



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 96 OF 2016

EBEI KOROBE APPELLANT

VERSUS

REPUBLIC RESPONDENT

**An appeal from conviction and sentence in original Lodwar PMCR 830/2012 delivered on 6/2/2014
by RM W Wachira Acting Principal Magistrate**

JUDGMENT

Ebel Kerobe 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. Act No. 3 of 2006.**

The particulars of the offence are that on the 21st day of November, 2012 at [particulars withheld] sub-location within Turkana County intentionally and unlawfully penetrated the genital organ of A N a girl aged ten (10) years. The appellant faced an alternative charge of indecent act with a child contrary to **section 11(1) of the sexual offences Act.** The particulars of the offence are that on the 21st day of November, 2012 at [particulars withheld] sub-location in Turkana County intentionally and unlawfully did an indecent act with A. N a girl aged 10 years.

The appellant was after full trial found guilty and sentenced to life imprisonment on count 1 and on count 2 (sic) sentenced to 10 years imprisonment. He was dissatisfied with the conviction and sentence and preferred this appeal. His main grounds in the petition of appeal are that the identification by the complainant was based on dock identification; that the charges are a fabrication by the father of the complainant who had a grudge with the appellant; that the reliance of the foot prints to locate and arrest him as the culprit was not proper, and that the prosecution relied on evidence of a single witness for identification and that no initial report and description of the appellant was made; that there were contradiction in the prosecution evidence and finally that his defence was not considered. The appellant filed written submissions in support of his appeal.

Mr Kimanathi learned prosecuting counsel opposed the appeal. He submitted that the complainant identified the appellant as the offence occurred in broad daytime, the age of the appellant was assessed at 8 years by the clinical officer and the sentence imposed was proper and lawful.

The evidence before the trial court was that PW1 A. M aged 8 years old was at [particulars withheld] area when the appellant came and asked her if she had seen camels pass near she was. She told him that she had not seen them. The appellant then asked her to give him her “thing”. She asked him what is it that he wanted. He then ordered her to lie down or else he will stab her with a knife. She complied. He then removed her skirt and tore her pant and then removed his male organ and he inserted it into her vagina.

He then left her. She went to her home and informed her parents – her father and mother. The father PW2 B. N was informed of the defilement that evening at 7.00pm. The next day he visited the scene and followed foot marks to where they found the appellant. They arrested him and took him to the elders. They then called the complainant who identified him. He was then taken to the chief's office and later to police. PW4 P.C Alfred Kiprop re-arrested the appellant from Kenya Police Reservist and issued the complainant the P3 form.

PW3 Kipkurui Ngeno the clinical officer at Lokitaung sub-district hospital examined the complainant who he estimated the age to be 10 years old. On examination he found she had pain on Pelvic region; she had bruises on the labia Majora and some reddish laceration on the labia Manora. There were no spermatozoa seen but there were epithelial cells with pus cells.

The appellant gave unsworn evidence. He testified that on the day he was arrested he was at the school. He was arrested for the offence of stock theft but not defilement. He denied committing the offence or even knowing the complainant.

The appellant was charged with the offence of defilement C/s 8(1) as read with section 8(2) of the sexual offences Act. The section provides

8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) Any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

a) The prosecution in a charge of defilement must tender evidence to prove (a) the age of the complainant

b) That there was complete or partial penetration of the genital organ of the accused into the genital organ

c) That positive identification of the accused as the person who committed the act of penetration.

The main ground raised in this appeal by the appellant is that he was not positively identified as the person who caused the penetration. This appeal is therefore premised on the issue of identification. In **Cleophas Otieno Wamunga – V – Republic criminal appeal No. 20 of 1989 at Kisumu** the court of appeal stated

“Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whatever the case against the defendant depends wholly or to great extent on the correctness of one or more identification of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification”

The complainant in her evidence stated that she was in the thicket when appellant came and asked her whose daughter she was. She then stated.

“He then asked me if I had seen camels there. I told him I had not seen. He ordered me to give him this thing which I have asked him what it was he then ordered that I lie down or else he will stab me with a knife. He then pulled me down and defiled me. After that he warned me not to tell anybody or he will kill me;

And then continued

After that he left me and went away

And then went on

I didn't know him. I came to know him that day. My father went to the scene. He then followed the footsteps. I told him about the footsteps. Accused was traced. I can't tell where he was found. I went to see him on that day and I was able to identify him.

When specifically asked by the appellant how she identified him in cross-examination, the complainant replied

"Nobody found us at the scene. It is you who defiled me. Your facial appearance and the clothes you were wearing is what made you identify you. You had the same clothes that you have now"

PW2 the father of the complainant testified that he arrested the appellant after following the footmarks from the scene that led him to where the appellant was. This he did not on the day of the offence but on the following day; he stated in his evidence

"We followed footsteps upto where the accused was. A certain boma. Accused had gone away but came back. We arrested him and took him before the elders for the wedding. He was identified by the elders. I also called E. to come and identify him. She identified the accused positively"

The learned trial magistrate in addressing this issue of identification in her judgment stated

"The child clearly identified accused from the very clothes he wore for they were the same as he was in the day she was defiled. I find the child's identification proper"

With great respect to the trial magistrate the complainant only stated that she would identify him from the clothes he wore. Though the offence occurred in broad day light the complainant did not state that there was visual identification of the appellant. Instead what was led in evidence is the fact that the footmarks from the scene led to where he was arrested. Those footmarks were followed one day after the commission of the offence.

In my view the identification of the appellant as the person who committed the offence was based on evidence that I do not find credible. In the circumstances I am satisfied that the appellant conviction was based on unsafe evidence.

I consequently find that the appellant's conviction was not proper, quash the conviction and set aside the sentence of life imprisonment imposed. I allow the appeal and order that the appellant Ebei Ekobe be set at liberty unless otherwise lawfully detained.

Dated at Lodwar this 1st day of March, 2017

S N RIECHI

JUDGE