



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 69 OF 2016

NICHOLAS KIPROP CHERAIS.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

(Appeal against both conviction and sentence of Resident Magistrate, Nakuru Hon. R. Amwayi in Criminal Case No.35 of 2014 Nakuru delivered on 23rd October, 2014.)

JUDGMENT

INTRODUCTION

1. The appellant was charged in the lower court with the offence of **defilement contrary to section 8(1) (3) of the sexual offences Act No.3 of 2006**. Particulars are that on 4th day of February 2017 in Rongai District within Nakuru County, he unlawfully and intentionally committed an act of inserting male organ namely penis to a female genital organ namely vagina of **MJ** a child aged 12 years old which caused penetration.
2. Appellant was also charged with alternative count of **committing an indecent act with a child contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on 4th day of February 2017 in Rongai District within Nakuru County, he unlawful committed indecent act by touching the female genital organ namely vagina of **MJ** a child aged 12 years with his penis.
3. After hearing, the trial magistrate found that the prosecution proved its case against appellant to the required standards. She found the appellant guilty of the offence of defilement and convicted him and sentenced him to 20 years imprisonment.
4. Being aggrieved by the trial magistrate, the appellant filed this appeal on the following grounds:-
 - i. That the trial magistrate erred in law and fact by relying on the evidence that was inconsistent and contradictory to each other.
 - ii. That the trial magistrate erred in law and fact by relying on the evidence of incredible witnesses.
 - iii. That the trial magistrate erred in law and fact by not considering that the constitutional rights of the appellant were violated.
 - iv. That the trial magistrate erred both in law and fact by relying on the medical evidence that was very inconsistent with the history given by the prosecution witnesses.
5. This being the first appellate court, I am obligated to reevaluate evidence adduced in the trial court and arrive at an independent determination. This I do while minded of the fact that unlike the trial court, I never got opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance.
6. The prosecution availed four witnesses, the complainant, her mother, the doctor and the investigating officer. The complainant testified that she used to visit her aunt's place while from school and the appellant being related to her aunt lived nearby. In her testimony, it was the second time the appellant was defiling her.
7. The appellant on the other hand, said he had travelled to Nairobi during the material period and came back on 7th February 2014. He

raised defence of *alibi* and alleged that that a land dispute exist between him and complainant's family.

ANALYSIS AND DETERMINATION

8. The ingredient for offence of defilement are identification, age and penetration. The finding on the three ingredients will answer issues raised in appeal.

9. In respect to age, I note from the record that the complainant produced in court a birth certificate which showed that the complainant was born on 16th July 2002. The offence occurred on 4th day of February 2017. This confirm that at the time of the offence the complainant was 14 years 5 months. The charge however indicate the complainant was aged 12 years. In view of the fact that birth certificate was produced, it confirm age of the child as age assessment is approximation. In fact it would not be necessary to undertake age assessment if birth certificate is available unless its authenticity is doubted. In this case, therefore I take birth certificate of age, as there is no evidence challenging its authenticity. I therefore take the child's age as 14 years 5 months at the time of offence.

10. On identification, PW1 said she knew appellant as he was related to her aunt and she used to go to her aunt's place from school and would meet appellant. She said the appellant was defiling her the 2nd time on 4th February 2017. This was confirmed by the appellant who said the complainant was well known to him. He further said he did not have a grudge or disagreement with the complainant.

11. As to whether penetration was proved, PW3, **Dr. Emmanuel Wekesa** produced P3 form filled by **Dr. Nodia** the doctor. He said the finding of child's examination is that physical examination did not reveal any injuries. On examination of her vagina, he found that her hymen was broken and the opening of vagina was abnormally opened. He said urinalysis revealed no abnormal findings. In cross-examination, he said the broken hymen is ordinarily caused by penetration by male genitalia.

12. From the foregoing, it is evident that there was penetration on the child.

She was therefore defiled.

13. The accused confirmed that the child is well known to him as they were related by marriage. The incident occurred at 5 pm; the issue of mistaken identity cannot therefore arise.

14. Accused raised defence of *alibi*; he said he had travelled to Nairobi on 3rd February and he was back on 6th February 2014. He also said the complainant's family have a land dispute with him. On cross-examination, he said he travelled to and from Nairobi via Molo line. He said he went to a friend's place in Nairobi one **Kosgei Gideon**. The appellant failed to produce receipts to confirm travel during the period herein nor avail the friend he stayed with in Nairobi to adduce evidence. Accused further failed to produce any document or person to confirm that he has a dispute with the complainant's family.

15. From the foregoing, I find that the ingredients of the offence of defilement were proved beyond reasonable doubt and the appellant's failed to prove his defence of *alibi* or that that a grudge existing between him and complainant's family which could possibly instigate motivated any complainant's family to frame up charges against him.

16. From the forgoing, I see no merit in the appeal against conviction.

17. As far as sentence is concerned, I note that the girl was aged 14 years 5 months at the time of the offence. The offence fall under section 8 (3) of the Sexual Offences Act which provide for a sentence of not less than twenty years. In view of **Murwatetu** case sentence is reduced to 15 years imprisonment.

18. FINAL ORDERS

- 1. Appeal on conviction is hereby dismissed.**
- 2. Sentence is reduced to 15 years.**
- 3. Sentence to run from the time the appellant was sentenced in the lower court.**

Judgment dated, signed and delivered at Nakuru via zoom This 30th day of April 2020

In the presence of:

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RACHEL NGETICH

JUDGE

Schola - Court Assistant

Appellant in person

Rita Counsel for the State