



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 13 OF 2017
(DEFILEMENT)
(CORAM: J.A. MAKAU – J.)

DANIEL OKOTH MARTIN APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 16.12.2015 in Criminal Case No. 620 of 2015 in Bondo Law Court before Hon. M. Obiero - PM)

JUDGEMENT

1. The Appellant **DANIEL OKOTH MARTIN** faced a charge of **Defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 8th day of July 2015, at [particulars withheld] Sub-Location, in Rarieda Sub-County, within Siaya County, intentionally caused his penis to penetrate, the vagina of AAB a child aged 13 years. The Appellant 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 the alternative charge are that, on the same day and time, same place, the Appellant intentionally touched the vagina of AAB, a child aged 13 years with his penis.

2. After full trial the Appellant was found guilty, convicted and sentenced to serve 20 years imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant preferred this appeal, setting out six (6) main grounds of appeal being as follows:-

1. That the Appellant was charged with defective charge sheet.

2. That the age of the victim was not established.

3. That the medical evidence did not prove penetration.

4. That no material exhibits were tendered to confirm the allegation.

5. That the Prosecution's case was full of contradictions and therefore cannot sustain a sound conviction.

6. That the trial Court failed to consider my sworn defence statement hence rejected it without cogent reason.

4. The facts of the Prosecution's case, form part of the record of Appeal and I need not reproduce the same, save to summarize the Prosecution's case and the defence.

5. The complainant AAB, aged 9 years, on 8.7.2013 at 9.00 pm left her grandmother's house and on the way, she saw Daniel, the Appellant, standing at his door, who called her, telling her he wanted to send her, AAB went to where the Appellant was, he caught AAB by right hand, pulled her into the house, pushed her onto the mattress, removed her pant, removed his and slept on her. He inserted his "dudu" into AAB "thing." AAB, screamed, but no one came to her aid. That after the Appellant was through he opened the back door and pushed AAB out of the house. AAB went back home and informed her mother, who informed other people who arrested DANIEL. AAB, later went to St. Elizabeth Hospital at Lwak, then Madiany Hospital, where she was treated. The matter was subsequently reported at Aram Police Station, AAB, was issued with P.3. form. The Appellant was arrested by members of public, who took him to police, whereby he was re-arrested and charged with this offence.

5. The Appellant, gave a sworn defence denying the charge. He stated on 8.7.2013, he went to his house at 6.30 p.m. and after 10 minutes, a crowd of people came including Paul Oduor (PW3), who pointed at him and people started beating him. They escorted him to Lwak AP Post, where a lady who is his neighbor, accused him of defiling her daughter, to which he denied. He was later taken to Aram Police Station.

6. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

8. The Appellant at the hearing of the Appeal, appeared in person and relied on his written submission, whereas, M/s. Odumba, the learned State Counsel, appeared for the State and opposed the appeal against both the conviction and sentence, urging the Prosecution, proved all the essential ingredients of the offence of defilement namely penetration, identification of the assailant and the age of the complainant.

9. Whether the Prosecution proved the essential ingredients of the offence of defilement? The Appellant in his petition of appeal, contends that the Prosecution, did not prove the age of the victim, penetration and that material exhibits were not tendered to confirm the allegation. On penetration, AAB, PW1, testified that the Appellant caught her by right hand, pulled her into his house, pushed her onto the mattress, removed her pant and his and slept on her, inserting his "dudu" into her thing, thus his penis into her vagina. AAB, went and informed her mother, who informed other people. PW2, mother to

AAB, (PW1), told, the Appellant that he had sexual intercourse with her daughter. PW3, a Clinical Officer who examined AAB, (PW1), on 8.7.2015, stated on her genitalia, there was laceration on the labia minora with evidence of penetration. The P3 form exhibit 2, reveal there was laceration on the labia minora, which are signs of forceful penetration. Exhibit 3 (PCR), confirmed there was laceration at labia minora, hymen absent and there were signs of forceful penetration. I therefore find from the evidence of PW1, PW2 and PW3 the Prosecution proved penetration.

10. On identification of the Appellant, (PW1), AAB testified at 9.00 p.m. she saw Daniel, the Appellant standing at his door, he called her, held her and talked to her before he pushed her into his house. She informed her mother after the incident. AAB, (PW1), knew the Appellant as a tenant of her grandmother and stated she knew the Appellant very well as a watchman, at [particulars withheld] Girls for 2 years PW2, was given the name of the assailant by AAB, (PW1), as Daniel, who she knew well and went to his house. PW3, saw Daniel, the Appellant who had locked the door, open the back door, and saw AAB, PW1, a child of his landlord leaving Appellant's house through the back door. PW3 informed PW2 of the incident when he met her and she went to interrogate the Appellant. I therefore find the Appellant was identified, as the assailant by the Prosecution witnesses, PW1, PW2 and PW3. The Appellant was recognized by the complainant as her assailant.

11. On the Complainat's age, there are some discrepancies as to her actual age. PW1 claimed she was 9 years, whereas , her mother PW2 stated she was 9 years having been born on 1.12.2005, but her birth certificate and other documents could not be produced as PW2 claimed the documents were burnt during the Post-election violence as the family was living at Nakuru. PW5 gave her age as 13 years. The treatment card exhibit 4, gave AAB's age as 10 years, exhibit 2, P3 form gave victim's age as 13 years. The Complainant's age assessment Report exhibit 6, gave AAB's age as 13 years. The charge sheet indicated the age of the victim as 13 years. I have very carefully considered the evidence adduced on the age of the victim and the fact that no birth certificate or any document was produced on her age, thus leading to her age assessment report being sought. In view of the fact that the Prosecution is under obligation to prove the age of the minor by producing relevant document which they failed to and in view of the age assessment Report produced by PW6 as exhibit 6. I will take the age of the victim as 13 years, I do not find the basis of Lower Court stating the victim's age was below 13 years in view of the age assessment Report. I find the trial Court was right in view of the above in substituting the charge from **Section 8(1) (2) to Section 8(1) (3)** and sentencing the Appellant under the provisions of **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.**

12. Whether the Appellant's sworn defence was considered? The trial Court considered the Appellant's defence. I have considered the appellant's defence, in light of the evidence of the Prosecution witnesses. PW1, PW2 and PW3 placed the Appellant at the scene of the crime. PW1, PW2 and PW3's evidence dislodged the Appellant's defence by placing him at the scene. His defence is therefore a mere denial, which I find to be without merits and I reject the same.

13 . The upshot is that the Appeal is without merits. The conviction is upheld and sentence confirmed.

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF JULY, 2017.

J. A. MAKAU

JUDGE

DELIVERED THIS 13TH DAY OF JULY, 2017

IN THE PRESENCE OF:

APPELLANT IN PERSON PRESENT

M/S. M. ODUMBA FOR STATE

C.C.

1. LABAN ODHIAMBO

2. LEONIDA ATIKA

LANGUAGE: ENGLISH/KISWAHILI

J. A. MAKAU

JUDGE