



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 21 OF 2020

CORAM: D.S. MAJANJA J.

BETWEEN

MUTUA NDATHO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. Abuya, SPM. dated 24th April 2018 at the Magistrate's Court at Meru in Sexual Offence Case No. 89 of 2016)

JUDGMENT

1. Although he was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** ("the **Act**"), the appellant, **MUTUA NDATHO**, was convicted on the alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Act**). The particulars of the charge were that on 12th November 2016 at [Particulars Withheld] of Buuri District within Meru County, he intentionally touched the vagina of KK, a child aged 8 years, with his penis.

2. The appellant was sentenced to 10 years' imprisonment and now appeals against conviction and sentence. As this is a first appeal, it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

3. The complainant, PW 1, gave her testimony on oath after a *voire dire*. She testified that she was 8 years old. She narrated what transpired on 12th November 2016. She stated that as she was playing with her friends including the appellant's daughter, the appellant called her. She narrated her ordeal as follows:

The accused told me we go sleep then we went to sleep. It was 4.00pm. When we went to sleep it was 4.00pm when we went to sleep, he removed my clothes and he entered the bed and removed my clothes. I had won a trouser which colour I don't recall. I had won a red sweater. I had on a white pant. He removed my trouser and pant. Accused had won a trouser and he removed his trouser and he inserted his thing inside her (pointing at her vagina). Then after he inserted he stayed. Then I was laying on the bed. When I started to cry he told me to put on my clothes and he put on his clothes. I never screamed when he finished he told me if I report he will kill me. Then the kid of accused, a daughter asked me if I did "Mumefanya" I said yes, I did.

4. PW 1 testified that she went to inform her grandmother, PW 2, what had taken place. PW 2, recalled that on the material day, PW 1, went to play at the appellant's place in the evening. When she returned after a while, she was crying. When PW 2 asked her what happened she narrated the ordeal with the appellant. She called her neighbour and when they examined PW 1's private parts, they observed that the private parts were swollen. They took PW 1 to the hospital and then reported the matter to the police. PW 1's grandfather, PW 4, was also at home at the material time when he also noticed PW 1 crying when she returned from the appellant's place. He also recalled that PW 1 narrated her ordeal to him.

5. The doctor produced the P3 medical form and the Post Rape Care (PRC) form, PW 5, which was prepared by the doctor who examined PW 1 on 13th November 2016. The key observation was that the hymen was broken. No spermatozoa were seen on the vaginal swab. He however, concluded that there was penetration.

6. The Investigating Officer, PW 6, confirmed that on 12th November 2016, the incident of defilement of PW 1 was reported by PW 2 and PW 3. He issued the P3 form and took the child to the hospital. He also secured the Birth Certificate.

7. When the appellant was put on his defence, the appellant gave sworn testimony. He denied that he knew the complainant. He told the court that on 12th November 2016, he was at the market from 9.00am to 9.00pm. On the next day, while at home, police officers came to see him

and alleged he had defiled PW 1. He denied this accusation as his wife was at home. In cross-examination, he stated that he did not know PW 1 as she was a student in Mombasa.

8. In order to prove the offence of defilement under **section 8(1)** of the **Act**, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. “*Penetration*” under **section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

9. I have evaluated the evidence and I find that PW 1 gave straightforward testimony on how the appellant called her into his house and proceeded to cause an act of penetration. Despite exhaustive cross-examination, the record shows that she remained unshaken. The complainant’s evidence alone was capable of supporting a conviction as the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. The trial magistrate was however satisfied that there was sufficient corroboratory evidence of sexual assault by the appellant. First, PW 2 and PW 3 confirmed that PW 1 went to play at the appellant’s house and when she returned, she was in a state of distress and narrated to them what happened.

10. As regards the medical evidence, the trial magistrate, concluded that since there were no lacerations/tears and her hymen was broken and no bleeding, the penetration was not proved. In my view, this was a misdirection as the offence of defilement is committed when the act of penetration is proved. Penetration may not result in any injuries. However, since the respondent did not cross-appeal against this finding, it shall remain undisturbed.

11. The appellant raised an alibi defence that he was not at home on that material day. An accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see **Kiarie v Republic [1984] KLR 739**). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial.

12. In this case, the testimony of PW 1 was credible and her presence at the home of the appellant, who as a neighbour, was confirmed by PW 2 and PW 3. He was a neighbour and there is no evidence that there was a grudge between the appellant, PW 2 and PW 3. I do not find the alibi credible.

13. The age of a child is a question of fact and it may be proved in any number of ways including, like in this case, the production of a birth certificate. She was born on 6th January 2009 hence she was aged 7 years at the time of the offence. It was proved that the complainant was a child for purposes of the offence, committing an indecent act. The prosecution proved all the elements of the offence of committing an indecent act with a child. Consequently, I affirm the conviction.

14. The appellant was sentenced to the mandatory minimum sentence under **section 11(1)** of the **Act**. While I am alive to the fact that mandatory minimum sentences are no longer tenable, the sentence was appropriate in light of the predatory behavior of the appellant towards the child. I am not convinced that the sentence is harsh or excessive. I affirm the sentence.

15. I dismiss the appeal.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.