



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 105 OF 2017

WILSON NDUNGU KANGETHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 2447 of 2015 Republic vs Wilson Ndungu Kangethe in the Chief Magistrates' Court at Eldoret by H. O. Barasa, Principle Magistrate on the 10th day of October 2017]

JUDGMENT

1. The appellant (**Wilson Ndungu Kangethe**) was convicted on a charge of sexual assault Contrary to Section 5(1) (a) (1) (2) of the Sexual Offences Act, that on 15th May 2015 at [particulars withheld] village in **TARAKWA** Location, **WARENG** District within **UASIN GISHU** County, he unlawfully and intentionally caused his finger to penetrate the vagina of **CC*** a child aged 4 years. He denied the charge and after trial he was sentenced to serve 2 years.

2. **CC** (PW1) lived with her parents and siblings, **C**, **T** and **C**, it was her evidence that while at home alone the appellant removed her trouser and touched her on the couch. She explained that her mother had gone to the shamba and her siblings had gone to school. She referred to the appellant as **NDUNGU**, and testified that before doing so gave her water and bananas, and after consuming the same, he touched her genitalia when her mother returned, she informed her what had transpired.

3. **EC** (PW2) mother of the minor told the court that she had gone to do some cultivation on her farm accompanied by **CC**. However **CC** got thirsty and she instructed her to go to the appellant's house as he was a neighbour. When the child took too long to return, PW2 deiced to check on her – she said:

“The accused came out with KC (also CC) my daughter started crying. The accused gave her a banana. I took her home. She did not look happy. I talked to her but she did not tell me anything.... At night, I put my daughter to bed ... The following morning.... She was dull... she told me she had pain in her private parts. I checked her vagina and noticed some watery substance on the same...I questioned her ... she told me that the accused who she referred to as uncle had touched her vagina with his finger...”

4. She confirmed **CC** had worn a pair of trousers on the date in question. She denied suggestion by the appellant that she was the one who pinched **CC**'s private parts. She also clarified that she had no grudge against him.

5. **DR. PAUL KIPKORIR** (PW3) who examined the minor found that she had fresh hymenal tears, saying, he found that the child has been sexually assaulted. He gave her age as 4 years – this was confirmed by the mother who said she was born on 10.10.11 and explained that the child's birth certificate got burnt in a house fire.

6. **PC JULIUS CHOGE** (PW45) who investigated the matter, upon receiving the report said at the time, the child's mother showed them the birth certificate which indicated year of birth as 11.10.10. He recorded statements from witnesses then arrested and had the accused charged in court.

7. In his sworn defence, the appellant confirmed that he knew **CC** as his neighbour's daughter it was his evidence that while at his home on 15.05.2015, **CC** arrived at his home and was shortly followed by her mother – they chatted then he went to the kitchen and brought a banana which he gave to the child. The child then left with the mother. He suspected that the child's mother did not like him because each time there were domestic issued between her and her husband, the appellant would be called to mediate and he always looked like he was siding with her husband. He maintained that he did not commit the offence.

8. The trial magistrate who had an opportunity to observe **CC** in court as she testified recorded that:

“...Her evidence was firm and consistent. She was clear here that the accused who was well known to her touched her vagina ... She did not strike me as a child who had been coached on what to say.”

9. The trial magistrate observed that having given such cogent evidence, the appellant failed to challenge her evidence on cross examination.

10. It was also the trial court's finding that the medical evidence confirmed that CC had been defiled as manifested by the injuries observed by the mother. Further that the appellant had the opportunity to be alone with the minor before her mother appeared, and he was not stranger to the child as well as a mother and there was no likelihood of mistaken identity.

11. The appellant contested these findings on grounds that) the prosecution's case was marred with inconsistencies which dented the credibility of the case.

b) The medical evidence was not substantial

c) The case against the appellant was an afterthought orchestrated by the minor's mother for reasons best known to her.

12. In the written submissions made by **MR OMBOTO** on behalf of the appellant argued that the appellant had written to the **DPP** casting doubts as to the authenticity of the medical evidence and when this was brought to the trial magistrate's attention the prosecution sought adjournment so as to subject the child to a second medical examination.

However on 28.07.2015, the prosecution informed the court that the complainant's mother had refused to have the minor taken for a second medical examination. The case eventually proceeded without the court being notified whether the child had undergone a 2nd medical examination. Counsel argues that this evasion by the child's mother ought to have created doubt in the mind of the court as regarding the bona fides of PW2. It was also submitted that PW4 was reluctant to appear in court and the case dragged for almost a year until a warrant of arrest was issued against him and that is what propelled him to attend court.

13. Counsel also submitted that although the incident allegedly took place on 15th May 2013, a report to the police was made only six days later i.e on 21.05.2015 – so it means something was amiss.

14. It was also argued that the P3 form did not indicate the history of the injuries, and the Doctor's conclusion was not based on any previous treatment notes.

15. In opposing the appeal Miss **ODUOR** on behalf of the state submitted that the child's age was proved by production of a document. Actually no document was produced to prove the child's age – the mother claimed that the birth certificate got burnt in a house fire (which was never reported to police) and the child was near subjected to age assessment.

16. I concur with Miss Oduor with regard to identification – infact that was a non issue as it was a common friend that

a) The parties were known to each other,

b) the child left her mother and went to the appellant's house and after some time the mother followed her there.

17. Mrs Oduor's contention is that the medical report proved that there had been penetration of the minor's genitalia. She concedes that following contestation by the appellant as to the authenticity of the medical report **DPP** did request for an independent medical report vide a letter dated 30.06.2015 but this was not acted upon and they ended up with the initial P3 form only

Counsel stated:

“We agree that the analysis made seven days after the incident, and the request for a 2nd medical report for comparison was necessary.”

18. Indeed PW2's deliberate evasion to subject the minor to a 2nd medical examination to establish whether indeed there was penetration raised doubt as to her bona fide and I think it was unsafe to rely on medical evidence that was already questioned.

From my view the conviction was not safe and it is quashed.

The sentence is set aside and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of October 2018.

H. A. OMONDI

JUDGE