



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 21 OF 2018

EPÉM LOTIANGOR EYANAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From original conviction and sentence in Criminal Case No. 17 of 2017 by the Senior Resident Magistrate - Hon. C.M. Wekesa delivered on 3<sup>rd</sup> May 2018 at Lodwar)*

JUDGEMENT

1. The Appellant **EPÉM LOTIANGOR EYANAE** was charged with the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 2<sup>nd</sup> day of January 2017 at Saleyard Area, Lodwar Town in Turkana Central sub-county within Turkana County intentionally caused his penis to penetrate the vagina of JAL a child aged fourteen (14) years.
2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 2<sup>nd</sup> day of January 2017 at [particulars withheld] Area Lodwar Town in Turkana Central sub-county within Turkana County intentionally touched the vagina of J.A.L. a child aged fourteen (14) years.
3. He pleaded not guilty, was tried, convicted and sentenced to serve imprisonment for a period of ten (10) years. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:-
  - a) *The age of the complainant was not proved.*
  - b) *The prosecution case was made up of hearsay and contradictory evidence.*
  - c) *The Appellant was not given enough time to prepare for his defence contrary to his rights under the Constitution of Kenya 2010.*
  - d) *His defence was rejected without any cogent reason.*
4. When the appeal came up for hearing before me Mr. Mong'are appeared for the state and opposed the appeal, while the Appellant who was not represented filed hand written submissions in which it was submitted that the prosecution case was not proved beyond reasonable doubt and that the age of the complainant was not proved. It was submitted that **PW1** the complainant stated that she was talking to the Appellant about marriage but was not clear whether the said marriage happened or not.
5. It was submitted that he was convicted based upon the contradictory evidence of the prosecution witnesses since **PW1** said that they were only two in the bush while **PW2** stated that he was an eye witness to the act. Further there was contradiction on time of the alleged commission of the offence in support of this submission the case of **WANJERA v REPUBLIC [1944]** sic. It was further submitted that vital witnesses including one Simon who had been sent by **PW2** to follow the Appellant was never called to testify and the court was persuaded to make adverse inference against the prosecution on the authority by **BUKENYA v UGANDA [1972] EACA 49**.
6. It was stated further that P3 form was produced by **PW3** who was not its maker and that the evidence of **PW3** confirmed that whereas the hymen was perforated there were no obvious bruises or discharge on the external genitalia confirming that no sexual intercourse happened. It was submitted that the Appellant's defence was rejected without any cogent reason being given and therefore the appeal should be allowed.
7. On behalf of the prosecution it was submitted that as per the evidence of **PW3** the complainant was medically examined and proper age ascertained. The prosecution called all the witnesses who were necessary to prove their case and to sustain a conviction. The Appellant was accorded sufficient time to prepare for his defence which was considered and properly rejected by the trial magistrate.

8. This being a first appeal the court is under a duty to re-evaluate the evidence tendered by the prosecution while giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses. See **OKENO v REPUBLIC [1972] EA 32** which I will do as I answer the issues identified herein for determination as follows:-

- 1) *Was the age of the complainant proved beyond reasonable doubt?*
- 2) *Was there contradiction in the prosecution case?*
- 3) *Was the Appellant defence considered?*
- 4) *Whether the Appellant was accorded adequate opportunity to prepare his defence?*

#### **The age of the complainant**

9. It was the evidence of **PW1** that though she did know when she was born, she was a pupil in standard three aged fourteen (14) years. This evidence was corroborated by that of **PW3 NGASIKE JOHN KIONG'A** a clinical officer who produced the medical report on behalf of the maker where the age of the complainant was confirmed to be fourteen (14) years. The trial court found as a fact that age assessment was conducted and the right age found to be fourteen (14) years. Based on the said P3 form and age assessment report, produced by consent, I am satisfied that the complainant's age was proved beyond any reasonable doubt and find no fault with the trial court's determination.

#### **Whether the prosecution case was proved beyond reasonable doubt**

10. It was the evidence of **PW1** that the Appellant who was known to her approached her with a marriage proposal and on 2/1/2017 sent his brother to her home who called her. She proceeded to meet him in a bush where they had sex for about one hour. She was able to identify the Appellant at the dock and stated that on 28/3/2017 when she was about to go to the home of the Appellant so that they could engage in sex, **PW2 LT** the mother of the complainant was informed that her clothes had been taken by another boy who was carrying them inside a bag and when the Appellant discovered that their design had been discovered, he ran away to town where he was apprehended and admitted that he wanted to marry the complainant. In cross-examination, she stated that they took action against the Appellant when he ran away with the complainant's clothes.

11. **PW2** produced medical report on behalf of **MR. KEMBOI BEN** by consent confirming that the complainant's hymen was perforated and concluded that she had sexual intercourse. The Appellant consented to the production of the said medical report and effectively cross-examined on the same and therefore find no merit on his submission that the same was not properly tendered in evidence.

12. When put on his defence the Appellant stated that on 28/1/2017 which was on a Saturday he left at 7.00 a.m. to pick his Baptismal card from the SDA church in Nakwamekwi and on reaching Juluk met **PW2** who was his employer and who had not paid him and he had reported him to the police so he demanded for his money and they went to the police station where they asked the police to arrest him on a charge of defilement.

13. In convicting the Appellant the trial court purportedly convicted the same based on circumstantial evidence to wit that he was found with the clothes of **PW1** in a bag as he wanted to take the same as a wife. Whereas there is no requirement for corroboration in respect of sexual offence and whereas the complainant's evidence seems credible, upon analyzing the evidence tendered it is clear that the trial court in dismissing the Appellant's defence shifted the burden of proof upon him by stating that it was upon the Appellant to prove the relationship of employment between himself and **PW2** and therefore fell into error.

14. Based upon the Appellant's defence before the trial court the fact that the prosecution did not call very vital witnesses which included the arresting officer to show how and where the Appellant was arrested and further the prosecution failed to call one **Simon** who brought the Appellant from town and having noted the contradiction between the evidence of **PW1** and **PW2** as to the state of the occurrence of the defilement, I would agree with the submission by the Appellant that there is a doubt raised in the prosecution case the benefit of which should have been given to the Appellant by the trial court.

15. This being a criminal matter the prosecution is expected to prove its case beyond any reasonable doubt and as I have stated herein the inability of the prosecution to call vital witnesses only leads to one logical conclusion that had they been called their evidence would have been adverse to the prosecution case as per the holding in **BUKENYA v UGANDA**.

16. On the issue as to whether the Appellant was accorded adequate time to enable him prepare for his defence, from the records before me the same first appeared in court on 2/2/2017 when a plea of not guilty was entered and the same admitted to bond. On 2/3/2017 when the matter was scheduled for hearing the Appellant informed the court that he had not been supplied with witness statements. It was only on 15/6/2017 when the said statements were supplied and the hearing commenced on 16/8/2017. I therefore find and hold that the Appellant had adequate time to prepare for his defence and therefore his constitutional right to fair trial were not violated.

17. Having analyzed the evidence tendered before the trial court and the submissions by both the Appellant and the prosecution I have come to the unfortunate conclusion that whereas there is evidence that the complainant was defiled, there remains doubt in the prosecution case as to whether it was done by the Appellant since there is a gap as to how he was arrested raising probable reason that his defence might be valid. The trial court did not give thought to the said defence and the prosecution did not dislodge it in cross-examination.

18. I therefore find merit in the appeal herein and hold that his conviction was not safe. The appeal is hereby allowed both on conviction and sentence which I hereby quash and set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

19. The prosecution has right of appeal.

**Dated, delivered and signed at Lodwar this 8<sup>th</sup> day of November, 2018.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ *for the Respondent*

\_\_\_\_\_ *for the Appellant*

*Accused -* \_\_\_\_\_

\_\_\_\_\_ *- Court assistant*