I know abusing is taabiya mbaya. Beating is taabiya mbaya. We didn’t have clothes. He told me to go remove my clothes. I removed all clothes. He also removed his clothes all. He then held touched my breasts lay on me. He touched my private parts. He then he used... I don’t know how it’s called. I faced up he lay on me spread my legs and his legs between. He then did it severally many times I lost count. We did up to morning. He did last one up to morning. In the morning he took me to his parent’s house. I stayed there up to evening. Again he took me to his hut and he did same things. He did this everyday. I stayed there for two weeks and he did taabiya mbaya on me everyday. After two weeks it was last Friday. Police came on Monday and arrested him. We were with him inside his house. We were taken to administration police. We sat there at Oldonyorok. We were taken to Lolgorian police station. I was taken for treatment at Lolgorian. I never used to now him. I never slept with anybody before. I felt pain on my thighs and this part (**touching her vaginal area**). He broke me. I saw some things likes (**she keeps quiet but appears to**) ... they appeared white. I do not really say blood. I couldn’t walk well. **My thigh and here (touching private parts) was painful**. Parents came but G came once. She never took me away home. The person told me I was to be his wife. He didn’t have another wife.” (Emphasis mine).*

6. The fact of arrest was confirmed by an administration police officer (PW 3) who went to the appellant’s home after being instructed by the local chief that a man was residing with a child as his wife. He told the court that on 10th February 2014, he was at the appellant’s house at 5.30 a.m where he found the appellant and PW 1 together. He arrested them and took them to Lolgorian Police Station.

7. A doctor at Transmara District Hospital (PW 2) produced the P3 form on behalf of her colleague whom she knew and was familiar with the signature. PW 1 was seen at the hospital on 10th February 2014 and nothing remarkable was seen as recorded. On examination of the vagina there was no injury to labia minora, majora and cervix.

8. In his sworn defence, the accused denied the charges. He told the court that he was being framed because of bad blood between his father and the community.

9. The issue in this case is whether the appellant caused the act of penetration. PW 1 gave clear evidence of what happened to her after she was taken to the appellant's home and stayed there for two weeks where she was considered the appellant's wife. She was firm when cross examined and confirmed that they were both arrested. Although the medical tests were negative in the sense that there was no evidence of injuries on the private parts, such evidence would only be corroborative. Under the proviso to Section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya), the Court may convict an accused on the uncorroborated evidence of a child if, for reasons to be recorded the court believes the child to be telling the truth.

10. In this case the magistrate who heard PW 1's evidence is not the trial magistrate who ultimately wrote the judgment. Although he did not observe the child he noted as follows;

“Was the alleged victim telling the truth? I did not have had the opportunity of hearing the alleged victim testify on oath. I did not also have the opportunity to hear the defence proffered by the accused. Their testimonies are however well documented. The alleged victim in her demeanour before B.O Ochieng' Ag. SPM (as he then was) was captured as clearly as could be. The victim was hard pressed to express herself. She was “shy and uneasy”. She “keeps quiet” before admitting the accused did have sexual intercourse with her. She used the common terms often used by child victims -“tabia mbaya.” Once she had mentioned it her evidence became clear.

11. Under section 199 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) a magistrate is entitled to record comments on demeanour. The record shows that the child was obviously in distress and the trial magistrate recorded that, *“I note that the subject starts to get uneasy.”* The magistrate writing the judgment was entitled to rely on these comments to come to the conclusion that the child's evidence was firm, consistent and credible and came to the conclusion that there was penetration.

12. PW 3 arrested the appellant at his house with the child hence corroborating the child's testimony. PW 1's evidence was unchallenged and his defence that he was framed was sterile as he did not give any account the fact that he had been with PW 1 in his home for two weeks. He did not raise the issue of the grudge with PW 1 in cross examination.

13. The totality of the evidence is that the offence was proved. The conviction is affirmed. The age assessment produced by PW 4 shows that the child was 14 years old hence the sentence is within the bounds of Section 8(3) of the Act hence it is also affirmed.

14. The appeal is dismissed.

Dated and delivered at Kisii this 12th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Nyantika for the Appellant holding brief for Mr. Nyamwange.