REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 6 OF 2017

JOHN RUTO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable H. O. Barasa in Eldoret Criminal Case No. 278 of 2016 dated 18th January, 2017)

JUDGMENT

John Rutto, the appellant herein, was charged in the lower court with the main count of defilement contrary to *Section 8(1)* as read with *Section 8(3)* of the *Sexual Offences Act No. 3 of 2006.*

The particulars of this offence are that on the 1st day of January, 2015 at [Particulars Withheld] village in Kocholwa Location, Keiyo south district, within Elgeyo Marakwet County, the appellant intentionally and unlawfully caused his genital organ (penis) into the genital organ (vagina) of *J M*, a girl aged 8 years.

The alternative count preferred is of indecent act, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006.*

The particulars of this offence are that on the 1st day of January 2016 in [Particulars Withheld] village, Keiyo South District, within Elgeyo Marakwet County, the appellant unlawfully and indecently caused his genital organ (penis) to come into contact with the genital organ (vagina) of *J M*, a girl aged 8 years.

The complainant in this case was born on 25th April, 2007, as per her clinic card. By the time of the alleged offence, which according to PW-2 was on1st January, 2016, the complainant was aged 8 years. However, in her voir dire she said she was 7 years old. Her evidence is that at the time of the alleged offence she was a standard 1 pupil at [Particulars Withheld] Academy. There is a day the mother (PW-2) sent her for milk at around 8.00 a.m. As she was going, Bagai followed her. He took her into the forest where he did tabia mbaya to her. He removed her pant. He put his chuchu into her susu. She felt pain. On 9th January, 2016 she reported the incident to her mother. The mother examined her and found that she had been defiled. She wanted to report to the Nyumba Kumi chairman, but he was not there on that day. She found him on 10th January, 2016 and made the report. He advised her to take PW-1 to Kacholwa assistant chief's office. Complainant's father learnt of the incident. He reported it to the Assistant chief (PW-5) on 14th January, 2016. PW-5 directed PW4 and *APC Wanjohi* to go and arrest the suspect (appellant). They went to Kabore village where they found the appellant already held and tied with ropes by members of the public. They untied him and re-arrested him. He was taken to the D.O's office.

The complainant was examined by *Dr. Yatich* at Moi Teaching and Referral Hospital on 16th January 2016. Her P-3 form was however filled on 18th January, 2016. She had however been treated at Kamosur clinic. Her hymen was broken but the same had healed. There was no discharge. HIV and VDRL test were negative. There was evidence of hymenal tears at position 6 O'clock. Other parts of the body were okay. PW-3 said there was evidence of penetration. PW-6 investigated the case and had the appellant charged with the offences.

The appellant in his defence stated that he lives at Setano village. He is a farmer and knows nothing about the complainant in this case. Her father hit him on the head and then framed him up with the offence. He caused his arrest on 18th January, 2016. He did not defile the child. He was not at the scene of the alleged crime on the material day. All the allegations against him are false.

The trial court evaluated the evidence, found him guilty of the offence in the main count and sentenced him to serve life imprisonment. The appellant dissatisfied with the said conviction and sentence lodged this appeal on the grounds:-

1. The penetration was not proved by credible means.

2. That there was variance between particulars of the charge and evidence tendered by prosecution witnesses.

3. That age of the alleged victim was not proved, the child health card brought bears different names from those of the complainant.

4. That crucial witnesses were not brought to clear doubts

5. That the trial magistrate erred in law and facts by convicting him and meting a harsh sentence in all circumstances instead of his acquittal.

6. That the prosecution case was not proved beyond reasonable doubts.

7. That PW3 (purported physician) was incompetent given the prevailing circumstances of this case.

8. That the appellant was prejudiced by the language used during trial.

9. That life imprisonment is brutally unconstitutional.

10. That appellant was not granted opportunity to sum up submissions.

11. That accused was improperly identified as "Bagai" and not "John Rutto" which occasioned incurable defect to his trial.

12. That section 36 Sexual Offences Act No. 3 of 2006 was not complied with.

The appellant made written submissions during the hearing of the appeal, while the state prosecutor made oral. I have evaluated the evidence, judgement, sentence, grounds of the appeal and the said submissions.

Before I get down to the serious issues emerging out of this appeal, I wish point out some procedural errors which were occasioned during the trial and which the court and the prosecutor ought be keen about.

The charge reads defilement, contrary to *Section 8(1)* as read with *Section 8(3)* of the *Sexual offences Act No. 3 of 2006*. The particulars of the offence and the evidence shows that the complainant was then aged 8 years. The right *Section* should have been *8(1)* as read with *8(2)* of the *Sexual Offences Act.* Given that the appellant was sentenced to life imprisonment, the sentence must have been under *Section 8(2*) and not *8(3)* as carried in the charge sheet.

The particulars of the offence also reads that the alleged offence was committed on the 1st day of January 2015. However, the adduced evidence shows it was on the 1st day of January 2016. Though these errors are curable, they are not admirable and should be avoided.

PW-5 who is the assistant chief Kocholwa sub location was not cross examined by the appellant. The record does not show that the appellant was given a chance to cross examine him and indicated that he had no issue for cross examination. However there is re-examination. It is questionable where re-examination is coming from. The procedure offends the provision of *Section 146(1)* of the *Evidence Act*. Likewise, PW-6 is recorded to have been cross examined by the accused twice. Towards the end of the first recorded cross examination the way what the witness said is recorded raises doubts as to whether it arose out of cross - examination. It is recorded as follows:-

> ***"We arrested him. We later took him to the police station. The person we arrested is over there. Accused identified. I did not know him prior to the incident".*** This appears to have come from evidence in chief though at the beginning it actually appears as cross-examination. This is a serious mix up, likely to affect the weighing of evidence.

Having observed that, I now turn to the crucial issues arising out of this appeal, which is of penetration and the organs used. The words used by the complainant in her evidence in chief are that, "Bagai followed me. He then took me to the forest where he did tabia mbaya to me. He removed my pant. He did tabia mbaya to me. He put his chuchu into my susu. I felt pain". The phrase "Tabia mbaya" and the organs or objects referred to by the complainant as chuchu and susu, are not used in the Sexual Offences Act. They therefore needed be explained to objectively to meet the meaning given in the Sexual Offences Act. "Tabia Mbaya" in English is Bad manners which refers to discourteous manners that ignores acceptable social usage. Even in it natural common usage by children and adults in Kenya is not restricted to sexual intercourse. "Chuchu" and "susu" where they are not defined and or explained can mean anything.

The offence of defilement is defined under *Section 8(1)* of the *Sexual Offences Act*. It is where a person commits an act which causes penetration with a child. Where there is no dispute like in this case that the victim was a child, of paramount consideration is whether there was penetration. This word "penetration" under *Section 2(1) (d)* of the *Sexual Offences Act*, means the partial or complete insertion of the genital organs of another person into the genital organs of another person. It may still not be clear without understanding of what "genital organs" are. Under *Section 2(1)* of the said *Act*, they include the whole or part of male or female genital organs and for purpose of the Act also anus. Oxford Concise Dictionary defines ***"genitals"*** as relating to human and animal productive organs. They can be internal or external and I am certain the sexual offences Act refers to only the external genital organs of which are a male penis and a female vagina, just as they are described in the particulars of the offence in the main count. The offence of defilement calls upon the prosecution to prove beyond reasonable doubt that a male penis partially or fully penetrated the victim's vagina and or anus. The evidence of the complainant does not establish that beyond reasonable doubt. The offence of sexual assault under *Section 5(1)* of the *Sexual Offences Act* also has penetration as an ingredient. The difference between it and defilement being that for sexual assault a sexual organ is penetrated with an object and or by another body organ other than a sexual organ. It therefore follows that existence of evidence of penetration alone is not by itself enough to lead to a correct finding that there was defilement.

PW-3, the doctor who gave evidence and produced the P-3 form is not the doctor who examined the complainant and filled it. Though the witness said there was evidence of penetration, the doctor who filled the P-3 form did not specifically find so. The produced P-3 form shows the doctor after making observations and recording them did not draw an expert opinion about it. The only observation he made is that the victim had healed hymenal tear at position 6 O'clock.

The mother (PW-2) who said she examined her on 9th January, 2016 did not disclose what she observed. She simply told the court that she found she had been defiled. ***"Defilement"*** is a technical term and witnesses should just describe what they witnessed and leave the court to draw conclusion as to whether it amounts to defilement or otherwise.

Broken hymen as was rightly observed in the Canadian case of the ***Queen –vs- Manuel Vincent Quitanilla, 1999 ABQB 769***, of which the Court of Appeal relied on in one the case of ***PKW –vs- Republic, HCCRA No. 331 of 2008,*** on its own is not adequate evidence of penetration.

The court observed that:-

> ***"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, Masturbation, injury and medical examinations can also rapture hymen. When a girl engages in vigorous physical activity like horse back riding, bicycle riding and gymnastics, there can also be natural tearing of the hymen".***

It therefore follows that without reliable evidence connecting the rapture of hymen to the preferred offence, the rapture by itself is not enough evidence of penetration. In this case penetration in relation to the offence of defilement was not proved. The facts even if taken as true do not draw a line between the offence of defilement and sexual assault.

The prosecution did not therefore prove the offence as charged beyond reasonable doubt. On the ground the appeal succeeds. The conviction is quashed as well as the sentence. The appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **13th** day of **November,** 2018

In the presence of:-

(1) The appellant

(2) Ms Mumu for State prosecutor

(3) Ms. Ann - Court clerk