



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

HCCRA No. 31 OF 2016

JUMA KADENGE GILBERT..... APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(An Appeal from the conviction and sentence of 15 years imprisonment by Hon. J.W. ONCHURU (P.M) of Lamu law Courts on 18/4/2015)

JUDGEMENT

1. The Appellant was convicted with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006 and sentenced on 18/4/2015.
2. The particulars of the charge are that on 3/9/2015 at 6 P.M. within Lamu County the Appellant intentionally accused his Penis to penetrate the vagina of XXX, a child aged 15 years.
3. The Appellant was faced with an alternative charge of committing an indecent Act with a child contrary to section II(I) of the sexual offences Act No.3 of 2006 in that on the same material particular as in count I (above), the Appellant intentionally touched the vagina of XXX, a child aged 15 years with his penis.
4. The Prosecution evidence in summary is that on 15/9/2015 at about 6p.m.the complainant went for a church service with her friend S. They returned in the evening and she took a shower and went to Zawadi's place where the Appellant was called by his in law V. On arrival, the Appellant inquired what had happened and the complainant told him she had differed with her mother. The Appellant then took the complainant to his house where they slept and had sex.

The following morning the Appellant went to work and on returning gave the complainant Kshs. 500/-. She left for her grandmothers place where she stayed for one day and left for Wangare's place. While at Wangare's place, the Appellant called the complainant and told her to go home as things had cooled down. He sent her Kshs. 400/-. The two met again and stayed together for three days. The Appellant decided to take the complainant to Mombasa but he first took her to Maggy's place where her brother J K found her and took her home. At home, the complainant was beaten by her mother and the matter was reported to the police.

5. The Appellant was also arrested and charged with this offence on 15/6/2015 after he wake up in the morning did some work before he went to his friend Ali's place. He said at Ali's place he saw a boy who requested to use his phone. After the conversation the man asked the Appellant to accompany him to the main road. At the main road, they met a lady whom the Appellant greeted but she did not reply. Shortly after that a vehicle arrived and took the Appellant to Mokowe Police Station where he was locked up.

6. The trial court found the Appellant guilty as charged and sentenced him to 15 years imprisonment. The Appellant has appealed against both conviction and sentence on the following grounds;

(i) That he pleaded not guilty on trial.

(ii) That he was was sentenced to fifteen [15] years imprisonment on 18/4/2016 for the offence of Defilement c/sec.8[I] as read with sec.8[3] of the sexual Offences act no.3 of 2006 in CR. Case no. 555/2015.

(iii) That he is twenty four years old and convicting him to fifteen years jail term without proper evidence is like just ruining his life forever.

(iv) That the principal magistrate's court did not analyze properly the charges against him since there was no evidence from the complainant party.

- (v) That the magistrate did not give him enough time to have the statements of the complainant and the witnesses as a whole.
- (vi) The magistrate allowed witnesses that were not indicated on the charge sheet and the court did not disclose them to him.
- (vii) That the statement shows very clear that the complainant was arrested alone by his brother with an assistance of administration police officer.
- (viii) That the p3 form or the Doctor did not specify that during the allegation if the complainant was virgin before and if she lost virginity thereafter.

7. I have carefully considered the submissions by both parties in this appeal, my findings are as follows:-

- (i) I find that the three elements of defilement are the identity of the perpetrator, penetration and the age of the complainant.
- (ii) I find that in the current case, the Perpetrator was properly identified by the complainant. She said the Appellant took her to his home where she lived with him.
- (iii) I also find that penetration was proved. The evidence of the complainant was corroborated by that of the Clinical Officer (PW5) who examined the complainant and confirmed that her hymen was broken.
- (iv) I also find that the age of the complainant was proved of production of the age assessment report which confirmed was 15 years old on 15/10/2015.
- (v) I find that the conviction herein is secure and the sentence lawful.
- (vi) I accordingly dismiss the appeal and I confirm both the conviction and sentence.

Due to the security situation at Hindi Prison, the appellant could not be availed to court for this judgment which has been long pending and the judgment is now delivered on this 28th day of February, 2018 in the absence of the Appellant.

_____ for the Appellant.

Mr. Kasyoka for the Respondent

Order to issue accordingly.

ASENATH ONGERI

JUDGE.