



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO 33 OF 2017

W K L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Bomet PM's Court Criminal Case No. S.O 6 of 2016 Hon. Nyigei SRM)

JUDGMENT

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

The particulars being that on the 27th day of January 2017 at [particulars withheld] Trading Centre within Bomet County he intentionally caused his penis to penetrate the vagina of A.C a child aged 9 years.

Being dissatisfied with the decision of the learned trial magistrate the appellant has decided to lodge this appeal.

This is the first appellate court. It has a duty to reconsider and re-evaluate the evidence on record so as to arrive at its own conclusions bearing in mind that unlike the trial court it did not have the opportunity to observe the demeanor of the witnesses. ***Okeno –V- R. 1972 EALR***

Brief facts

The complainant testified to have been born in the year 2005 was aged 9 years and was in standard 4 at [particulars withheld] Academy at Tegat.

On 27th January 2017 she was send by her mother to buy rice at [particulars withheld] shopping centre. On her way back she met the appellant who told her that he wanted to have a word with her. He took her to a kiosk owned by one Salim. There were no customers at the time. The kiosk had one table and two chairs. The appellant proceeded to remove her pants and his. He forced her to lie on the floor and inserted his male organ into hers. He threatened to cut her with a panga which was at the kiosk if she screamed. When he was finished with her. He put on his clothes opened the door and went away. She put on her pants and dress and picked the rice and went home. She did not report the matter to her parents. On 30th January 2017 she went to school and the school matron took her to Hospital when she saw her walking in pain. When she was interrogated she narrated what had happened on the 27th day of January 2017. The matter was reported to police and her parents. She further testified that the accused used to work at the kiosk where he took her but that day it was not in operation.

J K K (PW2) is the father of the complainant. On 30th January 2017 he was called from school where he was working and was informed that the complainant who is his daughter was at Tegat Hospital. Upon arrival there he was instructed to take the child to Longisa Hospital which he did the following day. She was issued with a P3 form which was later filled at the Hospital. The complainant informed him that she had been defiled by one W who was a neighbour and relative. He gave her age as 9 years.

L C (PW3) was at the time of this incident working as a matron of St. [particulars withheld] Academy. She testified that on 30th January 2017 at about 10:00 am she saw the complainant walking in unusual manner and called her to the office and upon interrogation she informed her that she had been sent to buy rice at the nearby shops when she met one Wesley (Appellant) who took her to some kiosk where he sexually assaulted her. She reported the matter to other teachers and called the parents of the victim. They took the child to Tegat Hospital where she was referred to Longisa Hospital for treatment and examination.

Julius Magut is the clinical officer who examined the complainant. He found the external genitalia normal. There were bruises on the labia minora and the hymen was recently broken.

Laboratory tests showed that there was presence of red blood cells and pus cells. He formed the opinion that there was penetration.

In his defence the accused testified that on the material day he was not at the scene as he was doing some cultivation in a tea farm about 2 kilometres away.

He denied having defiled the complainant and insisted that her father who is his uncle had a land dispute with him. He further denied working at a Hotel-Kiosk at [particulars withheld] trading centre.

Law analysis and Conclusion

The appellant was charged with the offence of defilement Contrary to Section 8 (1) (3) of the Sexual Offences Act which provides:-

“A person commits an act which causes penetration with a child is guilty of an offence termed defilement

(2) A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

The issues for determination are

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

Age

The complainant testified that she was 9 years old at the time of this incident and that she was born in the year 2008.

Her father (PW2) testified that his daughter was three days shy of 9 years. He showed the court her child health card.

PW4 (the investigating officer) produced this card as an exhibit. It showed the complainant to have been born on 30th January 2008.

I am satisfied that it was properly established that the complainant was eight years old at the time of this incident.

Identification

The complainant testified that she knew the appellant very well as he was her cousin. He used to work at a Hotel at Togat and that's where the incident took place. She had been send to the shops at around 10:00 am. This was in broad day light. He had access to the kiosk which was not open for business that day. The circumstances obtaining at the time made for positive identification.

Penetration

The complainant testified of how the accused lured her inside a kiosk undressed her and himself laid her down on the floor and inserted his male organ into hers. Her matron in school (PW3) observed the child walking in unusual way and decided to interrogate her and that's when she revealed that she had been defiled by the accused.

The evidence by the clinical officer (PW5) who examined her was to the effect that her labia minora was bruised and the hymen was missing. That the broken hymen was a recent event. He was of the view that there was sexual penetration. There was adequate and proper corroboration.

The defence put forth by the appellant is that he was not present at the scene at the time of the alleged defilement as he was some two kilometers away weeding tea bushes. That in itself was not sufficient to create a doubt in the mind of the court. He alleges that there is a land dispute between the father of the complainant and himself.

Such allegation is simply an allegation and nothing more and therefore cannot create a doubt in favour of the appellant.

The evidence against the appellant was overwhelming and the prosecution proved its case beyond reasonable doubt.

The conviction was safe and sentence lawful. The appeal has no merit and its dismissed.

Judgment delivered dated and signed this 19/9/2018 in open court and in the presence of learned counsel for the prosecution Mr. Wawire. Learned counsel for the defence/appellant in person present. Court assistant Rotich.

M. MUYA

JUDGE

19/9/2018