REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 156 Of 2018

ELIUD NDIWA SICHEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in original criminal case No. 14/2014 delivered on 6.7.2018 by Hon C.MENYA,RM]

JUDGMENT

The appellant Eliud Ndiwa Sichei was charged with the offence of defilement of a child(girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 27th day of October 2014 at around 1400hrs at Kapkateny Location in Bungoma County, Western province intentionally caused his penis to penetrate the vagina of SC a child aged 2 years and 7 months.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the 27th day of October 2014 at around 1400hrs at Kapkateny Location in Bungoma County, Western province the appellant intentionally and unlawfully touched the vagina of SC a child aged 2 years 7months.

The evidence before trial court was that a total of 5 witnesses were presented by the prosecution. It was the evidence of Pw1 – EM that she is a farmer and mother to the complainant. She testified that she recalls on 27/10/2014 while at home bathing her children were playing and she heard O crying and she ran to the scene and found Ndiwa had laid the victim on a maize store and he had reached her inner pant and he had removed his zip. She testified that she pulled him from the baby but appellant gave her a blow and she fell down and he escaped.

She testified that Pw3 came and she explained to him what has just happened and he examined the victim vagina and he saw the blood from the vagina of victim. She stated that she removed the victim from the store and took her to Chwele hospital then Bungoma District Hospital and reported the incident to Kapsambu Police station and was issued with P3 form.

Pw2,OK testified that the victim is his sister and that appellant did “tabia mbaya” to the complainant. He stated that the appellant placed the victim in a store, removed her panty and did ‘tabia’ to her. He stated that he saw them and called mum who was in the bathroom and she came and carried the child to the hospital.

Pw3 Eliud Mutai testified that he recalls on 27/10/2014 at 2.00pm while taking care of cattle in his compound he heard noise and a woman was crying with her child. He stated that she told him that somebody had defiled her child that is the appellant. He testified that the child is the complaint and they are neighbors. He also testified that the accused was their neighbor too.

Pw4 PC Robert Onkoba of Kaptama Police Post testified that on 27/10/14 she heard the baby screaming she found the accused defiling the complainant and he has escaped.She testified that the accused was spotted in Kimilili and they arrested him and charged

him.

Pw5 Simon Simiyu Bwabi of Makutano Dispensary previously at Chwele sub county hospital testified that on 27/10/2014 at around 3.00pm when complainant aged 2 years 10 months was brought at Chwele Hospital on ground of defilement by a person known to her. She was crying and he examined her vagina she was bleeding, the hymen was raptured and lab test showed blood cells in the urine. She was treated and referred to Bungoma District Hospital and from records of Bungoma indeed on 27/10/2014 the girl was bleeding and hymen was raptured and there was swelling in private part. He testified that she was defiled and he filled P3 form which he produced together with record book.

The Appellant chose to give unsworn evidence and called 3 witnesses. The Appellant testified as DW1 and testified that it is a lie that on that day he was at home weeding onions and he finished at 1.30pm and went to the Kiosk at 2pm and saw a group of people who attacked him and then left him and a neighbor took him to the hospital and he was arrested at Kaptola Hospital by a police.

DW2 Moses Naibei testified that accused is a neighbor and that that he went to the home of accused at 7.00am and they went to weed the onions with him until 1pm and they came back at 3pm and later a group emerged and assaulted the appellant and he took him to the hospital and later on he learnt that he was arrested.

Dw3 Lily Chepkemei testified that she is a farmer and testified that on material date she was told to go to the market by appellant and on return she prepared lunch and they later on a group of people appeared and attacked the appellant.

Dw4 Stella Kimisu testified that the appellant is her husband and he did not rape the complainant. She stated that on the material date sat 2.00pm she was from the market with her co-wife and they had lunch and a group attacked the appellant at 4.00pm claiming he had raped the complainant.

Upon full hearing the trial magistrate found the appellant guilty and sentenced him life imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

1. That the trial magistrate erred in law and fact by convicting dand sentencing the appellant without considering evidence on the appellant and his witnesses.

2. That the trial magistrate erred in law and fact by convicting appellant without considering that the prosecution evidence was inconsistent.

3. That the trial magistrate erred in law and fact by sentencing appellant to life imprisonment which itself was harsh and excess.

4. That the trial magistrate was generally biased as age of the child was not properly established.

5. That the trial magistrate erred in law and fact by relying on speculative and circumstantial evidence which could not form a basis for conviction.

This appeal was canvassed by way of written submission. Mr.Kituyi, the advocate for the appellant submitted that from proceedings and evidence on record the prosecution evidence was inconsistent and not corroborative.

He submitted that the court was not informed where the clothing of the child went if they had blood stains and none was produced in court.He submitted that evidence of PW2 was very abstract and seemed to have been tailored to suit the charge.

He submitted that age of the minor was not clear and the trial court relied on birth notification produced by the police officer to determine age of the victim and same cannot be used to prove age of a child.

He submitted the birth notification card was produced by police officer and not the mother therefore the same could not be used to sustain a conviction.

He also submitted that the P3 FORM supplied was inconsistent as it indicated that it was issued on 28th October 2014 while the

mother of the victim submitted that the victim was treated on the 27th October 2014.

He submitted that punishing the appellant on life imprisonment was excessive in nature other than punishment for purpose of correction relying on case law authority in ***SVS Jansen 1999(2)SACP 368*** .He submitted that there was no cogent evidence tendered to have warranted the appellant to be sentenced to life imprisonment.

Mr. Nyakibia opposed the appeal for the prosecution and orally submitted that the age of the complainant was properly proved to be 2 years and 7 months.

He submitted on identification that the appellant was properly identified by Pw2 a brother to the victim. The same was established. He submitted on penetration that PW1 evidence was corroborated by evidence of PW 5.He submitted that section 12 of the Evidence Act does not require corroboration of evidence of a minor and further submitted that evidence placed the appellant at the defilement scene and the prosecution relied on birth notification on evidence of age other than birth certificate.

This being the first appellate court I'm tasked with the duty of reevaluating the entire evidence to draw my own inferences and reach my own conclusions making due allowance for the fact that I did not have the advantage of hearing or seeing the witnesses testify. See **OKENO vs REPUBLIC [1972] E.A, 32**

Having analyzed the evidence on record and the submissions both by the state and the appellant it is my finding that the main issue for determination is whether the offence of defilement against the Appellant was properly established beyond reasonable doubt.

Three ingredients are key in order to prove the offence of defilement. These ingredients are so inextricably intertwined that the absence of one is fatal to the entire case. See ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*** **which set them out as** follows**:**

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

Was the appellant the person who defiled the complainant"

In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal on evidence of identification stated:

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction

In the instant case Pw1 mother of the victim recalled that on 27/10/2014 while at home bathing her children were playing and she heard O crying and she ran to the scene and found Ndiwa, the appellant had laid the victim on a maize store and he had reached her inner pant and he had removed his zip. She testified that she pulled him from the baby but appellant gave her a blow and she fell down and he escaped.

Pw2 OK, the brother to the complainant testified that he saw the appellant get held of the complainant and doing tabia mbaya. He screamed and their mother Pw1 came.

This is direct testimony by the Pw1 who witnessed what happened and the same was confirmed by Pw2 who was also at the scene.

The appellant when placed on his defence stated that it was a lie and he testified that he was in the shamba weeding onions with Dw2 up to 2 pm while Dw2 stated they parted ways at 3pm which to my consideration it is contradicting evidence and untrue. It is therefore my finding that the appellant herein was positively identified as the person who defiled the complainant.

The second ingredient the prosecution must prove in an offence of defilement is penetration.

PW5,Simon Simiyu Bwabi who examined complainant stated that on 27/10/2014 at around 3.00pm when complainant aged 2 years

10 months was brought at Chwele Hospital on allegation of having been defilement by a person known to her. She was crying and he examined her vagina she was bleeding, the hymen was raptured and lab test showed blood cells in the urine. He produced P3 form to that effect. Upon examination he found that the hymen broken and bleeding with urine incelligence. He confirmed that upon examination he found that there had been penetration.

The appellant argues that the age of complainant was not proved Pw1 stated that victim was 2 years but she doesn't have the birth certificate.PW3 stated that the victim was 2 years when the P3 form was filled.Pw4 stated that complainant was 2 years 10 months.

I have carefully perused the record on these issues. It is true that the witnesses stated different ages of the complainant. The best evidence of age is a birth certificate. PW4, the investigating officer produced a copy of notification of birth of the complainant. It shows that she was born on 19th December 2011 placing her age at 2 years 7 months at the time of at the time of the defilement, notwithstanding what any other witness or document may have said. This is not a contentious issue as the charge sheet states she was 2 years 7 months and the sentence meted was that applicable to a 2 year 7 months old victim.

There are numerous cases that deal with the question of proof of age, including: ***Musyoki Mwakavi v Republic [2014] eKLR*** held that:

"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".

On age, it appears to me that there is nothing requiring further inquiry, as the issue was resolved by the birth notification.

On sentence the appellant was sentenced to serve a sentence of life imprisonment. The minor was only 2 years 7 months years and under section 8(2) of the Sexual Offences Act, upon conviction, one is liable to life imprisonment. The court properly sentenced the appellant to life imprisonment. The sentence is lawful. Upon considering the evidence in the trial court, grounds of appeal and submissions, I find no merit in this appeal which is hereby dismissed.

I so order.

Dated and Delivered at BUNGOMA this 29th day of Nov, 2019.

S.N.RIECHI

JUDGE