



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 142 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

BENSON MUTWIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.L. Ambasi, CM dated 30th August 2016 at the Chief Magistrate's Court at Meru in Criminal Case No.1455 of 2014)

JUDGMENT

1. The appellant, **BENSON MUTWIRI**, was charged with defilement contrary to **section 8(1) (2)** of the **Sexual Offences Act**. It was alleged that on 16th July 2014 in Buuri District within Meru County, he intentionally caused his penis to penetrate the vagina of J G M, a child aged 9 years. He was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence.

2. 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**).

3. The child (PW 1) gave sworn testimony after a *voire dire* where she stated that on 16th July 2014, she was coming from school and she met the appellant collecting water. She narrated what transpired as follows:

He grabbed me and covered my mouth with his hand. He pulled me to a thicket and removed my clothes. He removed my pant and removed his trouser. He removed his penis and inserted it in my vagina. Then he pushed me on the ground and defiled me and felt pain. After defiling me he threatened to beat me if I informed my mother.

4. PW 1 told the court that when she went home she did not inform her mother. She was later taken to hospital after her mother discovered she had been defiled.

5. PW 1's mother, PW 2, recalled that on 16th July 2014, when she returned from work, she found PW 1 had bathed and washed her clothes. When she woke PW 1 on the next morning, she found blood on her pyjama. She tried to clean her up but PW 1 continued bleeding and was in pain. This when PW 1 told her that she was going to be killed. She took her to the dispensary but she was not treated as there were many people so they went back to on 18th July 2014. This when she revealed at the Hospital that she was defiled. They went to report at Subuiga Police Station.

6. PW 3, a medical doctor, produced the P3 form prepared by his colleague who examined PW1 on 22nd July 2014. The examining doctor observed that the vagina had several lacerations and tears and the hymen was broken. He noted that the examination was done 6 days after the incident. PW 4, the Investigating Officer confirmed that the report of the defilement was made on 20th July 2014. He proceeded to arrest the accused from his house and charge him.

7. In his defence, the accused denied the offence and claimed that he was not the person who committed the offence.

8. I have reviewed the entire evidence and I find that PW 1 gave clear evidence of how the appellant waylaid her as she was going home and proceeded to sexually assault her. The appellant was known to her and she had been seen from time to time collecting water although she did not know his name. PW 1 did not inform PW 2 of the incident immediately, but it is understandable that she was a young girl who had been

assaulted and threatened by the appellant. The fact of penetration was confirmed by PW 2 who found her vagina bleeding while PW 3 testified that the report of the examination of PW 1's vagina revealed lacerations and tears consistent with penetration despite the examination having been done 6 days later. All this evidence points to the appellant as the person who sexually assaulted PW 1. The appellant's defence that he was not the one who assaulted PW1 does not hold water as PW1 testified that he was familiar to her and the incident took place in broad daylight.

9. Counsel for the accused raise the issue of infections and the need to confirm that both the appellant and PW 1 were both infected by the same disease in order to exclude the possibility of any false charges. I find that the offence of defilement is proved by an act of penetration and not infection. Further, medical evidence obtained by testing of both the appellant and PW 1 would be unnecessary in a case where penetration is proved by other evidence. In *Geoffrey Kioji v Republic*, NYR Crim. App. No. 270 of 2010 (UR), the Court of Appeal stated that;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement.

10. PW 1's age was proved by production of her birth certificate which showed that she was born on 16th February 2004. She was therefore 9 years old and her age fell within the **section 8(2)** of the *Sexual Offences Act* which prescribes a mandatory life sentence where the age of the victim is below 11 years.

11. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at MERU this 30th day of May 2018.

D.S. MAJANJA

JUDGE

Mr Wamache, Advocate for the appellant.

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