



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 84 OF 2018

BETWEEN

AMR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. S.N Makila, SRM dated 24th August 2018 at the Chief Magistrate's Court at Kisii in Sexual Offences Case No. 53 of 2017)

JUDGMENT

1. The appellant, **AMR**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** ('the Act'). The charge against him was as follows:

On the diverse dates between 27th October and 1st November 2017 in Kisii Central Sub-County within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of RSM a child aged 7 years.

2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. He claims that the charge was defective as it did not show the time the offence was committed, that the prosecution did not prove the offence beyond reasonable doubt, that the evidence was inconsistent and the witness testimony contradictory. The State opposed the appeal on grounds that the prosecution had proved all the elements of the offence of defilement.

3. As this is a first appeal, I am required to re-appraise the evidence and reach an independent decision as to whether I should uphold the conviction. I must take into account that I neither heard nor saw the witnesses testify.

4. After a voire dire, PW 1, gave unsworn testimony. She stated that sometime in October 2017 while she was in her grandmother's house, the appellant called her. She narrated what happened as follows:

*In October, 2017 I was at my grandmother's house when **AMR** called me and J. He sent J to the river and he told me to sweep his house. On finishing he grabbed me and put me on the bed. He undressed me and did bad manners to me. He also undressed himself. He applied oil on his "thing" and put it in my private part (points at her vagina). I felt pain. He poured yellowish – whitish wet substance on my private part (points at her vagina). I screamed. The said **AMR** told me to go to my grandmother. I told her that I was in pain and had a headache but she told me to go and sleep it off.*

5. PW 1 told the court that the appellant had chased away her mother and that he was living close to her grandmother. She testified that when her mother came back on the same day she was washed and bathed.

6. The child's mother, PW 2, testified that on the material day she had left her children including PW 1 with her mother. She recalled that she used to live with the appellant who chased her away. When she went to her grandmother's place to bath the children, she noticed that PW 1 had a discharge from her private parts. PW 1 told her what had transpired the earlier that day. She took the child for examination and treatment first at Christamarriane Hospital then to Kisii Level 6 Hospital. She also made a report at Kisii Police Station.

7. The investigating officer, PW 3, testified that PW 2 came to the police station with PW 1 on 2nd November 2018 although the incident had been reported on 1st November 2018. She issued the P3 form and took them to Kisii Teaching and Referral Hospital. She testified that the appellant presented himself at the police station as he knew he was being looked for.

8. A Clinical Officer at the hospital, PW 4, testified that PW 1 had been brought to the hospital on 1st November 2017. According to the

treatment notes, there was bruising in the private parts with cuts and the hymen was broken. There was a discharge from the vagina. The high vaginal swab showed pus cells while urinalysis showed pus cells and white blood cells. He produced the P3 form. He noted that the child had been infected with a sexually transmitted infection.

9. In his unsworn testimony, he told the court that he is a motorbike rider and that on 26th October 2017, he arrived at home from work. He suspected his wife was unfaithful and when he confronted her, they disagreed and she left with the children to go to her grandmother's place. On 3rd November 2017 he stated that he was arrested. He claimed that he was being framed and that PW 1 had been coached to testify against him. He also told the court that on the material day he was attending to a sick relative with his brother.

10. The appellant's brother, DW 2, recalled that on 31st October 2017 he was with the appellant at a funeral and after they parted ways, he learnt that the appellant had been arrested.

11. In order to prove the offence of defilement, the prosecution must establish that the victim was a child, that she was subjected to an act of penetration by the accused. "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.*"

12. PW 1 gave clear testimony as to what transpired on the day the appellant took her to his house and sexually assaulted her. On this issue the appellant contended that the prosecution did not establish the precise day the incident took place and that the day was not stated in the charge.

13. According to the charge, which I have set out above, the offence was committed on diverse dates between "27th October and 1st November 2017." PW 1 only mentioned one incident and it was not put to her whether there were other incidents. According to her PW 2 came back on the same day, washed and bathed her.

14. PW 2 stated that PW 1 told her that the appellant had assaulted her earlier in the day. The P3 form shows that the incident was reported to the police on 1st November 2017 and on the same day PW 1 was treated. The P3 form was filled on 2nd November 2011. From the P3 form that the act of defilement was by "*by her father around 4 – 5 days ago at unknown times ...*" In cross examination, PW 3 stated that PW 1 could not recall the date but that it was alleged that the child was defiled on 29th October 2017.

15. In my view and given the testimony of the witnesses I have outlined, it is clear the child could not recall the date she was sexually assaulted, it is likely 1st November 2017. That is the date the incident was reported to the hospital and the child taken to the hospital for initial treatment and examination. I do not think failure to state the precise date in the charge was prejudicial to the appellant the fact of the incident of defilement were clearly stated and presented in the evidence.

16. In any case, the testimony of PW 1 was straightforward. Under the proviso to **section 154** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the trial court may convict an accused in sexual offences on the basis on the uncorroborated testimony of a child if, for reasons to be recorded, the court is satisfied that the victim is telling the truth. The trial magistrate noted that, "*Despite giving an unsworn testimony, she was consistent and remain(ed) steadfast when she was cross-examined. She reported the incident to her mother who noticed some discharge while bathing her that evening.*"

17. Quite apart from the fact that the incident took place in broad daylight, PW 1 knew the appellant as he was in a relationship with her mother until he chased her and the children away. The fact of penetration was proved by the medical evidence which showed her vagina had been injured. Such injuries on the vagina are not ordinary nor commonplace and corroborate the act of penetration.

18. In view of this positive and affirmative evidence, I reject the appellant's alibi testimony and it is also difficult to discern why a 7 year old child would implicate him in the offence.

19. There was not contest that the PW 1 was aged below 18 years. Her actual age was proved by produced of her Immunization Card which indicated that she was born on 7th January 2010. She was therefore aged 7 years old when the offence was committed. She was thus below the age of 11 years where under **section 8(2)** of the **Act**, the sentence of life imprisonment is mandatory where the victim is below the age of 11 years.

20. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at KISII this 20th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

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