



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 4 OF 2016

KELVIN MOGIRE MIHENCHA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. Munyendo - Sitati – RM dated 15th January, 2015 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 111 of 2015)

JUDGMENT

1. The appellant, KELVIN MOGIRE MIHENCHA, was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act (‘the Act’). The particulars of the offence were that on 31st January 2015 in Nyamache District of Kisii County, he intentionally caused his penis to penetrate the vagina of VM, a child aged 14 years.

2. The appellant now appeals against conviction and sentence on the basis of the petition of appeal, supplementary grounds of appeal and written submissions. The totality of his case is that the prosecution failed to prove the case against him beyond reasonable doubt. The state supports both conviction and sentence.

3. In order to deal with this appeal, it is important to recall that it is the duty of the first appellate court to review the evidence afresh and reach an independent decision as to whether to uphold the conviction. In doing so, it must make allowance for the fact that it neither heard nor saw the witnesses testify (**Okeno v. R [1972]EA 32**).

4. The child, PW 1, testified that she had been sent by her father to go to her aunt’s house to collect money on 31st January 2016 when the appellant, approached her. As she was leaving the appellant started chasing her. She described what happened as follows:

“The accused then took me to his house. His house is still within our village. When we were in his house he asked me to remove my clothes. I refused. He said he will call the community policing. He then took me to his bed. He removed my clothes. The accused then raped me. The accused had removed his clothes. He lay on me. I felt his penis in my vagina. When he was done with me he said he will call his sister to come and sleep with me. The accused went and lied to my father that I was hiding in his house. My father came with community policing and I was taken from the house. I was taken with Mogire at Nyangusu Police Station.”

5. PW 1’s father, PW 4, testified that he sent PW 1 to her aunt to collect money on the material day but she did not return. When he called his sister in law, she told him that she had released PW 1 at 2.00p.m. He started looking for the appellant and with the aid of the community policing, they laid ambush at the appellant’s home at night. They did not find him in his house but found PW 1 with the appellant in the appellant’s mother’s house whereupon they arrested them.

6. The investigating officer, PW 3, confirmed that on the night of 3rd February 2015, the appellant and PW 1 accompanied by PW 4 came to the police station. He arrested PW 2 and issued a P3 form to both the appellant and PW 1. PW 3 produced PW 1’s birth notification which showed that she was born on 2nd August 2000.

7. The clinical officer, PW 2, examined PW 1 and the appellant on 3rd February 2015 at Nyamache Sub-district Hospital. Upon examination of PW 1, he noted that there was inflammation of the interior vaginal walls and labia minora which he concluded were an indication of recent friction following penetration. A laboratory examination of vaginal specimen indicated that she had a sexually transmitted infection. An examination of the appellant also revealed that he also had a sexually transmitted infection.

8. In his unsworn statement, the appellant confirmed that PW 2 came to his home on the night of 2nd February 2015 together with other people. They searched his house and found nothing. He also stated that the people also searched his sister’s house and found a girl. He complained that he had been framed due to a land dispute.

9. I have reviewed the evidence and it is clear that PW 1 knew the appellant as they were neighbours. The appellant in his defence did not assert that PW 1 and PW 2 were strangers to him. The issue of mistaken identity is therefore negated by the fact that PW 1 was taken in broad daylight and stayed with the appellant for a few days. PW 1's testimony, which I have set out, on what took place leaves no doubt that the appellant, did cause an act of penetration.

10. PW 1's testimony was additionally corroborated by the expert testimony of PW 3. The fact that she disappeared and was found in the appellant's homestead was confirmed by PW 2. His defence that he was framed rings hollow and is an afterthought as this issue was not raised with PW 1 and PW 2 in cross examination.

11. The age of the child was also proved by the testimony of PW 1 and PW 5 and the production of PW 1's birth notification by PW 3. It showed that she was 14 years old at the time the offence was committed.

12. The totality of the evidence is that the prosecution proved all elements of the offence. The age of the child falls within the bracket of section 8(3) of the Act which prescribes a minimum sentence of 20 years imprisonment.

13. The appeal is dismissed.

Dated and delivered at Kisii this 24th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.