



**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 25 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**A K.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. M. K. N. N. Maroro, PM dated 5<sup>th</sup> March 2018 at the Chief Magistrate's Court at Meru in Criminal Case (SOA) No. 79 of 2016)***

**JUDGMENT**

1. The appellant, **A K**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that on 14<sup>th</sup> and 15<sup>th</sup> July, 2016 in Buuri district within Meru County, he intentionally caused his penis to penetrate the vagina of J K, a child aged 7 years.
2. The appellant now appeals against conviction and sentence on the grounds that the prosecution witnesses gave contradictory and conflicting testimony which was hearsay, that the prosecution failed to prove its case beyond reasonable doubt and that the medical evidence could not support the conviction.
3. As the first appellate court, I am required to re-analyse the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972]EA 32**). In order to proceed with this task, I will set out the facts as they emerged before the trial court.
4. The child, PW 1, testified that she was 8 years old and that the appellant was her father. She recalled that during the night of 15<sup>th</sup> July 2015 the appellant came to where she was sleeping, removed her blouse and panty and then removed his trousers and inserted his penis into her vagina. He told her not to tell anyone and if she obeyed he would buy her a big loaf of bread. On the next day, he did the same to her but on that day, he told her to go back to her mother's place. At the time, the appellant and the child's mother were living separately.
5. As PW 1 was going to her mother's place, she met PW 2, the area manager for "Nyumba Kumi". PW 2 recalled that when he met PW 1 he interrogated her and she told him that the appellant had chased her away. He also testified that PW 1 had been missing and that they were looking for her. He called the child's mother PW 3.
6. PW 3 testified that PW 2 called her at about 8.00pm while she was at home and told her that he had found PW 1. She went to his house and found PW 1 who told them about her ordeal. She checked PW 1 private parts and found blood. On the next day she went to school and told the head teacher. The matter was reported to Subuiga Police station on Thursday whereupon they were referred to the hospital.
7. An officer from Subuiga Police station, PW 4, recalled that the child was brought to the station on 20<sup>th</sup> July 2017 at about 4.30pm. She recorded statements and accompanied PW 1 and PW 3 to Meru General Hospital where PW 1 was examined and treated.
8. PW 5, a doctor working at Meru General Hospital produced the P3 form filled by another doctor. According to the P3 form, the child's private parts were normal and there were no bruises but the hymen was broken. There were also numerous blood and pus cells although no spermatozoa were seen under microscopy. He also produced PW 1's immunization card showing that PW 1 was born on 6<sup>th</sup> May 2008.
9. In his sworn defence, the appellant denied the charges against him. He confirmed that he knew PW 1's mother, PW 2. He testified that he had stayed with PW 1 for 3 years after PW 3 had left him although she returned and stole the child. It is in these circumstances that he was framed as a result of the dispute with PW 3.
10. In this case there is no doubt that the appellant knew PW 1 and he admitted as much in his defence. PW 1 gave clear testimony that

confirmed that the act of penetration took place on the consecutive nights until she was chased away. This evidence is sufficient to convict the appellant, if for reasons to be recorded, the trial magistrate believed the child. In this case the trial magistrate did not record the reason for believing the child hence corroboration was required.

11. The evidence of corroboration was twofold. First, PW 2 found her in a state of distress on the material night after she had been chased away from home. Second, the medical evidence tended to confirm the fact of penetration.

12. The appellant attacked the medical evidence as insufficient. This is explained by the fact that the child was seen one week after the incident and the only evidence of penetration was numerous pus and blood cells. Likewise, the failure to seek medical treatment on time does not weaken the prosecution case. PW 2 explained in cross-examination that she did not have money and it only after intervention from officers from the School that the child was taken to the police station and then referred to the hospital.

13. The appellant also complained that the prosecution did not call PW 1's head teacher who was told of the incident. The law on this issue was summarized by the Court of Appeal in **Benjamin Mbugua Gitau v Republic [2011] eKLR** thus:

*This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.*

14. In this case, the head teacher was actually informed of the incident after the child reported to school on the Monday after the incident. PW 2 was the first person to meet PW 1 on the material evening after she had been chased away by the appellant. Thereafter, PW 3 was called. The head teacher's testimony would merely add to the number of people PW 1 narrated her ordeal to and as such it would neither add nor subtract from the prosecution evidence.

15. The child's age is a question of fact. PW 5 produced the immunization card that showed that PW 1 was born on 6<sup>th</sup> May 2008. For purposes of the offence of defilement she was below the age of 18 years. Since she was aged 7 years at the time the offence was committed, the mandatory sentence of life imprisonment under **section 8(2)** of the **Act** was lawful.

16. The appeal is dismissed.

**DATED and DELIVERED at MERU this 17<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.