REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 13 OF 2019

BETWEEN

BTM...APPELLANT

AND

REPUBLIC...RESPONDENT

(***Being an appeal arising from the ruling of Hon. M. M. Nafula, SRM in Kapenguria Criminal (SO) Criminal Case no. 11 of 2019 read and delivered on 22nd November, 2019)***

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein is the accused in Kapenguria PMC Cr (SO) Case no. 11 of 2019 in which he is charged with ***defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, no. 3 of 2006.*** The particulars of the offence are that on 20th July 2018 within North Pokot Sub-County [in Pokot County] [he] intentionally [and unlawfully] caused his penis to penetrate the vagina of IC a child aged 14 years.

2. The appellant is also charged in the alternative with the offence of committing an ***indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006,*** where it is alleged that on the 20th day of July 2018 at [Particulars Withheld] Village within North Pokot sub-county in West Pokot County, [he] intentionally [and unlawfully] touched the vagina of IC, a child aged 14 years with his penis.

3. The appellant pleaded not guilty and the case was set down for hearing during which the prosecution called five witnesses in spoort of its case.

4. At the close of the prosecution case, the appellant was put on hisdefence. He gave unsworn evidence and called no witnesses. After conclusion of the hearing the learned trial magistrate found the appellant guilty on the alternative count of committing an indecent act with a child and sentenced him to life imprisonment.

The Appeal

5. Being aggrieved by the whole judgment of the learned trial court, the appellant filed this appeal which is premised on eleven

grounds of appeal. Substantively, the appellant contends that it was wrong for the learned trial magistrate to base his conviction on the strength of a single witness. That the evidence adduced by the prosecution was uncorroborated, discredited, malicious, far fetched and unconvincing. The appellant further contended that the evidence on record did not connect him tot he offence. He also contended that he did not have the services of an advocate as a result of which he did not have a fair trial.

6. Finally, the appellant contended that the sentence passed by the learned trial magistrate was harsh and excessive in the circumstances.

7. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. In discharging this duty however, the court ought to bear in mind the fact that it does not have the opportunity of seeing and haring the witnesses who testified and to make an allowance for the same. See ***Peters versus Sunday Post [1957]EA 424.***

The Prosecution Case

8. The complainant herein, c testified as PW1 and told the court how on the material day she was all alone at home with the appellant who is her grandfather. While she was taking a bath the appellant went to where she was an beat her up then carried her and placed her on his bed, naked. The appellant lay on top of her while touching her on her private parts. He touched her with his penis as he also scratched her back. He went further and put his penis in her vagina before he went away. MA also testified that the appellant had done this thing to her four other times in the past. She was later taken to hospital by her mother who also reported the incident to '**Omwami**'. MA was not cross examined for reasons that her evidence was by way of an '**unsworn statement**'.

9. PW2, Jemimah Okaalo, a member of community policing told the court that on 17.11.2015 at about 9.00am, she was at the chief's office when the complainant was taken there by another member of the community policing PW2 took the complainant to hospital where it was established that she (complainant) had scratches on her back and chest and wetness on her private parts. Thereafter the matter was reported at Khwisero Police Station.

10. PW3 was Florence Afune, Assistant chief of Mundala sub-location. By the time of her testimony, she had occupied that office for 10 years. She testified that on 17.11.2015 at about 9.00am, while she was in her office, she received a report that the appellant had been defiling the complainant. PW3 immediately dispatched two members of the community policing team to the appellant's home to fetch the complainant. The two people returned tot he office with the complainant who had scratch marks on her neck and back. The complainant was also in pain. PW3 instructed PW2 to take the complainant to hospital before she went to record her statement with the police.

11. Juma Vince, a clinician at Eshirusa Model Health Centre testified as PW4. He examined the complainant on 17.11.2015 after allegations that the complainant had been defiled by her grandfather. PW4 confirmed that the complainant was 5 years old. On examination, PW4 found the complainant looking frightened and scared and was wearing dirty clothes. She had scratch marks on the neck and back. She had no hymen, no lacerations and no bleeding, indicating that there was no penetration on that particular day. PW4 however testified that the complainant had contracted a urinary track infection (UTI). PW4 stated that on further examination of the complainant, he concluded that the complainant had been defiled before, though penetration had not occurred on the 17.11.2015. PW4 produced the complainant's treatment notes PRC form and the P3 form as well as age assessment form as Pexhibits 1, 2, 3 and 4 respectively.

12. Number 66442 Corporal Isaiah Kirui, the Investigation Officer was PW5. HE recalled that on 17.11.2015 at around 4.00pm, he was at Khwisero Police Station when he received a telephone call from PW2 that the complainant had been defiled by the appellant. Not long after receiving the report, the complainant and the appellant were escorted to the police station. By then, the complainant had already been taken to Eshirusa Health Centre for initial treatment as per P exhibit 1.

13. PW5 also testified that the complainant told him she had been defiled by the appellant; not once but many times; whereupon PW5 issued the complainant with a P3

14. It was also the respondent's submission that the conduct of the appellant for over 3 moths when he failed to appear in court is a clear indication that he is a flight risk. For the above two arguments the respondent relied on ***Misc. Criminal Application no. 67 of 2017 KKK versus Republic [2017]eKLR*** and ***Republic versus Lucy Njeri Waweru & 2 others [2013]eKLR.*** In the ***KKK Case***,

above bond was denied because the accused was an uncle to the victim. In the ***Lucy Njeri Waweru case*** (above) bond was denied on grounds that the accused was likely to interfere with witnesses.

Analysis and Determination

15. After a careful analysis of all the circumstances leading to the trial court's ruling of 22.11.2019, I am satisfied that the said ruling is premised on solid ground. It is not disputed that the right of an accused person under ***Article 49(i)(h) of the 2010 Constitution*** is subject to the absence of compelling reasons to warrant a denial of bond. In the instant case, the record shows that the appellant herein is a flight risk. The reason given by the DCIO for the appellant's absence from court over several months was that he was a police officer working in Kitui West, and that he had been on leave. It is not lost to the court that a police officer, whether on leave or on duty can be accessed at any time of day or night by his superiors. On the 14.10.2019 the DCIO Pokot North asked for time until 28.10.2019 when he would avail the appellant. That did not happen and it took another three weeks before the appellant came to court. The appellant alleged that he had not been informed of the offence and that he did not know that he had committed an offence. These allegations, in my view are unsubstantiated and carry no weight in this case, and in any event, the police were under a duty to arrest the appellant whether or not he was on leave.

16. The second reason why I am satisfied that the learned trial magistrate's ruling is well founded is because she considered the relevant law and submissions before concluding that the appellant could only be released once the evidence of the victim has been taken. Though ***article 49(i)(h)*** talks of compelling reasons, nowhere in the Constitution is the phrase '**compelling reasons**' defined. Further, the Constitution does not indicate the form in which such reasons may be or can be presented to court. The reasons could be contained in an affidavit or they could be orally presented to the court, depending on the circumstances of each case.

17. Developments in this area of bond have grown in the recent past as can be seen from through the Criminal Procedure Bench Book as well as the bail and bond policy guidelines. Compelling reasons, according to these two publications include but are not necessarily limited to the following:-

1. the risk of the accused person failing to attend court;

2. the possibility of the accused person committing, or abetting the commission of a serious offence;

3. the likelihood of the accused person posing a danger to the victims, individuals or the public;

4. the likelihood of the accused person interfering with witnesses or evidence;

5. the likelihood of the accused person posing danger to national security;

6. that it is in the public interest to detain the accused person in custody.

18. In the instant case, it is shown that the appellant and the victim are close relatives who were living in the same house prior to the commission of the offence. In this kind of scenario, and considering the position of the appellant in society and the very delicate family relationship alluded to hereinabove, I do hold and find that the appellant is likely to interfere with the victim as a witness and bear pressure upon her to opt for a '**settlement**.' This means that it would not be safe to have the appellant out on bond before the victim testifies. The appellant's presence out there is bound to increase fear and anxiety in the victim and by extension to other witnesses. In my considered view therefore, the conditional bond granted by the ruling of 22.11.2019 was reasonable.

Conclusion

19. In light of all the above, I find that this appeal is lacking in merit and is accordingly dismissed. I further order as follows:-

1. The appellant shall be released on bond of Kshs.100,000/- plus one surety of a like amount as soon as the evidence of the victim is taken by the trial court.

2. To expedite this process, Criminal Case No. 11 of 2019 shall be mentioned before the trial court on Monday 9.12.2019 with a view to fixing an early hearing date.

3. Right of appeal within 14 days from the date of this judgment.

4. Appellant remanded in custody

Judgment delivered, dated and signed in open court at Kapenguria on this 5th day of December, 2019

RUTH N. SITATI

JUDGE

In the Presence of

Ms Bartilol for Appellant

Mr Okoth for Respondent

Ms Chebet watching brief

Ms Juma Court Assistant

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