



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 8 OF 2017

FRANCIS MUENDO JOHN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. Simiyu L. (Ag) SRM delivered on 10th December, 2014 in Machakos Chief Magistrate's Court Criminal Case No. 774 of 2013)

JUDGEMENT

1. The Appellant, Francis Muendo John was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the Appellant, on the 10th July, 2013 in Mwala District within Machakos County, intentionally and unlawfully, caused his penis to penetrate the vagina of E N N a child aged sixteen (16) years.
2. He faced an alternative charge of indecent act with a child contrary to **Section 11** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that the appellant on 10th July, 2013 in Mwala District within Machakos County, intentionally and unlawfully, caused his penis to penetrate the vagina of E N N a child aged sixteen years.
3. A plea of not guilty was entered for both charges and the Appellant was put to trial. Upon hearing of the case, the trial court convicted the Appellant of the offence and sentenced him to 15 years imprisonment.
4. This being a first appeal, it is for this court to re-analyze and re-evaluate the evidence a fresh and arrive at its own independent conclusion. The appellant having been charged with defilement, it was for the prosecution to establish that the appellant committed an act which causes penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." Indecent act on the other hand is defined under section 2(1) of the Act as an unlawful intentional act which causes, "(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration." Another issue that has to be determined is the age of the complainant to ensure that she was a child at the time of the act.
5. Brief facts are that E N N while walking to her aunt's home was ambushed by the Appellant who was a pillion passenger on a motor bike. He told her that he wanted to escort her since it was late and that he knew her father N. She refused telling him that she had reached her destination. The Appellant allegedly grabbed her by the neck and put her on the motor bike. They rode up to a junction where the Appellant and complainant disembarked and he dragged her into a garden under a mango tree. The garden is said to have been on her uncle's land. He tore and pulled her underwear. He pulled down his trouser and underwear and inserted his penis into her vagina. He had sex with her thrice. The third time she bit his lip and he backed away in pain. She then ran to her aunt's place where she found D M (PW3) who helped her to bed and she narrated the ordeal the following day. J S N (PW1) was informed of the ordeal by N, E N N's father. She the next day interrogated E N N who narrated to her what had happened. She accompanied her to the DC's office where they reported the incident. There they gave the police E N N's clothing which she wore on the material day. They went to Masii health center and was informed to go to Machakos Level 5 Hospital where they went the following day. James Kilonzo a Clinical Officer at Masii health center and who attended to E N N confirmed that she was aged 16 years. Upon examination he found her clothes bloody from tears and laceration from labia majora and minora, the labias were tender on touching, no injuries on outer body parts, the injuries were a day old. Police Constable William Bosire who was attached to Masii police station received the report on 11th July, 2013 that the Appellant had defiled E N N on 10th July, 2013 at around 7.00 pm. He issued her with a P3 form and on 13th July, 2013, the Appellant was arrested at his home in Utithini village by Corporal Mutunga and PC Munyake Fredrick. He stated that E N N had informed him that she bit the Appellant's lip during the incident. He took the Appellant to Masii Health Care where he was examined and the swelling on the lip confirmed. He then charged the Appellant with the offence he was facing. He visited the scene and confirmed signs of disturbance and that the homestead was about 300 metres away. He produced E N N's skirt, biker and shoes as P. Exhibit 1-3 respectively. He also produced the Appellant's treatment document as P. Exhibit 4.
6. Put on his defence the Appellant (DW1) stated that he was on the material day at work at Mwangi's premises. That he had been there

between 6th and 12th and only went back home on 12th. That he was on the material day at 7.00 pm at Nomads resort bar with Patrick Kioko and Peter Kyalo watching news. He denied ever knowing E N N prior to the trial. He produced receipts for lodging dated 1st, 8th, 9th, 10th, 11th, 12th and 14th July, 2013. He also produced a register of a self-help group for which he is a member indicating that he was away from the group in Utimini from 4th July, 2013 to 29th August, 2013. Patrick Wambua Kioko (DW2) stated that he was on the material day with the Appellant at Nomads resort and got to work together the next day and that he went back home on 12th July, 2013.

7. I have given due consideration of this case together with the submissions tendered therein. In my view the following issues fall for this court's determination:

a) Whether or not the age of E N N was established.

b) Whether or not there was penetration and or indecent act.

c) Whether or not the appellant was positively identified.

8. No submissions were made with regard to the first issue. E N N produced her birth certificate which reveals that she was born 16th October, 1996. It is therefore clear that she was 16 years and some months old at the time of the incidence.

9. On the second issue, PW1 stated that E N N walked with difficulty. PW4 on his part confirmed that E N N had blood from tears and laceration from her labia majora and minora, that the labias were tender on touching, that no injuries on outer body parts and that the injuries were a day old. This was a confirmation that there was penetration.

10. On the third issue, the Appellant contended in submissions that he was not positively identified. That being dark and having been ambushed and therefore filled with fear, she was unable to make the correct judgment on identification. It was contended that voice identification was not properly tested by the trial court for a safe conviction. On the issue of identification, the Appellant cited some authorities among them; **Peter Kioko Wambua & 3 Others v. Republic (2013) eKLR** and **Silas Gitonga Simon v. Republic (2014) eKLR**. That E N N failed to mention her assailant's name in the earliest instance weakening her case and cited **George Bundi M'Rimbera v. Republic**. He further argued that E N N failed to call N as a witness. He relied on the case of **Bukenya & others v. Uganda (1972) EA 549**. The respondent on the other hand submitted that this was a case of recognition as opposed to identification of a stranger. That the appellant was known to E N N and that she identified him by voice and facial recognition and lastly by the wound she inflicted on him.

11. The court in **Wamunga v. Republic (1989) KLR 424** at 426 had this to say on the issue of identification:

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

12. In **Nzaro v. Republic (1991) KAR 212**, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

13. This court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification. From the evidence on record, it is clear that the time within which the act occurred was not a short time. Considering the time stated, the circumstances were favourable for E N N to identify the appellant. The time between the grabbing of E N N, putting her on the motor bike, dragging her to the scene and defiling her were favourable for recognition bearing in mind also that he was a person known to her. See also **Anjononi & others v. Republic (1981) eKLR** where the court was of the view that:

"...recognition of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form or other."

14. It emerged from E N N's evidence and PW5 that E N N bit the Appellant's lower lips during the incident. Although the appellant however in his defence produced receipts in an attempt to prove that he was away on the material day and brought DW2 to support his said allegation, the Appellant did not rebut the said allegation or explain how he sustained the wound on his lower lip. The Appellant was examined and the injuries on the lower lip confirmed. This therefore placed the Appellant at the scene of crime and left no doubt that he was the perpetrator. Indeed the complainant recognized him and mentioned his name leading to the arrest. In the circumstances, I find that the prosecution established the ingredients of the charge of defilement.

15. Submissions were made on the failure to call Mr. N as a witness. It must be noted that Section 143 of the Evidence Act does not specify the number of witness one has to bring to prove a case. What matters is bringing witnesses who establish a charge. Further, Mr. N although said to have gotten the information in the defilement first, did not witness the incident he can therefore not be said to possess information that would be adverse to the prosecution case. All the prosecution needed to bring were witnesses to establish the ingredients of the offence which it did.

16. In the end, I find that this Appeal has no merit and is hereby dismissed. The trial magistrate's judgment is hereby upheld. The conviction and sentence is affirmed.

Orders accordingly.

Dated and delivered at Machakos this 14th day of June, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Machuki for Nzioka- for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant