REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 12 of 2016

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 753 of 2013 of the Principal Magistrate's Court at Kapenguria)

DOMINIC OKODOI……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

DOMINIC OKODOI alias KADUKA was charged, tried, convicted and sentenced on both the main count and the alternative count. The offence in the main count is of ***defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act number 3 of 2006*****.** The particulars of this offence are that on the 24th day of July, 2013 in West Pokot County, the appellant did cause his penis to penetrate the vagina of (S.B) a girl aged 8 years.

The preferred alternative charge is of ***indecent act with a child contrary to section 11(i) of the Sexual Offences Act number 3 of 2006***, of which particulars are that on the 24th day of July, 2013 in the West Pokot county the appellant intentionally touched the buttocks of (S.B).

The prosecution called 3 witnesses. PW-1 was the complainant herein, PW-2 the clinical officer and PW-3 the investigating officer. Their case is briefly that on 24/7/2013 the complainant who was then aged 8 years and was a class 3 pupil at [Particulars Withheld] Primary School, was left at home with her younger sister by their mother. The mother had gone to work in a hotel. The appellant (Kaduka), who is their neighbour knocked on the door in the morning.

The complainant opened for him. He entered into the house. He removed her clothes and removed all his clothes. He laid on her and put his penis on her vagina. She screamed. She felt pain. It was her first time to experience such. The mother reported at Kapenguria Police Station on the very same day. She was referred to Kapenguria Hospital on 25.7.2013. She was examined by PW-2 who found that her hymen was broken and there was presence of foul smelling discharge of which he opined was a sign of actual penetration. The pant was also stained with whitish discharge. Laboratory tests undertaken did not reveal any STI or STDs.

The appellant was arrested by members of the public who were inclined to lynch him. The police rescued

him. He was equally examined by PW-2 on 25.7.2013. His external genitalia was normal, devoid of any physical injury. Laboratory tests showed no STD though urine test showed presence of STI. The P3 forms were thus filled and produced in court as exhibits.

PW-3 after completion of the investigations charged the appellant with the stated offences. The appellant when he was placed on his defence opted to give sworn testimony and to call 2 witnesses. He however ended up only giving his own testimony without calling a witness. His defence is that he is innocent and did nothing.

Judgment was passed on 12.8.2013 whereby he was convicted on both counts and sentenced to serve life imprisonment on the main count and 10 years imprisonment on the alternative count.

He appealed to this court on 19.8.2013 on the grounds that:-

> **1. Section 43 of the Sexual Offences Act was not duly observed in his conviction.**
>
> **2. The trial magistrate erred in law and fact by failing to observe that the medical reports produced did not show that there was defilement.**
>
> **3. Crucial witnesses did not testify in the case, contrary to section 150 of the CPC.**
>
> **4. He was convicted on contradictory evidence and was not allowed adequate time to present his defence.**
>
> **5. The case was not proved beyond reasonable doubt as no exhibits were produced.**
>
> **6. PW-3 gave two different numbers for each P3 form which is a fraud.**

The appellant expounded on the above grounds in his written submissions. On the first ground he argued that the charge is fatally defective as the word "**unlawfully**" was missing in it particulars of the offence.

In consideration of this ground, I have looked at ***section 8(1) of the Sexual Offences Act number 3 of 2006***. It reads:-

> "***A person who commits an act that causes penetration with a child is guilty of an offence termed defilement."***

"**Penetration**" is defined under section 2 to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The alleged word "**unlawfully**" is not carried anywhere as an ingredient for this offence. This is so as a child is incapable in law of giving consent to sex and hardly can one have lawful sex with a child. The charge particulars therefore needed not carry the word "**unlawfully**" and it's correct as drafted in its particulars.

On the second ground he, the appellant, challenges the information in the presented P-3 forms and the shoddy investigation by the clinical officer. While I do agree with him that the vaginal discharge of the victim and the whitish substance on her clothes should have been examined in an effort to connect them with the appellant's spermatozoa, lack of doing so is not fatal unless where there is no other evidence connecting the appellant with the offence. PW-1 in this case stated well that she was defiled by the appellant who is her neighbour. She referred to him in her evidence as Kaduka. She knew him before then and the incident happened in the morning and she could not have made a mistake of him. Her evidence is of recognition rather than identification of which makes it more reliable and safe to rely on.

In ground three the appellant avers that the mother of the complainant who was a crucial witness was not called. I agree with him that she was a relevant witness but find that she was not a crucial one. She could only have told the court what she was told by the complainant and the action she took. The presented evidence includes that of PW-1 the actual eye witness. The gap as to who reported to the police and the

members of the public is not fatal to the prosecution case. There is no doubt that the matter was reported to the police the very same day of the incident and the appellant arrested on the very same day. Given these confirmed facts I have no ground to infer that if the mother was called her evidence would have been adverse to the prosecution case. Such inference should be grounded on logic arising from the facts of the case. The finding in ***Bukenya vs Uganda 1973 EA 549*** is not therefore applicable in the circumstances of this case.

Ground 4 and 5 were argued together. Appellant alleges he was not accorded a fair hearing. I have looked at the proceedings and they were conducted in accordance with provisions of Criminal Procedure Code. He well participated in the hearing and was given a chance to cross examine all the witnesses. When he was placed on his defence he sought adjournment two times before he eventually said he was ready to proceed and proceeded on 12.8.2013. It is him who failed to call his stated two witnesses. The court had allowed him time to prepare. Witnesses' statements were not requested for and denied. Failure to use them in defence unless shown that if used the decision would have been different, is not fatal to the prosecution case.

The raised grounds 6 and 7 have been argued within the other grounds. The evidence of PW-1 is explicit on what the appellant did to her of which amounts to an offence of defilement. It is corroborated by the evidence of PW-2 that she was penetrated. I have no cause to doubt it. Appellant defence was of mere denial and it was rightly rejected by the trial magistrate in consideration of the weight of the prosecution case. I find nothing that would tilt the scale of justice in count 1, in favour of the appellant.

The error the trial magistrate did was to make a finding in relation to the alternative count, having found the appellant guilty of the main count. Alternative counts when preferred are like a spare tyre of a motor vehicle. They are only of use when the running tyres fail. Given that the main count subsisted in his finding, the magistrate should not have made a finding in relation to count II. The evidence adduced did not even support it even if it were an independent count as nowhere in the evidence was it stated that the appellant touched the complainant's buttocks. The state prosecutor concedes to appeal on this alternative count, and rightly so.

The bottom line is that the appeal on the main count fails and is consequently dismissed. However appeal on the alternative count is allowed. The appellant is accordingly acquitted of that count and the sentence of 10 years imprisonment set aside. He will only serve sentence in count 1 of life imprisonment. This court so orders.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 10th day of November, 2016.

S. M. GITHINJI

JUDGE

10.11.2016