



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT LODWAR**

**CRIMINAL APPEAL NO. 46 OF 2017**

**STEPHEN EBEL EKIDOR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in criminal case No.27 of 2017*

*by the Senior Resident Magistrate – Hon C M Wekesa*

*delivered on 19<sup>th</sup> September, 2017 at Lodwar)*

**JUDGMENT**

1. The appellant **STEPHEN EBEL EKIDOR** was charged with the offence 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 which were that on the 18<sup>th</sup> day of March, 2017 within Turkana County intentionally caused his penis to penetrate the vagina of **CAL** a child aged ten 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 18<sup>th</sup> day of March, 2017 within Turkana County intentionally touched the breast/vagina of **CAL** a child aged ten years with his penis.

3. He pleaded not guilty to the said charge, was tried, convicted and sentenced to serve life imprisonment. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds:-

*a) The trial court erred in law by failing to evaluate the whole evidence before the court.*

*b) The prosecution case was full of contradictory testimony in material particulars and therefore the case was not proved beyond reasonable doubt.*

*c) His defence was rejected contrary to section 169 (1) of the criminal procedure code.*

4. When the appeal came up for hearing before me, the appellant who was unrepresented filed written submissions which he relied upon while Mr. Morngare for the office of the Director of public prosecution's opposed the appeal.

**SUBMISSIONS**

5. On behalf of the appellant, it was submitted that he was only charged with the offence because of an existing grudge between his family and that of the complainant. He submitted further that the conditions prevailing were not suitable for his identification by the complainant whose evidence was that she was attacked from behind and lost consciousness only to gain memory and found her private part wet with penetration together with bodily harm around her head.

6. He submitted further that the prosecution case was full of material contradiction and that there was no first report made to the authorities by the complainant. He stated that there was no identification parade conducted as the complainant evidence was that she did not know him before the attack. He submitted that there was a possibility of mistaken identity as the attack allegedly took place on a public path where everyone is entitled to pass. He stated that the identification parade conducted was faulty as the complainant was forced to identify him before the identification parade was conducted.

7. He submitted further that there was no primary eye witness to corroborate the evidence of the complainant and that he was only convicted on the circumstantial evidence of fabricated foot prints which was followed by PW2 and PW4 whose evidence was contradictory. He submitted further that there was contradiction between the testimony of PW1 AND PW4 as regards the clothing he was wearing and those recovered by PW4 thereby raising doubt in the prosecution case. He stated finally that PW2 deceived the trial court that he admitted to him having defiled the complainant which evidence was not corroborated. He stated that he was not medically examined together with the complainant so as to link him with the commission of the offence.

8. On behalf of the prosecution it was submitted that the trial court fully evaluated the evidence before the court which evidence was not contradictory as submitted by the appellant. It was submitted that the appellant defence was fully considered and rejected by the trial court. On identification it was submitted that the appellant was properly identified at the scene and at an identification parade conducted at the police station. Finally it was submitted that PW2's evidence corroborated the fact that the complainant sustained injuries and was taken to the hospital by PW3 where PW5 confirmed the said injuries. PW4 followed the foot prints to the home of the appellant and therefore the prosecution case was proved beyond reasonable doubt making the appellant conviction safe.

### **EVALUATION OF THE EVIDENCE**

9. This being a first appeal, the court is under a duty to reevaluate the evidence tendered before the trial court to come to its own conclusion thereon while giving allowance to the fact that it did not unlike the trial court have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO –V – REPUBLIC (1972) EA 32** which has been applied with approval in several court of Appeal case.

10. **PW1 CAL** A minor having been found capable of understanding the meaning of oath stated that she was in class three at the time but did not know her age. On the material day she was coming from the river heading home when the appellant attacked her caused the bucket she was carrying to fall down hitting her face and lost consciousness. When she gained consciousness she found herself bleeding from her private part and head. She was rescued by a lady whose name she could not remember. She was later on taken to hospital at Kerio before being referred to Lodwar referral hospital. It was her evidence that she did not know the appellant before then but saw him the following day after his arrest, she identified him at the dock as the person who was following her when she was coming from the river and confirmed having identified him at an identification parade. In cross-examination she stated that she saw the appellant when he approached her and after passing her came back and attacked her. It was her evidence that the appellant was wearing a long sleeved shirt and trouser.

11. **PW2 JEL** a teacher at [particulars withheld] Primary School where the complainant was a pupil confirmed her age as ten (10) years in class three. It was his evidence that he had known the appellant for three years. It was his evidence that on 18/3/2017 at 9.00pm while in Lodwar he was called on phone by **CE** with information of the defilement of PW1 and that people were following the foot prints of the attacker. They went to the Kerio health centre where the complainant had been admitted and found her with swollen right eye and bruises on the neck. He proceeded home where he was informed that the attacker had been arrested and was at the home of the village elder where he saw him. The appellant later on escaped from the chief's office and he mobilized five youths who managed to apprehend him. It was his evidence that when he asked the appellant why he had defiled the minor the same he answered in Turkana "**it is only the day that had reached**". He stated that there was no grudge between him and the appellant.

12. **PW3 SAN** an aunt of the complainant who was staying with her confirmed her age to be ten years. She confirmed having known the appellant since childhood. It was her evidence that on the material day the complainant had gone to the river but did not come back home. She was later brought by Engolio having been beaten with bruises, bleeding nose and bleeding from her private parts. When she asked the complainant who had beaten her she stated that she did not know him but he was a man. In cross-examination she confirmed knowing the appellant as the son of Ekidor whose mother stays at Enangolupus.

13. **PW4 PHILIP NKEDMOKIGELAN** a KPR was at the market on 18/3/2017 at 9.30am (sic) when he heard noise from the village. When he proceeded to the scene he saw the complainant who had injuries on her head and private part. He undertook a search and followed the foot prints upto the scene where he saw blood and foot prints belonging to the appellant and prints of rubber shoe which they followed upto the appellant mother's home; where the sister of the appellant confirmed that the foot prints were his and that he had changed his clothes which were wet. He arrested the appellant whom he took to the chief's camp where he admitted having committed the offence.

14. **PW5 BEN** a clinical officer at Lodwar County and referral hospital produced the P3 form on the complainant confirming her age to be ten years old, the eyes of the complainant was swollen and red, lateral aspect of the neck were tender, blood stains were seen in the external genitalia, tears were seen on the labia majora and labia minora, vaginal wall had bruises and cervix was also bruised and edema. As a result of the said examination he confirmed that penetration took place with injuries classified as harm. On cross-examination he stated that he examined the complainant after three days having been initially attended to at Kerio hospital.

15. **PW6 PC ELVIS OPUKE** testified that the appellant was brought to the station by members of the public on allegations of defilement. He filed P3 form and interviewed and recorded statements from the witnesses as the Investigating Officer. On 20/3/2017 he conducted identification parade where the complainant positively identified the appellant. In cross-examination he confirmed that the appellant changed the clothes he was wearing since he knew that he was being trailed.

16. When put on his defence the appellant stated that on 18/3/2017 he was from home heading to the lake to sell charcoal which he did. In the evening at 10.00pm people he did not know came to his home, woke him up and beat him before tying his hands and put him on a motor cycle to the police station before being taken to court and charged with the offence of defilement. In cross-examination he stated that he did not know the people who arrested him.

### **ANALYSIS AND DETERMINATION**

17. From the proceedings, submissions, and the ground of appeal I here identified the following issues for determination:-

#### **a) Whether the appellant was positively identified**

**b) Whether the prosecution case was full of contradiction**

**c) Whether the prosecution case against the appellant was proved beyond reasonable doubt.**

18. On the issue of identification it was the complainants evidence that she did not know the appellant before the date of the assault, however as she was from the river he passed her on the way only to turn back and attack her causing he to lose consciousness. After the appellant was arrested, she was able to positively pick him out in an identification parade which was properly concluded and upon being picked out the appellant signed the identification parade forms indicating that “it wasn’t me”. It was the complainant evidence that when the appellant grabbed her hand there was adequate light as the sun was setting and she was able to see him when he passed her before turning back after short while, she was able to describe the clothes the suspect was wearing as a long sleeved shirt and trouser.

19. The Court of Appeal in **DAVID MWITA WANJA & 2 OTHERS – V – REPUBLIC CRIMINAL APPEAL NO. 117 OF 2005 (2007) eKLR** had this to say on the issue of identification parade.

*“ the purpose for and the manner in which identification parade ought to be conducted have been subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessors of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instruction contained in police force standing orders, see REPUBLIC – VS – MWANGO S/O MANAA ( 1936) 3 EACA 29. There are a MYRIAD other decisions on various aspects of identification parade since then and we need only cite for emphasis JIHIA – V – REPUBLIC (1986) KLR 422 where the court stated at page 424;*

**It is not difficult to arrange well-conducted parade. The order is clear. If properly conducted especially with an independent person present looking after the interest of a suspect, the resulting evidence is of great value put if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade it will be concluded by the witness that the man in the dock is the person accused of the crime and it will be difficult if not impossible, for the witness to dissociate himself from his identification of the man on the parade and reach back to his impression of the person who perpetrated the alleged crime**

20. There was no evidence tendered before the trial court to show that the parade was not properly conducted neither did the appellant challenge the production of the identification parade forms into evidence. In addition to the identification parade the appellant was positively identified by PW4 who arrested him having followed his footsteps from the scene to his mother’s home and therefore positively placing the same at the scene. It is therefore clear that the appellant was positively identified and find no merit on this ground of appeal.

21. The appellant in his submissions stated that he was only framed with this offence as a result of an existing grudge between the family of the complainant and his family however from the records of proceedings, it is clear that this appellant did not put the issue of the grudge to the witness in cross-examination. PW2 in his evidence in chief stated that there was no grudge between him and the appellant which evidence was never controverted by the appellant. The appellant in his defence did not raise the issue of the grudge and therefore find no merit on his ground of appeal.

22. On the issue of contradiction in the prosecution evidence, upon perusal of the record of appeal it is clear that any contradiction therein was of very minor nature which did not go to the root of the prosecution case. This being a charge of defilement, where there is no requirement of corroboration of the evidence of the complainant, I have noted that there were strong circumstantial evidence tendered which corroborated the prosecution case and therefore find the prosecution case was proved beyond reasonable doubt and the appellant conviction was safe.

23. The upshot of the matters stated herein is that I find that the appeal herein lacks merit and is hereby dismissed, the appellants conviction and sentence is affirmed.

24. The appellant has a right of appeal.

**Dated at Lodwar this 6<sup>th</sup> day of December, 2018**

.....

**J WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ -for the Respondent

\_\_\_\_\_ - for the appellant

\_\_\_\_\_ - accused

\_\_\_\_\_ - court assistant