



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 3 OF 2018

RE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Sexual Offence Case No. 59 of 2017

by the Senior Resident Magistrate - Hon. C.M. Wekesa

delivered on 3rd August, 2017 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the night of 20th and 21st November 2016 at [Particulars withheld] area in Turkana Central Sub-county within Turkana County intentionally caused his penis to penetrate the vagina of **EA** a child aged six (6) years old.

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 night of 20th and 21st November 2016 at [Particulars withheld] area in Turkana Central sub-county within Turkana County intentionally touched the vaginal anus of **EA** a child aged six (6) years old.

3. He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-

a) He was framed of the charges as a result of an existing grudge.

b) The prosecution evidence was not corroborated.

c) Conditions prevailing was not ideal for identification.

SUBMISSIONS

4. When the appeal came up for hearing before me the Appellant who was unrepresented filed what he termed substituted grounds of appeal and written submissions which he relied upon while Mr. Mong'are appeared for the Respondent and opposed the appeal.

5. On behalf of the Appellant, it was submitted that the prosecution evidence against him was not credit worthy and that the conditions prevailing was not ideal for positive identification as the intensity of the moon light was not stated. It was stated that the prosecution case was full of contradictions and that upon his arrest no identification parade was conducted.

6. On behalf of the Respondent it was submitted that the Appellant was convicted based on the medical report on record and the evidence of **PW1**. It was submitted that this being a sexual offence there is no need for corroboration. It was submitted that the Appellant was positively identified since the moon light was bright enough.

7. 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**.

8. The prosecution case against the Appellant was that **PW1** who was found not to understand the meaning of taking oath testified that as she was sleeping the Appellant went and carried her away to a tree where he defiled her. She stated that the Appellant removed his shorts and inserted his private part inside her vagina and she experienced pain which made her cry attracting **PW2**. She stated that she looked at the face of the Appellant as there was moon light.

9. **PW2** stated that she was sleeping with the children when the Appellant came and carried away **PW2** who she heard crying. When she responded to the cry she found the Appellant on top of the complainant defiling her. When the Appellant saw her he ran away. She knew the Appellant as her uncle's son and used to stay with him. After committing the offence the Appellant disappeared leaving behind his phone and wallet.

10. **PW3** was informed of the incidence by **PW2** and assisted in the recovery of the Appellant's phone and purse with Kshs.350 and assisted in the arrest of the Appellant. **PW4** produced the P3 form on the complainant who had sustained four degree tear on the external genitalia and recto vaginal fistula confirming a forceful penetration. **PW5** received the report and took the complainant to Lodwar Hospital in critical condition and recorded statements from witnesses. The Appellant was later on arrested by **PW3** with the help of the **AP Officers** and **N.P.R.**

11. When put on his defence the Appellant stated that on 19/11/2016 he was from Loyangalani riding a motor boat and proceeded to Nadoto and slept until the following morning when he went to see the chief distributing money to the elderly. He then saw a young man with a girl. He was told to remove his shoe that resembled the footprint they had followed of the person who had committed the offence. He was arrested and they picked his mobile phone and wallet. On 5/12/2016 he was charged.

12. From the record and submissions herein I have identified the following issues for identification in this appeal:-

a) Whether the Appellant was positively identified?

b) Whether the prosecution case against the Appellant was proved?

13. It is clear from the record that the Appellant was identified through recognition by **PW2** who went to the scene upon the complainant screaming out of pain. She recognized the Appellant who was her uncle's son. The complainant **PW1** was also able to identify the Appellant using the bright moon light. He was also placed at the scene through his mobile phone and wallet which were recovered thereat. **PW3** was able to trace the footsteps of the Appellant. It is therefore clear that the Appellant was positively identified and there was no mistaken identity.

14. On the poof of the prosecution case **PW2** was very clear on what had happened to her. Being a child of tender age there is no way she would have made up the story of the Appellant putting his private part in her vagina. The medical report confirmed that the complainant was defiled thereby corroborating the evidence of **PW2**, **PW2** and **PW3**.

15. I therefore find no merit in the appeal herein which I hereby dismiss and affirm the trial court's finding on both conviction and sentence.

16. The appellant has right of appeal.

Dated, delivered and signed at Lodwar this 5th day of December, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*