



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 19 OF 2018

JOHN MUNYAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment delivered on 19th July, 2017 by Hon. J.W. Onchuru (Principal Magistrate) Chief Magistrate's Courts at Thika in Criminal Case No. 2612 of 2011).

JUDGMENT

1. The Appellant, John Munyao was charged with the **offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**

The particulars being that the Appellant on the 29th day of May 2011 in Thika East district within Kiambu County, by use of his genital organs namely penis caused penetration into the genital organ namely vagina of M W a child aged 7 years.

2. The prosecution case was that the complainant, PW1 M W a standard 2 pupil together with her elder sister who was a standard 3 pupil were outside their grandmothers home giving water to the goats at the roadside. That the Appellant who was a neighbour called them and sent the elder sister to buy sweets. That the Appellant took the complainant inside the house, placed her on the bed and had sexual intercourse with her. That the Appellant then threatened to kill her if she revealed what had happened then told her to go home.

3. The complainant informed her sister what had transpired. When the grandmother returned home from a funeral she had gone to attend she was informed of the matter. The grandmother made a report to the village headman. The complainant's mother was called and the complainant was taken to a nearby Health Centre for treatment and a report made at the nearby police post.

4. The Appellant in his defence case gave unsworn evidence. He stated that on 5th June, 2011 he went to Delmonte area and returned home in the evening. That he did not find his wife at home and went to look for her at the river. He was then arrested by two man who took him to the police station where he was charged. The Appellant termed the charges herein as maliciously instituted due to a quarrel with the complainant's mother.

5. The trial magistrate found the Appellant guilty as charged and convicted him accordingly. The Appellant was sentenced to life imprisonment.

6. The Appellant was aggrieved by the conviction and sentence and appealed to this court. The amended grounds of appeal are as follows:

(a) The language used by the trial court was not understood by the Appellant.

(b) The prosecution evidence was contradictory.

(c) The P3 form was not produced by the doctor who filled in the same.

(d) The prosecution case was not proved.

7. During the hearing of the appeal, the Appellant relied on his written submissions. The said submissions essentially expound on the grounds of appeal. The Appellant further contended that he was convicted under a non existent provision of the Law, that the complainant's age was not proved and blamed the case on bad blood with the complainant's mother.

8. The learned counsel for the state opposed the appeal. He submitted on the sufficiency of the prosecution evidence and stated that the

prosecution case was proved beyond any reasonable doubts.

9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

10. The complainant (PW1) was affirmed after the trial court carried out a *voire dire*. The complainant in her evidence gave a narrative to the court that left no doubt that she had been defiled. The complainant described how the person she identified as the Appellant placed her on the bed, unzipped his trousers removed her trousers and inner wear then removed his organ which is used to urinate, knelt down and inserted the said organ in her part of the body that is used to urinate. She stated that she felt pain.

11. The complainant's evidence that she was left alone with the Appellant when the others went to buy sweets after being sent by the Appellant is supported by that of her sister, PW2 S W. Both PW1 and PW2 who were affirmed stated that they knew the Appellant as a neighbour.

12. The circumstantial evidence by PW1 and PW2 reflects that the offence took place during the day. This can be deduced from the other activities they were engaged in like giving the goats water by the road side and going to the shops. The evidence of both PW1 and Pw2 is that they knew the Appellant as a neighbour. PW3 the complainant's mother gave evidence that confirms that the Appellant is a neighbour.

13. The evidence of PW1 and PW2 is consistent and is that of recognition during day time. It is noteworthy that the evidence of recognition is more assuring. The court expressed itself as follows in the case of **Anjononi & another v Republic 1980 KLR**:

“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”

14. The mother (PW3) gave the complainant's age at the time of giving evidence in court as 8 years. A Clinic Card was produced as an exhibit by PW4 PC Kenneson Onyango Obongo, the investigating officer. The same reflects that the complainant was born on 28th September, 2003.

15. Dr. Nduati Robinson (PW5) from Thika Level 5 Hospital testified on behalf of Dr. Murimi who had examined the complainant and filled in the P3 form. The doctor gave the complainant's age at the material time as 7 years. The doctor's opinion was that the complainant had lacerations in her genitalia and the conclusion was that the complainant had been defiled.

16. The P3 form was filled in the normal course of duty. Dr. Nduati (PW5) informed the trial court that the doctor who filled the P3 form was away pursuing a Masters Degree. The Appellant had the opportunity to cross-examine the doctor (PW5) on the contents of the P3 form.

17. The Appellant's defence that this case is due to bad blood between him and the complainant's mother is not convincing. The complainant's mother during cross-examination by the Appellant stated that she grew up with the Appellant as a neighbour and denied suggestions by the Appellant that she was telling lies to put him in trouble. The mother also denied the existence of any land dispute.

18. The complainant's mother maintained her evidence during cross-examination. The medical evidence established that the complainant was indeed defiled. This is not something that the mother could have stage managed. I am satisfied that the prosecution case was proved beyond reasonable doubt.

19. The Lower Court proceedings reflect that there was a court clerk carrying out interpretation throughout the proceedings. The language of the trial court is reflected as English/Kiswahili. The Appellant participated in the trial throughout and cross-examined each and every witness. The inference that can be drawn is that the Appellant understood the proceedings against him.

20. The Appellant was charged under Section 8 (1)(2) of the Sexual Offence Act. The trial magistrate reflected that the Appellant was convicted under Section 89 (1)(2). This is a non existence provision of the Sexual Offence Act. However, the Appellant was charged under the correct provision of the law and reflecting the wrong provision in the judgment did not occasion any prejudice to the Appellant. (See Criminal Procedure Code Section 382). The sentence meted out is within the law.

21. In the upshot, I find no merits in the appeal and dismiss the same.

Dated, signed and delivered at Kiambu this 22nd day of June, 2018

B. THURANIRA JADEN

JUDGE