



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 5 OF 2018

KEVIN WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable H.M Nyaberi in Iten Criminal Case No. 19 of 2015 dated 31st January, 2018)

JUDGMENT

KEVIN WANJALA, the appellant herein, was charged in the lower court in the main count with the offence of defilement, contrary to *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence being that on the 3rd day of December, 2014 at [particulars withheld] village, [particulars withheld] Sub location, Kiptuilong location, in Elgeyo Marakwet County, the appellant intentionally caused his penis to penetrate the vagina of *BW*, a child aged 10 years.

In the alternative he was charged with the offence 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 this offence are that on the 31st day of December 2014 at [particulars withheld] village, [particulars withheld] Sub location, Kiptailong location in Elgeiyo Marakwet County, the appellant intentionally touched the vagina of *BW*, a child aged 10 years with his penis.

The prosecution case is that the complainant in this case, who gave evidence as PW-3, was born on 2nd December, 2004. A birth certificate to the said effect was produced as an exhibit. At the time the offence was allegedly committed, that is on 31st day of December 2014, she was aged 10 years. She was schooling at [particulars withheld] Primary school in class 6. She was living at [particulars withheld] centre. On 31st December, 2014 she was in the house with PW-1 who is her cousin, *BM* her younger sister, and the appellant who was their herdsman. Her mother, the PW2 in this case had travelled to Nairobi. At about 10.00 p.m they went to sleep. The cousin slept in her bed alone while the complainant shared a bed with her younger sister. The appellant was left watching Television set. The door to the bedroom was not fastened but just shut back. The complainant later heard the appellant calling her. He called her three times. When she rose she found him standing next to her. He held her right hand and dragged her out of the house, behind, next to her mother's bedroom.

While there the appellant removed her long trouser and pant completely. He then removed his trouser. He drew out his penis and inserted it in her vagina while they were standing. She felt pain as he penetrated her. At round that time PW-1 felt the urge for a short call. She rose to answer to it. She noted the complainant was missing. She went outside and found her and the appellant in the act. She did not disturb them as she feared the appellant could escape. There was electric light. She retreated into the house. After a short while complainant also got into the house and slept.

PW-1 told her mother, *CN* about the incident and on 7th January, 2015 the said *CN* told PW-2 about it. PW-2 closed her business and reported the matter at Tambach police station. She was assigned two police officers who accompanied her home where they arrested the appellant. The complainant went with them to the police station where she was issued with a P-3 form. She was examined by PW-4 on 7th January, 2015. This was 8 days after the alleged incident. She had taken bath and changed her clothes. The head, neck, thorax, stomach, upper limbs and lower limbs had no injuries. The labia minora had redness but there were no bruises. Labia majora was normal. The hymen was

broken. Anal region was normal. There was no discharge. HIV test was negative and urine test normal. The witness was of the opinion that there was penetration. PW-5 investigated the matter and had the appellant charged with the offence.

The appellant in his defence stated that he was employed by the mother of the complainant as a herdsman. On 25th December, 2014 he

wanted to go home and told her that. She however persuaded him not to go. He was adamant about going. PW-2 told him that she'll be going to Nairobi. He told her on 1st January, 2015 he'll go home. However on 1st January 2015 he did not go home. He went grazing cows. The following day PW-2's husband called him and persuaded him not to go home. He was angry but continued working. On 5th January, 2015 PW-2 paid him 2,500/-. He told her he wanted to go home. On 7th January, 2015 the police went and arrested him. They alleged on 31st December, 2014 he defiled the complainant. He denied the allegation.

The trial magistrate weighed the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve life imprisonment.

Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that:

- (1) The complainant's age was not proved by any credible means.
- (2) The prosecution case is inconsistent and uncorroborated.
- (3) His culpability was not established.
- (4) He was unrepresented during trial.
- (5) Penetration was not proved.

I have considered the charge, evidence adduced, judgment passed, sentence, grounds of appeal and submissions by both sides.

This is a case where we have two eye witnesses, the complainant herself and PW-1 who witnessed the act constituting the offence. The evidence of these two witnesses agrees closely in all material particulars leaving no doubt that they were truthful in what they told the court. The evidence was not effectively challenged during cross examination by the appellant. The evidence is to the effect that the appellant is the real culprit and he penetrated the complainant. The evidence on penetration is further corroborated by the evidence of PW-4 who noted the complainant's hymen was broken and the labia minora had redness. He concluded that she had been penetrated.

The appellant's defence cannot be true. If he was a good worker and the employer really wanted to keep him, there is no way she would have fixed him as by doing so she was definitely going to lose him as a worker. If the case was fabricated, PW-2 would most likely than not have placed herself as an eye witness rather than using PW-1. The evidence is logical and natural, lacking in facets of a fabricated or cooked story.

A birth certificate was produced that doubtlessly shows by the time of the offence the complainant was aged 10 years. The sentence of life imprisonment was appropriate given the age. The decision by the trial court was therefore correct in terms of conviction and sentence and this court finds no cause to interfere with it. The appeal is accordingly dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of December, 2018

In the presence of:-

The appellant

Ms Mumu for state

Mr. Mwelem Court clerk