



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HCCA No. 02 OF 2017

STEPHEN KACHUNGA NJOKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence of 10 years imprisonment

by Hon. J.W. Onchuru (P.M) at Lamu Law Court on 1/12/2015)

JUDGMENT

1. The Appellant was charged with Defilements Contrary to Section 8(4) of the Sexual offences Act No. 3 of 2006. He was convicted and sentenced to 10 years imprisonment on 1/12/2015.

2. The particulars of the charge were that on diverse dates between December, 2014 and 13th March 2015 at [particulars withheld] Sub county within Lamu county, the Appellant intentionally caused his penis to penetrates the vagina of XXX, a child aged 17 years.

3. The Appellants was charged with an alternative charge of committing an indecent Act with a child contrary to Section 11(a) of the Sexual offences Act No. 3 of 2006 in that in the same material particulars as in count 1 (above) the Appellant Intentionally touched the Vagina of XXX, a child aged 17 years.

4. The Prosecution evidence in summary was that the Appellant started defiling the complainant in December, 2014 when the complainant a 17 years order when the Complainant went to to Robert Margo's place at 3p.m. and met the Appellant.

The Appellant offered to take the complainant to Mumbi's place where she alleged the mother of the complainant was waiting for her. They did not find the complainant's mother and when the complainant wanted to go back, the Appellant took her behind Mumbi's house in an open field and removed her pant and had sex with her. The Appellant then ordered the complainant to put on her clothes and go home. The complainant did not tell her mother what had happened.

5. Again on 13/3/2015, the complainant said she went with her Aunt to attend a wedding at [particulars withheld] Village and on her way home she met her friends at xxxx Area and while they were chatting the Appellant sent for her and took her to xxxxx place where he alleged that her mother was waiting for her. The Appellant then took the complainant to the bushes where he defiled her. That night she did not sleep at home and the following morning when her mother confronted her she told her mother that the Appellant had been defiling her.

The matter was reported to the police and the complainant was taken to Hospital and upon examination was found to be six weeks pregnant. The Appellant was subsequently charged with this offence.

6. The Appellant in his evidence before court denied that he defiled the complainant. He said on 10/05/2015, he gave Pw2, the complainant's mother Kshs. 1000 to go and buy sugar and she took too long to return his change prompting hi m to follow her to the AP canteen. The Appellant said on asking Pw2 about his change,she abused him and he was subsequently charged with this offence.

7. The trial court found the Appellant guilty and sentenced him to 10 years imprisonment the Appellant has now appealed against both sentence and convictions on the following grounds:

GROUND OF APPEAL

(i) That he pleaded not guilty to the charge

(ii) That he was sentenced to ten years imprisonment for the offence of defilement C/Sec. 8(1) as read with Sec. 8(4) act no. 3 of 2006.

(iii) That no DNA was done to prove that he is the one who was to be blamed.

(iv) That the statement of PW1 and PWII had no signature and date to prove that they are the ones who recorded the statement.

(v) That the Appellant not given enough time to prepare my defence.

(vi) That the incident occurred on March, 2015 and he was arrested on May, 2015 and they were staying in the same plot with the complainant.

(vii) That the complainant lied to the court by saying she was in school while she was not and there was no official document produced in court to prove.

(viii) That this was a grudge between the Appellant and the mother of the complainant who had borrowed money from him and she was not ready to pay the money back to me

(ix) That the complainant was forced to give evident in the court. When she refused the Magistrate ordered the complainant to be taken to police cells.

8. I have carefully considered the submissions by both Pester and my findings are as follows:-

(i) That the three elements for the offence of defilement are Identity of the Perpetrator, penetration and the age of the complainant.

(ii) In the current case, the Perpetrator was identified by both the complainant and his mother (pw2). The Appellant was a neighbour and well known to both the complainant and his mother.

(iii) The prosecution also proved penetration. The evidence of Pw1 was corroborated by that of the Doctor who confirmed that her hymen was missing and she was 6 weeks and one day pregnancy

(iv) I find that it is not mandatory to do a DNA test as this is not paternity test.

(v) I find that the age of the complainant was proved by production of her Clinic card which showed the complainant was born on 20/12/1999 and in March, 2015she was 17 years old.

(vi) I find that the evidence herein is watertight and the conviction is secure.

(vii) I accordingly dismiss the Appeal and uphold 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.