



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.46 OF 2015

DUNCAN KIPLANGAT TOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J. Ndururi (P.M)

in CMCR No.13 of 2014 delivered on 6/11/2015)

JUDGEMENT

1. The Appellant was sentenced to 15 years imprisonment on 6/11/2015 for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act (SOA) No.3 of 2006.
2. The particulars of the charge were that on 16/2/2014 at [particulars withheld] village of Kericho West District of Kericho County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MC a girl aged 15 years.
3. The Appellant was faced with an alternative count of indecent Act in that on the same material facts as in count 1 (above) the Appellant unlawfully touched the vagina of MC, a girl aged 15 years with his penis.
4. The prosecution evidence in summary is that on the material day at about noon, the complainant was in the kitchen house lighting fire. The house also doubled up as her bedroom and it had a bed. The Appellant entered the kitchen and carried her to the bed. He removed her under pant and undid the zip of his trousers and defiled her.
5. The complainant said her grandmother was away and upon return she told her but the grandmother did not take any action. The following day she went to school and told the headmistress (PW2) and the child was taken to Kiptere Health Centre where she was examined and treated by PW3.
6. The examination revealed bruises on the abdomen and lacerations on the posterior labia majora and minora. There was a whitish discharge from her vagina and the hymen was torn and there were also blood stains on the posterior perineum of the genitalia. PW3 confirmed that there was vaginal penetration. The child was also taken for age assessment.
7. At the time the accused person was staying in the same homestead as the child. He was arrested and charged with this offence and in his defence, he denied defiling the child.

8. The trial court found the Appellant guilty as charged and convicted him with Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence Act and sentenced him to 15 years imprisonment.

9. The Appellant has now appealed to this court against both conviction and sentence on the following grounds;

i) THAT the charge sheet was defective.

ii) THAT the prosecution evidence was not corroborated and it had irregularities.

iii) THAT no voire dire examination was conducted before taking the testimony of the minor.

iv) THAT the sentence of 15 years imprisonment was excessive in the circumstances of this case.

10. The parties filed written submissions which I have duly considered. The Appellant submitted as follows;

i) THAT the charge sheet was defective and further the age of the complainant was not proved as no birth certificate was produced.

ii) THAT the trial court did not conduct voire dire examination and further the age assessment Report prepared by Dr. Sogomo was not produced in court. He also said there was contradiction between PW2 and the complainant who said she was in class seven while the Head Mistress (PW2) said she was in class 8.

iii) THAT the sentence of 15 years imprisonment is excessive as the law provides for 12 years for indecent Act.

11. The Respondent opposed the appeal and submitted in writing as follows;

i) THAT on the issue of voire dire, the court of appeal in the case of MARIPETT LOONKOMOK VS REPUBLIC MOMBASA COA CASE NO.68 of 2015 that a trial cannot be vitiated by failure to conduct voire dire.

ii) THAT the prosecution evidence was consistent and corroborative and the testimony of the complainant corroborated by that of the medical officer who confirmed vaginal penetration.

iii) THAT the sentence was not excessive as anyone charged with defilement contrary to section 8(1) as read with section 8(3) of the SOA is liable to imprisonment for a period of 15 years.

12. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own independent conclusion as to whether or not to support the findings of the trial court bearing in mind that the Trial Court had the opportunity to see the witnesses.

13. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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] E.A 424.”

14. The elements the prosecution required to prove in a case of defilement are as follows;

i) Penetration.

ii) Identity of the perpetrator.

iii) The age of the victim.

15. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as: -

“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.

16. The evidence of the complainant was cogent on the issue of penetration. She explained what the Appellant did to her. The testimony of the complainant was corroborated by that of the medical officer (PW3) who confirmed vaginal penetration.

17. On the second element, I find that the complainant knew the Appellant very well since they were living in the same compound where he was a herds boy to the grandmother. The incident occurred at noon and the Appellant was identified by complainant as the person who defiled her.

18. I find that lack of *voire dire* does not vitiate the prosecution case. Taken in its totality, I find that the complainant’s evidence was truthful and reliable.

19. The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years.

20. On the issue of the age of the complainant, there was production of the age assessment Report produced in court by PW5. I find that it was not mandatory for the doctor who did the age assessment to appear in court to produce the Report.

21. I find that the appeal herein lacks merit, the same is dismissed and both the conviction and sentence are upheld.

Delivered, signed and dated at Kericho this 22nd day of January 2021.

A. N. ONGERI

JUDGE



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