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| Case Number: | Criminal Appeal 2 of 2019 |
| Date Delivered: | 27 Nov 2019 |
| Case Class: | Criminal |
| Court: | High Court at Kapenguria |
| Case Action: | Judgment |
| Judge: | Ruth Nekoye Sitati |
| Citation: | Kedireng Lokilepuang alias Geoffrey v Republic [2019] eKLR |
| Advocates: | M/S Kiptoo for the Respondent |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | Hon. P. Y. Kulecho |
| County: | West Pokot |
| Docket Number: | - |
| History Docket Number: | Criminal (SO) case no. 33 0f 2018) |
| Case Outcome: | Appeal dismissed |
| History County: | West Pokot |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 2 OF 2019**

**BETWEEN**

**KEDIRENG LOKILEPUANG ALIAS GEOFFREY.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgment and conviction by Hon. P. Y. Kulecho, from 5.3.2019 in Kapenguria PMC Criminal (SO) case no. 33 0f 2018)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein was charged with the offence of ***defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006,*** the particulars thereof being that on the 27th day of July 2018 at Indek village within West Pokot County he intentionally and unlawfully caused his penis to penetrate the vagina of PC a child aged 8 years.

2. The appellant pleaded not guilty to the charges. The case therefore went to full trial during which the prosecution called four witnesses in support of its case against the appellant. The appellant also testified when put on his defence and denied committing the offence.

3. At the conclusion of the hearing and after careful analysis of the evidence as recorded, the appellant was found guilty of the offence of defilement as charged and sentenced to life imprisonment as by law prescribed.

**The Appeal**

4. Being dissatisfied with the whole of the learned trial court's judgment, the appellant filed this appeal, originally by himself. In a further amended petition of appeal dated 26th September 2019 M/S Lowasikou & co. Advocates set out the following grounds of appeal:-

**1) THAT the trial magistrate erred in law and facts in [convicting the appellant] on inconclusive age assessment which was doubtful and of no satisfactory medical records only child clinic card (PMFI-1) was relied [on] to ascertain age.**

**2) THAT the trial magistrate erred in law and facts in convicting and sentencing [the appellant] on flawed, insufficient *voir dire* of a clearly tender aged minor contrary to section 19(1) of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya.**

**3) THAT the trial magistrate erred in law and fact in affirming conviction and sentencing the appellant and [in] not**

**confirming that the medical evidence could not conclusively support the act of penetration of a defilement case.**

**4) THAT the [trial] magistrate erred in law and facts in convicting and sentencing the appellant [without] considering his defence and/or the credibility of his alibi which was not challenged by the prosecution counsel.**

**5) THAT the trial magistrate erred in law and in fact by relying [on] the testimony of PW1 and PW2 whom they used the phrase "bad manners," a phrase which is not an ingredient of the offence in the Sexual Offences Act to convict the appellant.**

**6) THAT the trial magistrate erred in law and facts by sentencing the appellant to serve life imprisonment [when] the evidence adduced was not weighty [enough] in the circumstances.**

5. In a nutshell, the appellant contends that the prosecution did not prove the case against him beyond any reasonable doubt and secondly that the sentence of life imprisonment was not supported by the evidence.

**Submissions**

6. During the trial the trial, the appellant proceeded with the appeal in personafter his counsel withdrew from the case with the appellant's permission. He relied on his written submissions which he highlighted at the hearing. He contended that he could not have been at the scene of the alleged crime since he was sick. He also alleged that the case proceeded in Kiswahili a language he did not understand, although the complaint about language did not form part of the grounds of appeal.

7. The State opposed the appeal and urged the court to find and hold that the case against the appellant was proved beyond any reasonable doubt and to dismiss the appeal. Regarding the appellant's complaint about language, the respondent submitted that the language used was Pokot, which language the appellant understood and which enabled the appellant to cross examine witnesses.

**The Prosecution Case**

8. From the four prosecution witnesses, the prosecution case is as follows:- The complainant who testified as PW2 stated that on 27th July 2018 at about 4.00pm she saw the appellant grazing his goats near where she was washing clothes. She later joined the appellant, and the two of them continued looking after the goats. PW2 stated that the appellant was their neighbour whom she knew as Geoffrey. Then suddenly, the appellant grabbed her, removed her clothes and then did "**bad manners**" to her private parts. She felt much pain and also bled. Thereafter both PW2 and the appellant went to their homes. In the evening PW2 told her mother what the appellant had done to her.

9. PW1's mother, V T who testified as PW1 told the court that when she left for the market on 27th July 2018 at about 2.00pm, she left her four children, among them PW2 who had already returned home from school. On getting back home at about 6.00pm, she noticed blood coming from PW2's private parts. On enquiry, PW2 told her that Geoffrey had done bad manners to her, by defiling her in the nearby bushes. PW1 took PW2 to the hospital and also confirmed that Geoffrey, the appellant in this case, was their neighbour.

10. In cross examination, PW1 stated that though she did not witness the incident, PW2 implicated the appellant as the culprit and that the appellant had told PW2 not to tell her anything because if she did, he would kill her.

11. PW3 was no. 95725 PC(W) Lilian Moraa of the gender office at Kapenguria Police station. She was the investigating officer of the case after she had been given instructions to do so by the OCS. PW3 stated that PW2 narrated to her what the appellant had done to her and how he had warned her against saying anything about the incident to anyone with a threat that he would slaughter her if she dared do so.

12. PW3 also testified that when PW2 went home, she washed her pant and petticoat and put on another dress (red) which also got stained. PW2 later reported the incident to her mother when the latter returned home. PW3 accompanied PW2 to Kapenguria County Referral Hospital for examination and treatment. She also visited the scene, which was in a bushy patch not far from PW2's homestead. The blood stained red dress was produced as Pexhibit 4.

13. Dr. Jotham Mukhola testified as PW4. He testified on behalf of Dr. K. Sang who had examined PW2 at the Kapenguria County Referral Hospital. On general physical examination the doctor noticed a vaginal tear, bleeding and torn hymen. Blood was noted on PW2's external genitalia. On urinalysis, blood was seen in the urine, thought no spermatozoa was seen. Dr. Mukhola produced the P3 form as Pexhibit 2, the PRC form as Pexhibit 3 while PW2's child immunization card was produced as Pexhibit 1. In the doctor's opinion, there was ample evidence of defilement. PW4 confirmed that the appellant was not taken to the hospital for examination as would have been the case if the police had acted according to good practice.

**The Defence Case**

14. The appellant gave a brief sworn statement in which he denied committing the offence. He alleged that on the material day, he was sick and that he was arrested when making his way to hospital. He was then taken to the police station and later charged with an offence he knew nothing about.

**Submissions**

15. The appellant filed and relied on his detailed written submissions in urging the court to overturn the entire trial court's judgment and to set him free. The appeal was opposed with counsel for the appellant contending that the case against the appellant was proved beyond any reasonable doubt. Counsel urged the court to dismiss the appeal.

**Issues for Determination**

16. From the evidence, submissions and the law, the issues that arise for determination are the following:-

**a) whether the age of the complainant was satisfactorily proved;**

**b) whether the prosecution proved that there was penetration;**

**c) whether the appellant was positively identified at the culprit**

**d) whether the case proceeded in a language understood by the appellant**

**e) whether the sentence imposed, by the learned trial magistrate was against the weight of evidence**

**Analysis and Determination**

17. For the offence of defilement to be proved, each of the issues number (a) to (d) must be proved to the required standard, and if the court finds that any one of the ingredients was not proved, it will not hesitate to set the appellant free.

**a) whether the age of the complainant was proved**

18. The importance of proving the age of a victim in sexual offences cannot be gainsaid because sentences for sexual offences are variegated according to the age of the victim.

19. In the present case, the charge sheet shows that the complainant was an 8 year old child. In her evidence, PW1, the mother to the complainant told the court that the complainant was born on 4th April 2010. She also identified the complainant's clinic card – PMFI – 1, which was later produced by Dr. Mukhola, as Pexhibit 1 confirming the complainant's date of birth as 4th April 2010. The P3 form Pexhibit 2 shows that the complainant was 8 years old. The courts have held that the age of a child, as defined under the ***Sexual Offences Act, No. 3 of 2006 and the Children's Act, no. 8 of 2001,*** can be proved by documentary evidence such as birth certificate or child clinic card or by evidence of a parent of the child, guardian or other responsible adult who knows the child. See ***Hadson Mwachango versus Republic [2016]eKLR.*** The court may also estimate the age of a child through observation and common sense.

20. In the present case, I am satisfied that the evidence given by PW1, coupled with the documentary evidence given by Dr. Mukhola, proves beyond any reasonable doubt that the complainant was a child aged below 11 years of age, and more specifically she was 8 years of age.

**b) whether the prosecution proved penetration**

21. The appellant in his submission contends that the use of the words '**did bad manners to me**' by PW2 does not mean that he defiled the complainant. ***Section 2 of the Sexual Offences Act, no. 3 of 2006*** defines penetration to mean any superficial or deep intrusion by one genital organs into the genital organs of another. In this case, if the prosecution proved that the appellant's penis either superficially or deeply intruded into the complainant's vagina, the ingredient of penetration will have been proved.

22. According to the testimony of Dr. Mukhola, the complainant's genital area had blood and her hymen was also missing. Though no spermatozoa was seen, blood was found in the complainant's urine. The doctor formed the opinion that the complainant was defiled. In my considered view, the ingredient of penetration was proved, and as held by the Court of Appeal in the case of ***Sahali Omar versus Republic [2017]eKLR***

***".....penetration whether by use of fingers, penis or any other gadget is still penetration as provided under the Sexual Offences Act."***

**c) whether the appellant was positively identified as the culprit**

23. PW2 testified that while she was in the bushes grazing goats with the appellant, the appellant grabbed her, removed her clothes and "**did bad manners**" to her. In the Kenyan context, "**doing bad manners"** to a woman or girl or even a boy has the connotation of sexual intercourse. The reason for this is, in my humble view, the societal embargo on referring to sex and matters related thereto in explicit language. This court therefore understands that when a man is alleged to have done bad manners to a woman or girl it simply means having had sexual intercourse with the woman or girl in case of rape or defilement, or touching the private parts of a woman in the case of committing an indecent act.

24. PW2 also stated that the appellant whom she knew as Geoffrey was their neighbour. PW1 also confirmed the fact that the appellant was their neighbour. PW2 thereafter reported to PW1, PW3 and even PW4 that it was Geoffrey who had done bad manners to her while in the bushes grazing goats.

25. During his submissions, the appellant alleged that he was arrested for no apparent reason because he was sick on the day of the alleged offence. He denied the charge.

26. I am however satisfied that the consistency with which PW2 repeated the appellant's name to her mother, to the Investigating Officer and to the doctor confirms that she was talking of things she was convicted about. I am aware of the dangers that lurk in the shadows of the evidence of single identifying witnesses. I note that courts have to be particularly careful in such circumstances because corroboration would ordinarily be required. The present case is exempt from the requirement for corroboration by dint of the proviso to ***section 124 of the Evidence Act*** which allows a court to convict on the evidence of a single identifying witness as long as the trial court is satisfied that the witness is telling the truth.

27. In her judgment the learned trial magistrate stated in part as follows:-

***"There is no evidence of bad blood between the complainant's family and the accused's as to suggest that PW1 might have had the motive to want to falsely accuse the suspect. The child sounded truthful and convincing when she testified before court and the court has no reason to disbelieve her."***

28. As regards the appellant's evidence the learned trial magistrate stated that the same "**was so weak**, **it did not displace the prosecution evidence linking him to the charges."**

29. The above were observations of the trial court which saw and heard the witnesses. In its appellate jurisdiction, this court would

have no reason to doubt what the trial court said about the demeanor of the complainant. This court has also itself considered the appellant's testimony and concluded that it offers no challenge to the prosecution's case against him.

30. In a nutshell, I find and hold that the appellant was properly and positively identified as the perpetrator of this heinous act which took place at around 4.00pm on the day in question.

**d) Whether the court proceedings were conducted in a language understood by the appellant**

31. The appellant submitted that the complainant gave evidence in Kiswahili Language that he did not understand, and was therefore prejudiced. The record shows, right from 2nd August 2018 when the appellant took plea that the language of interpretation was Pokot. The entire record shows that the language of interpretation was Pokot. Though the complainant testified in Kiswahili the language of interpretation was Pokot. I therefore do not think that the appellant was in any way prejudiced by the fact of the complainant testifying in Kiswahili, just in the same way he cannot say he was prejudiced when Dr. Mukhola testified in English. The proceeding were interpreted into Pokot for the appellant. This complaint about language by the complainant is baseless, and is accordingly dismissed.

e) **Whether the sentence imposed by the trial court was against the weight of evidence**

32. As alluded to earlier in this judgment, sentences provided under the ***Sexual Offences Act, no. 3 of 2006*** are variegated according tot he age of the victim. ***Section 8(2) of the Act*** provides that ***"a person who commits an act of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"*** [Emphasis is mine]. The learned trial magistrate in this case imposed the mandatory sentence provided under the Act. She did so after considering the fact that the appellant was a first offender and that he had also informed the court in mitigation that he was an orphan and had asked for leniency. The learned trial magistrate also noted that the law did not give her any alternative in what sentence to mete out to the appellant.

33. Until the Supreme Court of Kenya decision in ***Francis Karioko Muruatetu & another versus Republic [2017]eKLR,*** the position was as stated by the learned trial magistrate in the present case. In the ***Muruatetu case***, above the Supreme Court noted that statutory mandatory sentences deprived a trial court of its discretion to mete out appropriate sentences depending on the circumstances of each case. The Supreme Court also stated, with regard to the mandatory death sentence for capital offences that the death penalty may still be imposed if the circumstances so warrant.

34. The Court of Appeal in S***tephen Wanjala Wanyonyi versus Republic [2019] eKLR*** applied the Supreme Court reasoning in the ***Muruatetu Case*** (above) in setting aside the statutory mandatory sentence and substituting it with a sentence the court thought appropriate in accordance with the guidelines set out by the Supreme Court. This means that if this court finds a good reason to interfere with the sentence of life imprisonment, it may proceed to do so.

35. This court notes that the appellant was extremely brazen in his attack on the complainant, who was a neighbour's daughter. As so aptly noted by the trial court, when the complainant saw the appellant herding goats, she "***went to where he was and he defiled her, implying that the complainant knew the accused very well [and] that is the only logical explanation that can be drawn from the fact that she would just see him herding goats and out of her own volition join him. The accused must have exploited the child's trust and innocence."***

36. What the appellant did, in my view was such bad manners that he deserves a harsh and deterrent sentence. He is the kind of person who can be described as a sex pest, because only pests can attack the innocence of little children such as the complainant in this case. The appellant therefore needs to be kept away from the community for long enough to give the complainant and others like her an opportunity to have a safe childhood.

37. For the above reasons, I would reduce the appellant's term of imprisonment to forty (40) years with effect from 5th march 2019.

**Conclusion**

38. In summary, I make the following orders in this appeal:-

**1. The appellant's appeal on conviction has no merit and the same is therefore dismissed.**

**2. The appellant's appeal on sentence succeeds in part only to the extent that the sentence of life imprisonment is set aside and replaced with forty (40) years imprisonment with effect from 5th march 2019.**

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

39. It is so ordered.

**Judgment delivered, dated and signed in open court at Kapenguria on this 27th day of November 2019.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

Present in court – Appellant

M/S Kiptoo present for Respondent

Mr. Juma Barasa – Court Assistant