



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CRIMINAL CASE NO. 14 OF 2018

JOAB ISIELA MALWEYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **JOAB ISIELA MALWEYI** was convicted for the offence of defilement of a child Contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the charge were that on 30th May 2012 at **CPU** village within **UASIN GISHU COUNTY**, he intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of **DM**, a girl aged 3 years.

The appellant denied the charge, but upon hearing, he was convicted and sentenced to serve life imprisonment.

2. The complainant was declared a vulnerable witness under **Section 31(4)** of the **Sexual Offences Act** by virtue of her inability to talk, and her grandmother **ML** was appointed to testify on her behalf.

3. **ML** (PW1) told the trial court that she had custody and care of the minor **DM**, as her mother moved in **SOY**. On 30.05.2012 at about 1.00pm, where at home, she saw the appellant (who was her neighbour employee) grazing his employer's cattle. She saw **DM** following him – that was not the first time for the child to follow the appellant, as she was used to him. Later PW1 saw the child coming home while carrying her panty in her hand. The child wanted to pass urine, as well as defecate but was unable as she was feeling pain.

4. PW1 noticed some discharge from the minor's genitals, which she described as male sperms. Fearing the child may have been defiled, she took her to hospital.

5. On re-examination PW1 stated the child:-

“She came after parting with the accused person. The accused was taking away the cows in a very fast way.”

6. **AA** (a sister to the minor's mother) accompanied the child and PW1 to hospital. PW1 briefed her about the incident, saying the child had been defiled by a neighbour.

The next day she reported the matter to police and also went in search of the appellant. However the appellant's employer said he had gone for a burial at their home. Later appellant was arrested.

7. **DR. PAUL RUNUH** (PW6) produced the P3 form on behalf of **DR. JAGUGA**, and the findings were that the child had hymeneal tears leading to a conclusion that there had been penetration.

8. **I P JOSEPH LICHENE** who was then at **SOY POLICE STATION** confirmed receiving a report about the incident and that on **10th June 2012** at 1.00pm, the appellant was taken to the police station by members of the public who said they got him out of a motor vehicle as he was trying to run away.

9. In his sworn defence the appellant admitted that he knew the minor but denied defiling her.

On cross examination stated:

“I did not commit the offence. I was not looking after the said D on that day.”

10. The trial magistrate in her judgment pointed out that the appellant was well known to PW1 who saw him in the company of the minor in broad daylight. Shortly before the incident. Further there was no reason for the minor to lie against the appellant and her evidence was corroborated by the medical findings.

11. The trial magistrate also noted that the minor's age was confirmed not just by her guardian's evidence but also the clinic card which recorded that she was born on 29.08.2009 thus making her 3 years at the time the offence was committed. The trial magistrate observed that the appellant's defence was a mere denial and he did not give any evidence to displace what the prosecution had presented. Further that his conduct so soon after the incident – boarding a motor vehicle for another destination, be spoken of a man with a guilty mind. His defence was thus rejected.

12. Being aggrieved by these findings, the appellant challenged the trial court's decision on amended ground condensed to that:

a) **There was no medical evidence to link him to the offence – he cited Section 36 of the Sexual Offences Act,**

b) **The prosecution relied on fabricated evidence, yet the child never testified.**

13. The appellant argued his appeal through written submissions, submitting that they were not subjected to forensic analysis and he did not undergo any medical examination to establish that he was the culprit.

It was his contention that he was implicated simply due to enmity between him and the minor's mother.

14. He also complained that the minor did not testify and that this resulted in a miscarriage of justice. In opposing the appeal, **MISS KAGALI** on behalf of the prosecution submitted that the minor was examined so soon after the ordeal, by PW1 who saw a semen – like discharge in her genitalia. These observations were confirmed by the medical evidence which noted a hymenal tear with evidence of penetration.

The child had been in the company of the appellant and no one else – shortly after that she came back with her panty in her hands and pain in her privates.

The evidence pointed to no – one other than the accused; and indeed as the trial magistrate pointed out, his defence was a mere denial which did not dislodge the prosecution's case.

15. As for the minor not testifying – a basis was set that before the trial court that minor did not know how to speak properly and the trial magistrate having interviewed the minor confirmed that, and declared her a vulnerable witness.

16. **Section 31 (2)** of the Sexual Offences Act provides that a court may on its own motion or on request by prosecution or any witness who is to give evidence, declare any such witness vulnerable on account of inter alia

a) **Age**

b)

c) **Trauma**

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17. Furthermore the trial court examined the intermediary before making the declaration under Section 31(4) of the Sexual Offences Act.

What the trial magistrate did was within the law and there was no violation of the appellant's right in fair trial.

The upshot is that the appeal lacks merit and is dismissed.

H. A. OMONDI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY 2019