



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO 47 OF 2017

PHILLIP KIPNGENO MITEY.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

Cr. Case No. 3 of 2013 PM's Court Sotik – Hon Omwansa PM)

JUDGMENT

The appellant above mentioned was sentenced to 20 years imprisonment for the offence of defilement Contrary to Section 8(1) as ready with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 23rd day of January 2013 at [Particulars withheld] village Sotik- Bomet county, he intentionally caused his penis to penetrate the vagina of S.C a child aged 12 years.

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

Brief facts

This case fell before Hon. Omwansa for retrial upon orders by the High court.

Complainants father (PW1) testified to the effect that on 23rd January 2013 at about 2.00 p.m. he had sent his daughter to draw water and to return with heads of cattle which had been at the grazing pastures. After a short while he heard screams emanating from the river. He thought his daughter head been bitten by a snake and decided to go and find out the problem.

Upon proceeding to the scene he met his daughter running while holding her pants with one hand. Upon asking her what was the problem she shouted “it is Phillip”. On checking he saw Phillip running towards the river while holding a panga and a stick at a distance of 30 metres away. The witness decided to rush back to his house so as to arm himself with a panga and a stick. His wife arrived at the scene and started wailing. He got reinforcements from youths in the neighborhood and went in search of the accused but they did not catch up with him.

Later at about 5.00 p.m. he received information that the accused had been arrested and handed over to police.

Complainant’s mother (PW2) testified that her daughter was born on 20th May 2001. She produced a clinic health card to that effect. She testified to have gone to the shops on 25/1/2013 to buy soap at about 2.00 p.m. Upon returning she saw her daughter running while crying. She was carrying her pants which were torn, upon checking her private parts in the company of other ladies, they were wet and there was some liquid like mucus.

They took her to Ndanai Hospital for treatment and examination. Meanwhile members of public went in search of the accused whom the complainant had mentioned as the person who had defiled her while near the river.

The complainant, a standard seven pupil at [Particulars withheld] primary school at the time, testified that she was born on 20th day of May 2001 and that on the 23rd day of January 2013 at about 2.00 p.m. she had been send by her parents to bring cattle home from the pastures. On the way she met the accused who send her to go and collect for him a jerrycan. She went and returned with the jerrycan. He got hold of

her hands as she was handing him over the jerrycan. He gagged her mouth with a piece of cloth wrestled her down and removed her skirt and pants.

He removed his trouser and pants and proceeded to insert his male organ into hers and had sexual intercourse with her. Afterwards, she wore her skirt and ran towards home carrying her torn pants and crying for help. She met her father and told him that Phillip had defiled her. The Accused took to his heels with her father on the chase. Upon arrival at home she told her mother of what Phillip had done to her.

She checked her private parts and took her to Ndanai Hospital and later to police station where they made a report and she was issued with a P3 form. The accused was later arrested.

The clinical officer (Paul Ngetich) examined the complainant on 23/1/2013 and on the genitalia found minor redness on the labia majora. There was no discharge or physical injury.

In his defence, the accused who gave an unsworn statement testified that on the 23rd day of January 2013 he was erecting a fence. At 2.00 p.m. he proceeded to Abossi Secondary School to pay school fees for his child, while there the area chief went and told him that he wanted to see him in his office. Upon arrival there, he found members of public who alleged that he had defiled a girl at Kaplelach. He denied the allegations and he was taken to Ndanai police station. It was his contention that the complainant's father bears a grudge against him owing to a request he made to him for posts which he was denied.

The issues for determination are

- (1) Age of the complainant
- (2) Whether there was penetration
- (3) Identification
- (4) Corroboration

Age

On the issue of age

The complainant's mother (PW2) did testify that her daughter was born on 20th May 2001. She identified a clinic health card which showed the date of birth of the complainant.

The complainant herself (PW3) testified to have been born on 20/5/2001 and was also referred to the clinic card which showed that to be her date of birth.

The defilement is said to have occurred on 23/1/2013. By deduction, therefore, the complainant was 12 years at the time.

Penetration

The complainant testified to have been defiled on 23/1/2013 by the accused who had confronted her while on her way to the pastures to take cattle back home. She narrated of how he got hold of her hands wrestled her down and undressed her and himself and proceeded to have sexual intercourse with her. When he was done with her, she left running and crying and holding aloft her torn pants.

The Doctor who examined her found that she had minor redness on her labia majora. Section 2(1) of the Sexual Offences Act defines penetration to mean:-

“The partial or complete insertion of the genital organ of a person into the genital organ of another”.

In the present case the redness was on the labia majora which means that there was no complete insertion but even the smallest insertion amounts to penetration.

Identification

This incident took place at around 2.00 p.m. The accused was known to the complainant and her family. The two had met when she was going to where their cattle were grazing with a view of taking them home. They had a chat. There was ample opportunity to recognize him. After the act she ran towards home and reported to her father that it was the accused who had defiled her. The father PW1 did see the accused running away. He chased him but he disappeared. He was later chased by members of public and arrested.

Corroboration

The evidence of the complainant was corroborated by that of her father who saw the accused running away after the act. It was also corroborated by the mother of the complainant and the doctor who examined the complainant.

In his defence the accused alleges that there did exist a grudge between him and the complainant's father over some posts. During cross-examination of the witnesses he did not allude to the existence of such a grudge and at best it remains an afterthought.

I am satisfied that there was overwhelming evidence against the accused. The prosecution's had proved its case beyond reasonable doubt. The conviction was safe and the sentence lawful.

The appeal has no merit and it's disallowed.

Judgment delivered dated and signed this 4th day of October 2018 in the presence of the learned counsel for the prosecution Mr. Wawire the appellant in person present court assistant present.

M. MUYA

JUDGE

4/10/18