



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 213 OF 2016**

**BETWEEN**

**PETER ALLAN KUNDU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number 349 of 2016*

*in Principal Magistrate's Court at Sirisia by Hon. L.Kiniale (SRM) on 18.10.16)*

**JUDGMENT**

**The Trial**

1. The Appellant herein **PETER ALLAN KUNDU** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of **the Act**. The particulars of the main count are that

***On 15th December, 2015 at Sirisia location within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of SM a girl aged 8 years***

**Prosecution case**

2. The prosecution called a total of five (5) witnesses in support of its case. PW1, the complainant stated on the material date at about 5.00 pm, she was going to market when she met the appellant, whom she referred to as Mwalimu Allan who sent her to the house of one mad man called J to collect something for him. PW2 JMN, the complainant's father stated that he met complainant who looked shaken running at about 7.30 pm on the material day. That he called his wife who on checking the complainant's private parts said that she had been defiled as a result of which she was escorted to hospital and later to the police station where complainant said that she was defiled by teacher Allan who was their neighbor. PW3 JK, the complainant's mother stated that after checking on the complainant's private parts and noticing that she had been defiled asked her who was responsible and she said that it was Mwalimu Allan who was their neighbor. PW4, PC Naftali Dado received complainant's report on 16.12.15 but could not trace the appellant immediately because he had run to Uganda but was later arrested there and handed over to Kenya police and was subsequently charged. PW5 Simon Kiveu, a clinical officer treated the complainant on 16.12.15 and prepared treatment notes. On 17.12.15, he filled a P3 form which shows that complainant had a broken hymen with fresh bleeding from lacerations on the vaginal walls. The witness also produced complainant's age assessment report showing that she was approximately 8 years old.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant gave an unsworn defence raised an alibi that he was in Uganda and later Sudan when in the month of December, 2015 when the offence is alleged to have been committed.

4. *In a judgment* delivered on 18th October, 2016, appellant was convicted and sentenced to life imprisonment.

**The appeal**

5. Aggrieved by this decision, the appellant lodged the instant appeal on 1st November, 2016. From the 8 grounds of appeal and written submissions filed on 25th April, 2018, I have deduced the following issues for determination:-

1. ***When the offence was committed***
2. ***When was complainant taken to hospital***
3. ***Where was the offence was committed***

6. When the appeal came up for hearing on 5.11.18, Mr. Juma appearing for the appellant chose to wholly rely on the grounds of appeal and also on the written submission in which the grounds of appeal are reiterated.

7. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that the minor errors that the appellant relies on are not fatal to the prosecution case.

#### **Analysis and determination**

8. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

***“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

9. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and on behalf of the state.

11. In dealing with this appeal, I will separately address the 2 grounds summarized above.

12. In **Dickson Elia Nsamba Shapwata & Another V. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view the Court of Appeal of Kenya respectfully adopted in the case of **Philip Nzaka Watu v Republic [2016] eKLR** and stated thus:-

***“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”***

#### **1. When was the offence committed?**

13. The first issue that the appellant complains regards the date when the offence was committed. The charge sheet indicates that the offence was committed on 15.12.15. Although the complainant testified that the offence was committed on 17.12.15, there is evidence from her parents that she reported the offence to them on 15.12.15, on the same day that it was committed. Granted that the complainant was a child of tender years who was 8 years, it would not be expected that she would be precise with dates.

#### **2. When was complainant taken to hospital?**

14. The second issue that the appellant complains about relates to the date when the complainant was taken to hospital. The treatment notes and the P3 form demonstrate that complainant was taken to hospital on 16th December, 2015 and not 15th December, 2015. The evidence contained in the written documents cannot in my considered view be contradicted by oral evidence. The fact that complainant's parents told court that complainant was taken to hospital on 15.12.15 whereas the clinical officer stated that she was taken to hospital on 17.12.15 is in my considered view a minor contradiction that has not been demonstrated to have misled the appellant or caused him any prejudice. This also applies to the date complainant was taken to the police station which is confirmed by the P3 form and complainant's parents to have been on 15.12.15 and not 16.12.15.

#### **c. Where was the offence committed?**

15. Complainant testified that the offence was committed in the house of one mad man called J. PW2, the complainant's father told court that complainant told him that the offence was committed in the house of J. The appellant's contention that complainant's father told court that complainant was defiled in an incomplete house is not supported by the evidence on record and it is rejected.

14. Appellant has not stated that he was deceived or misled by the anomalies of dates. The errors with regard to the dates are in my view minor and insignificant. (See case of **Boniface Khayumba Katumanga -Vs- R [2014] eKLR, Peter Ngure Mwangi -Vs- R [2014] eKLR and Michael Thimani Kaniaru -Vs- R [2009] eKLR**). They are curable under **Section 382** of the **Criminal Procedure Code** which provides as follows:

***"Subject to the provisions hereinbefore contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint summons, warrant, charge, proclamation, order, judgment or other proceedings under this Code, unless the error, omission, or irregularity has occasioned a failure of justice."***

15. Having said that, it is now my duty to consider if the prosecution was proved beyond any reasonable doubt. In order to consider this issue it is important to note that key ingredients necessary to establish a sexual offence under the Sexual Offences Act are as follows:

**i. Age of the victim.**

**ii. Penetration.**

**iii. Identity of the offender**

16. To begin with the question of complainant's age, PW5 Simon Kiveu, a clinical officer produced complainant's age assessment report showing that she was approximately 8 years old.

17. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail:-

***"partial or complete insertion of a genital organ of a person into the genital organ of another person."***

17. This was well captured by the learned trial magistrate who stated that the complainant's evidence that the appellant had inserted his penis in her vagina was corroborated by the evidence contained in the P3 form which shows that complainant had a broken hymen with fresh bleeding from lacerations on the vaginal walls.

18. The question of identity was not contested. Complainant told the court that she knew the appellant as Mwalimu Allan. Her parents confirmed that the appellant was well known to the complainant since he was their neighbour with the father referring to him as Teacher Allan and the mother referring to him as Mwalimu Allan. The offence is alleged to have taken place at about 5.00 pm and there was therefore no possibility of mistaken identity. From the totality of the evidence on record, I have come to the conclusion that the appellant was satisfactorily and more reliably recognized by the complainant since he was not a stranger to her.

19. The trial court rightfully considered the provisions of **Section 124 of Evidence Act** and warned itself that a court in such offences such as this can convict on the basis of the evidence of a complainant alone if that is the only evidence available and after considering the entirety of the evidence concluded that it believed that the complainant was speaking the truth.

### **Disposition**

20. In conclusion I find that all the three necessary ingredients of the offence under which the Appellant was charged were established and proved beyond reasonable doubt. In view of the reasons set out above, I find that the trial court was right in arriving at the decision it did. The age of the minor clearly established that the offence committed fell within **Section 8(2) of the Sexual Offences Act No. 3 of 2006** which prescribes a life imprisonment sentence upon conviction. In the premises, I find no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

**DELIVERED AND SIGNED AT BUNGOMA THIS 9<sup>th</sup> DAY OF November 2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants - Ribba & Diannah**

**Appellant -**

**For the Appellant -**

**For the State - Mr Oimbo**