



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E023 OF 2020

RML.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from

the Original Malindi Criminal Case No. 79 of 2018 in a judgment

delivered on 13th December, 2018 by Hon. Dr. Julie Oseko – Chief Magistrate)

CORAM: Hon. Justice S.M.Githinji

Mr Mwangi for the state

Appellant in person

J U D G M E N T

RML was charged in the lower court with the main count of defilement, contrary to section 8 sub-section (1) as read with sub-section 3 of the Sexual Offences Act No.3 of 2006.

The particulars of this offence are that on the 23rd day of September, 2018 at [particulars withheld] area in Malindi Sub – County, within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of **BRW (BRW)**, a girl aged 14 years.

There is a preferred alternative count of committing an Indecent Act, contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars hereof being that on the 23rd day of September, 2018 at [particulars withheld] area in Malindi Sub – County within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of **BRW**, a girl child aged 14 years, by using his penis.

The complainant hereof was born of **GK and KK**. The father however passed on. They live at [particulars withheld] in Malindi. The appellant herein who is married, is their neighbor and by the time the offence was allegedly committed was a man friend to the complainant's mother. They were close to a point where the complainant regards the appellant as his step-father. The appellant many nights, spent at their home with the complainant's mother, sharing the bed.

On the 23rd September, 2018 at 7.00am the complainant was at home. She was with the appellant as the mother had gone to fetch water. She went to the bathroom. Adjacent to the said bathroom was still another bathroom separated with a wall which height was up to the lintel. The appellant went to the adjacent bathroom. As the complainant was bathing the appellant scaled the wall and through the space between the lintel and the roof, accessed the bathroom where the complainant was. Complainant saw him as he was jumping down into the said bathroom. She tried to grab a lessso to cover herself. The appellant closed the bathroom door from inside. He covered her mouth and forced her to lie down. He was naked as he did that. He then inserted his penis inside her anus. When he was through, he got back to the other bathroom the same way he had left. The complainant finished bathing and went to the house. There was a curtain separating where she was and where the appellant was. As she was oiling her body, the appellant pushed aside the curtain. He urged her to remove the lessso covering her nakedness. The appellant had covered himself in a towel. He called her to where he was. They struggled. He dropped his towel. The mother got in and found them. She asked the complainant what they were doing. She said the appellant wanted to have sex with her. The mother hit her with a stick as well as the appellant. The appellant left and was away for a month.

Basically the foregoing evidence is the one that relates to the date the offence was allegedly committed. What follows thereafter in the evidence of Pw -1 is not covered in the particulars of the offences in the charge sheet. The evidence is that when the appellant returned to their home, one day on a Saturday while he mother was away, he removed her trouser and inserted his penis into her vagina. She was asleep and when she woke up she found him inside her. She pushed him away and he fell on the bed. The mother entered and asked what they were doing. The appellant told her not to say anything. She went outside. While washing clothes the mother warned her against having sex with the appellant as she could be infected with a disease.

On another day when the mother had gone to visit a patient in hospital, the appellant called the complainant to go and sleep in his house. The appellant has a wife and the complainant shared with the wife the bed as the appellant slept on the seat. After the wife had left at 7.00am for work, the appellant went to the bed. He turned the complainant on the side and inserted his penis into her vagina. He had sex with her while covering her mouth. The mother went and found her in the house. She told her what had happened. The mother and her brother who was present said she was lying.

The appellant had sex with her several other times in the bathroom in the same manner he had done before. The complainant kept on complaining to her mother who only warned her that she will catch a disease. She eventually reported to an aunt called L who told her uncle about it.

The said uncle called Pw -3 a Bajaj driver. He told him about the report and requested him to find out what was happening. Pw-3 went to [particulars withheld] Primary School where the complainant was schooling. He found her and asked her what the problem was. She reported that her step father A was doing bad things to her in the bathroom. She narrated how he used to scale the wall of the adjacent bathroom, get to her bathroom and have sex with her. She also alleged he was doing it in the house in bed. They informed the teacher who advised them to report to the police.

They reported at Malindi Police Station on 2nd October, 2018. Pw-2 received the report. The report was that on 23rd September, 2018 the complainant was defiled by her step-father called R. On 3rd October, 2018 she was escorted to Malindi Sub – County Hospital. Her age was assessed and found to be 14 years old. Her P-3 form was also filled by Pw-4. His evidence is that the complainant's hymen was broken. She had foul smelling discharge. She was pregnant.

Upon closure of the prosecution case the Court found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant gave sworn statement in his defence and called no witness. His defence is briefly that he lives in Kisumu Ndogo and is a driver. On the material date he disagreed with his wife. There was a scuffle in which his wife bit his finger. He reported to the police and was treated at Tawfiq hospital. His brother in law called him to deliberate on the issue. They were not able to as there were children. The appellant went to the home of this friend called Dan.

After 3 days the appellant was called back by his wife. They reconciled and related well. His brother-in-law AK was not happy about it. He said the two were playing with their minds as they had separated. On 29th September, 2018 the brother-in law saw them together and vowed to do something bad.

On 1st October, 2018 the appellant was told by Tony that the said in-law and his wife were planning something sinister. When complainant got home she refused to eat with them. She did so for 3 days. On 4th he was arrested on allegation that a woman called Pendo was complaining that he was not seeing her. He was taken to the police station and was charged with the fabricated offences. The wife told him it must be her brother who was behind it. The complainant went to see him in prison. They alleged they gave the doctor 5,000/- and he could pay 170,000/- to settle the matter.

The trial court evaluated the evidence and the submissions and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 10 years imprisonment.

The appellant aggrieved by the said conviction and sentence appealed to this Court on the grounds that; -

- 1. He was convicted on the evidence of Pw-1 which was contradictory, inconsistent and therefore unreliable.**
- 2. The evidence of Pw-1 did not tally with that of Pw-3 on the person who informed Pw-3 about the incident.**
- 3. Age assessment report and the P-3 form were irregularly produced.**
- 4. The case was not proved beyond reasonable doubt as DNA test was not conducted.**
- 5. Some crucial witnesses were not called by the prosecution.**
- 6. Defence was not properly weighed.**

The appellant filed submissions while the state offered oral submissions.

I have considered the charges preferred, evidence adduced by both sides, the judgement passed and sentence meted, grounds of appeal and submissions. The only issue which the Court need weigh is the inconsistency between the evidence adduced and the particulars of the offences in the charge sheet.

The particulars of the offences refers to an incident that allegedly took place on one day, and that is on 23rd September, 2018. It is alleged on that day the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of BRW, a girl aged 14 years. The alternative count also refers to the said date and allege the appellant intentionally and unlawfully committed an indecent act by touching the vagina of BRW, a girl child aged 14 years by using his penis.

The evidence of Pw-1 in relation to what happened on that particular day is to the effect that the appellant penetrated her anus. While she claimed on other subsequent occasions he penetrated her vagina, such are not covered in the charge sheet and the evidence was of little probative value as far as the charge in place is concerned, if any. The evidence is what brought confusion in the case and made the investigating officer not focus on the incident he was investigating. Pw-4 did not therefore examine the anus of the complainant but the vagina which had nothing to do with the incident of 23rd September, 2018. The prosecution had a choice of raising several counts of each time an offence was allegedly committed or do as they did in this case of picking one incident of which they felt they had clear, easy and strong evidence on. Having gone by the latter position, it then does not pay to adduce evidence on incidents not covered in the charge. Calling such evidence amounts to calling evidence of accused's character which can prejudice his case by portraying him as a person who readily commits related offences. Similarly, it may blur the accused on the offence he is actually defending and make him lose focus. If the Court is not keen it can also be swayed the wrong way as it happened in this case.

The particulars of the charge talks of penetration of the complainant's vagina while the evidence discloses penetration of her anus. The evidence in support of the charge, other than that of the complainant, focuses on penetration of her vagina and is to that effect. Pw-4 even indicated that the complainant was pregnant. If correct, this must have been out of an incident of another undisclosed date and not the clear incident of 23rd September, 2018, covered in the charge sheet.

The question here is not about the date of the offence of which if it was the only issue such would be curable under section 382 of the Criminal Procedure Code, but the genital organ which was penetrated. Anus though also a genital organ under section 2 (1) of the Sexual Offences Act, is different from vagina, also a genital organ. The facts and particulars of the offence in the charge sheet need agree on the genital organs used.

Having observed so, the bottom line is that the prosecution did not establish the offence against the accused person beyond reasonable doubt. The trial magistrate erred in finding otherwise. The appeal therefore succeeds. The conviction and the sentence are quashed. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF NOVEMBER, 2021.

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S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Mwangi for the State
2. The Appellant in person