



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 179 OF 2017

JOSEPH MWANGI MWAVULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. A. Ndung'u, Resident Magistrate delivered on 15th day of October 2015 in Shanzu Law Courts Criminal Case No. 364 of 2013.)

J U D G M E N T

1. Appellant was charged with offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. X of 2006 in Shanzu CMC CR. Case No. XXX of 2013.

2. Particulars were that on the 14th day of May 2013 at [particulars withheld] village in Kilifi County within the Coast Region intentionally caused his penis to penetrate the vagina of E.G. a girl child aged 4 years and upon taking the evidence of the prosecution witnesses the trial court found the most appropriate offence was sexual assault contrary to Section 5(1)(a) (i) and 5(2) of Act No. X of 2006. This was pursuant to the provisions of Section 179(1) & 2(2) of the Criminal Procedure Code.

3. The appellant was sentenced to serve 20 years imprisonment after the trial Magistrate considered that his mitigation as a 1st Offender end found he had committed a heinous crime that left the victim with lifelong psychological trauma. He also considered that sexual abuse of children was prevailed in the region and that made him arrive at the conclusion that a deterrent sentence was called for.

4. The Appellant was aggrieved by the conviction & sentence and he preferred this appeal on the following grounds:-

i. That the learned trial Magistrate erred in law and facts by convicting and sentencing me on a substantial evidence of the minor.

ii. That the learned trial Magistrate erred in law and facts by failing to find that there was no identification of the assailant to PW 2 who initiated the arrest.

iii. That the learned trial Magistrate erred in law and facts by failing to consider the contradictions between the evidence of PW 1 and the doctor.

iv. That the learned trial Magistrate erred in law and facts by relying on the evidence of PW 1 who did not voluntarily give evidence but was coerced to say so by her mother and that there was no nexus between what happened to her and the appellant.

v. That the learned trial Magistrate erred in law and facts by relying on just one piece of law that is Section 124 of the evidence act without taking into consideration that corroboration is still needful in such circumstances.

vi. That the learned trial Magistrate erred in law and facts by discounting and not considering in detail my defence evidence.

vii. That the learned trial Magistrate erred in law and facts by failing to find that the charge was defective.

viii. That the learned trial Magistrate erred in law and facts by not considering my mitigations.

ix. That the learned trial Magistrate erred in law and facts by giving a harsh and excessive sentence.

x. That the learned trial Magistrate erred in law and facts by failing to consider that time spent in remand custody prior to conviction and sentence.

5. The appeal was canvassed by way of written submissions. The duty of this court as 1st appellate court is to re-evaluate and analyze evidence adduced in the lower court and considered whether the judgment of the trial Magistrate was found on sound principal of law and based on evidence on record (summary of the evidence in lower court).

6. The issues for determination are whether:-

a) The perpetrator of the offence was properly identified.

b) Whether the complainant was sexually assaulted.

7. The complainant left school to go home but didn't get home and it is when PW 3 inquired from PW 2 that PW 2 realized she was missing. They looked for her from school and she was not there when PW 2 & PW 3 went back to school to make more inquiries. PW 1 came and held the mother PW1's hand. She told PW 2 that she had been to Babus place who gave her beef and ugali to eat and then allowed her to go home.

8. On the way PW 1 saw 'Babu' and pointed him to PW 2. When PW 2 asked appellant why he went with the child without her permission appellant told her she should not worry as he had given the child ugali & beef. PW 1 & PW 2 went home and when PW 1 went for a short call she came back while walking with difficulty.

9. Complainants mother examined her private part and found the under garment was dirty but she didn't bleed. That while PW 1 was taking PW 2 to appellant's place PW 2 saw appellant crossing the road and she tried to stop him but he didn't stop. She ran after him and when appellant became harsh and started shouting at the child.

10. Members of public told him to give the child time to speak and the child said that appellant had done bad manners to her after giving her ugali and thereafter promised to give her deep fried potatoes. On the way to hospital PW 2 and appellant were quarrelling and they took appellant to Mtwapa police station using his motorcycle. When PW 1 was taken to Coast General Hospital she was examined and found to have been sexually assaulted.

11. Dr Abdul Hussein produced P3 form as well as PRC form filled upon examination and treatment of the complainant. It was found that the child's hymen was missing and there was laceration on her labia minora and faucet and indication she had been assaulted sexually. The child testified very clearly that the appellant used his index and middle finger to penetrate his genitalia.

12. From evidence on record for prosecution, PW 2 realized there was something amiss when child came from the bathroom while walking with difficulty after a short call. PW 1 told the mother and the court appellant had sexually assaulted her using hi index and middle fingers. On medical examination the child was found to have lacerations on labia minora. This was evidence of sexual assault. Her hymen was also broken.

13. The appellant claimed he had gone to buy herbal medicine for snake bit for his wife but the witness he brought to support his case DW 2 lived in Kiembeni while he lived in Mtwapa. DW 2 doesn't say how he knew the appellant. He didn't know the woman the appellant allegedly went to buy medicine from and he didn't know the date the offence was committed.

14. The appellants defence as analyzed by the trial Magistrate was very doubtful as his own witness was not certain of what evidence he was coming to support. Appellant also claimed that PW 1 was undressed by members of the public and her private part examined a matter that was not confirmed by PW 1, PW 2 & PW 3. The appellants defence was a sham.

15. The appellant was identified by the child shortly after the incident and he confirmed that he had given the child ugali and beef and that the mother should not be worried. This was confirmed by the child that after appellant had given her ugali he undressed her and did 'tabia mbaya' to her using his middle and index finger and promised to buy for her deep fried potatoes.

16. I do find that the appellant's appeal lacks merit save that the sentence of 20 years will be substituted with the minimum 10 years under Section 5(1) (i) and 5(2) of the Sexual Offences Act. Since the appellant does not appear to have secured his release on bond the sentence of 10 years will commence from date he was arraigned in court i.e. 16th May 2013.

17. Orders accordingly.

Right of Appeal on points of law 14 days.

Dated, signed and delivered in open court at Mombasa this 27th day of May, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE