REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 45 OF 2017

EDWARD KIPROTICH KIGEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in S. O. No. 26 of 2017 (Hon. B. R. Kipyegon (SRM) dated 15th December 2017)

JUDGMENT

1. The appellant, Edward Kiprotich Kigen, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars of the offence are that on the 20th day of May 2017 in Kericho Sub-County in Kericho County did intentionally and unlawfully cause his penis to penetrate the vagina of G C K, a girl aged 9 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence are that on the 20th day of May 2017 in Kericho Sub-County, Kericho County, did intentionally and unlawfully cause his penis to come into contact with the vagina of G C K, a girl aged 9 years.

3. He faced a second count of deliberate transmission of a sexually transmitted disease contrary to section 26 (1) (b) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 20th of May 2017, at the same date, place and time as in count I, having actual knowledge that he is infected with syphilis, intentionally, knowingly and willfully inserted his penis into the vagina of G C K reasonably knowing that it was likely to lead to her infection.

4. He pleaded not guilty to the main count and the alternative charge and was tried before B. R. Kipyegon (SRM). He was found guilty of the main charge of defilement and sentenced to life imprisonment. He has appealed against both his conviction and sentence and raises 5 grounds of appeal.

5. His first ground is that the trial court erred in law and fact by passing a harsh sentence without considering that the evidence adduced by the prosecution was not water tight to base a conviction and sentence of life imprisonment on. In his second ground, he argues that the trial court erred in relying on the evidence of the mother of the complainant without considering that there was a grudge between the appellant and the mother of the victim, for whom he had worked between 2003 and 2017, over salary.

6. He contends, thirdly, that the trial court failed to consider that he proceeded without any statements. His fourth ground is not entirely clear. He argues that the trial court erred in law and fact by determining that the offence of defilement had been proved without considering the evidence of PW4 (the clinical officer) that there was nothing from the complainant (about the offence). Finally, he contends that the trial court erred in law and fact by rejecting his defence without any cogent reason.

7. As the first appellate court, I am under a duty to re-evaluate the prosecution evidence and reach my own conclusion, bearing in mind that I did not have an opportunity to see or hear the witnesses, which the trial court had- doing – **see Okeno vs R [1972] EA. 32.**

8. PW1 was the complainant's mother, M C K. She left her children, the complainant, G C, born in 2008, and her brother, V K (PW3) at home on the 20th of May 2017. PW3 later called her and informed her that he had found the accused and the complainant in the house. She had gone back to her house and had called the complainant and asked her what had happened, and the complainant had said that she had slept with the appellant for a second time. PW1 had taken her to hospital where she was examined and found to have been defiled in the anus. She had been found to have blood in the anus. PW1 had known the appellant since 2007 as he used to work as a herds-boy for her brother in law. PW1 had produced a birth certificate of the child which showed that she was born in 2008.

9. PW2 was the complainant, G C K, then 9 years old and a class 3 pupil. Her evidence was that she knew the appellant, whom she pointed at in the dock. She had been left with her brother, V, at home. V had gone to mend his shoes and left her at home. She had washed her clothes then taken a bath. As she was changing, the appellant had entered her mother's bedroom and called out her name.

10. He had told her he wanted to do 'tabia mbaya' and had removed her trousers as well as his pants and trousers. He had done 'tabia mbaya' to her, and she had felt pain in her groin area, which she pointed at. She and the appellant had been standing. She had said she would report him, and he had threatened to kill her. Her brother V had walked in and found the complainant and the appellant facing each other. The appellant had then packed his clothes and left. According to the complainant, the appellant had done 'tabia mbaya' to her before. She repeated in cross-examination by the appellant that he had done 'tabia mbaya' to her 'again.'

11. PW3, V K, a form 2 student, had gone to have his shoe mended on 20th May 2017 and had left his sister, the complainant, at home alone. He had returned after about 10 minutes to find the appellant and the complainant together in their main house with its door open. He had known the appellant for about ten years. He was a friend and a herdsboy at PW3's uncle's home. PW3 had seen the appellant pull his trousers up. He had informed his mother that he had found the appellant defiling the child.

12. The clinical officer, Robert Kipyego Langat (PW4) had examined the complainant on 22nd May 2017. He had found the hymen and labia intact. The complainant had a longitudinal tear of the anus. He concluded that the laceration on the anal orifice showed an attempt at defilement.

13. The final prosecution witness was PW5, the investigating officer. He had taken statements of witnesses and given the complainant the P3 form.

14. When placed on his defence, the appellant denied committing the offence. He stated that he was taken to the police station and it was alleged that he defiled a child whom he did not know. He stated that he had worked for 'this woman' since 2013 and had asked her for his salary but she had asked him to wait.

15. I note from the judgment of the trial court that he had considered the prosecution evidence and the defence of the appellant. He had found the evidence of the prosecution witnesses credible and reliable. He noted that the age of the child had been established by the production of a birth certificate. He had also found that the findings of the doctor strongly suggest some anal penetration. He had found the evidence of the minor credible, but that it had also been corroborated by other prosecution evidence.

16. I have considered the prosecution evidence, the appellant's grounds of appeal and as his written submissions, as well as the oral submissions made by the Learned Senior Prosecution Counsel, Mr. Ayodo.

17. In opposing the appeal, Mr. Ayodo asked the court to uphold the conviction and sentence. I note that the appellant alleges that there was inconsistency in the time that the offence is alleged to have occurred. He also submits at length about the amount he was owed for his service to the mother of the complainant, and asks the court to make an order that he should be paid his unpaid salary for 11 years. He alleges that the clinical officer was bribed, and asks that the evidence of PW1, 2 and 3 should not be relied on as it is the evidence of members of the same family.

18. Having considered the prosecution evidence in this matter, the defence of the accused, the decision of the trial court and the submissions of the parties, I find no basis for interfering with the conviction and sentence.

19. The appellant was found by PW3 pulling up his trousers while standing up facing the complainant. The complainant was clear in her evidence that she had been defiled, for the second time, by the appellant. She had stated that she would report him, and he had threatened to kill her. Her evidence indicates a child who was clear about what had been done to her, and by whom. Even without other prosecution evidence, her evidence met the requirements of section 124 of the Evidence Act.

20. However, her evidence was materially corroborated by that of her brother, PW3. He had walked in and found the appellant and his sister, and had seen the appellant pulling up his trousers. The medical evidence also corroborates the evidence of PW2 that she was defiled. The laceration on her anus was evidence of penetration.

21. I find that all the appellant's grounds of appeal have no merit. The prosecution evidence which I have considered above was, in my view, overwhelming and left no doubt that it was the appellant who defiled the complainant. The sentence, upon conviction for defilement of a child of less than 11 years, is life imprisonment, so the sentence meted out was lawful.

22. On the second ground, there was no evidence of a grudge between the appellant and the complainant's mother over salary. She had testified, and this was not challenged in cross-examination by the appellant, that he was employed by her brother-in-law. It is noteworthy that he did not raise the issue of the salary arrears or a grudge over such arrears when he cross-examined PW1.

23. The appellant argues that he proceeded with his case without statements. I note, however, that orders were made for him to be supplied with statements, and he did not thereafter raise the issue. It is also clear that he was able to follow the proceedings and cross-examine witnesses, and so I find that this ground also has no merit.

24. The appellant complained about the court ignoring his defence. However, I note that the court did consider the defence, which was an allegation that there was a grudge between him and the mother of the complainant. I find that there is no basis for the allegation that the defence was ignored.

25. Accordingly, I find this appeal to be without merit. It is hereby dismissed and the conviction and sentence upheld.

Dated Delivered and Signed at Kericho this 11th day of October 2018.

MUMBI NGUGI

JUDGE