



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 96 OF 2017

B M S.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an appeal from the original conviction and sentence in

SO Case Number 301 of 2016 in the Chief Magistrate's court

at Eldoret – Hon. H.O. BARASA (PM)

JUDGMENT

1. The appellant, **B M S**, 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 offence were that on the 17th December 2016 at [Particulars withheld] Estate, in Wareng District, within Uasin Gishu County, intentionally caused his penis to penetrate the vagina of I A (particulars withheld) a child aged 15 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary with section 11 (1) of the said Act.
2. The appellant pleaded not guilty to both the main count and its alternative charge and a trial was thereafter conducted in which the prosecution called a total of 7 witnesses in a bid to prove its case.
3. A summary of the prosecution's case was that (PWI), the complainant herein is the appellant's step daughter while PW3 E M is the complainant's mother and the appellant's wife. The complainant testified that on the fateful day at about 7 am she was sleeping.
4. PW3, the complainant's mother testified that the complainant was aged 16 years. She produced a copy of the complainant's Certificate of Birth which showed that she was born on 26th December 2001. She further testified that on the 17th December 2016, she left her house at around 6.30am to run an errand only to return at around 7.00am when she found the appellant sleeping on the complainant's bed. The complainant then informed PW3 that the appellant had defiled her. The complainant was then taken to Moi Teaching and Referral Hospital where she was examined and treated. She was also issued with a P3 Form which was duly filled by a medical officer (PW6) who produced it as an exhibit during the trial. According to PW6, the complainant sustained visible marks on the left cheek and had vaginal tears in three places which were consistent with defilement.
5. PW7, a police officer attached to Langas Police Station, investigated the case and went to the scene shortly after the matter was reported to the police. Her testimony was that she found the appellant after he had been beaten up and injured by members of the public who were angered by his conduct. She booked the appellant at the station before escorting him to hospital for treatment.
6. When placed on his defense, the appellant testified that he had a disagreement with his wife (PW3) after which she decided to leave him but that as she was packing her items onto a pick-up truck, she started to scream thereby attracting the attention of members of the public who then beat him up until he lost consciousness before the police came to the scene to arrest him.
7. After considering the evidence presented by the prosecution and the appellant, the trial court found that the prosecution had proved its case beyond reasonable doubt after which the appellant was convicted and sentenced to 20 years imprisonment thereby provoking the instant appeal in which the appellant set out the following grounds of appeal.

8. At the hearing of the appeal, the appellant argued that the prosecution's case was not proved to the required standards as

9. On her part, Miss Mumu, learned counsel for the state submitted that the prosecution had established all the critical ingredients of the offence of defilement namely; the age of the complainant, penetration and the positive identification of the appellant as the perpetrator of the offence.

10. As the first appellate court, the duty of this court is to re-evaluate and reanalyze the evidence tendered before the trial court with a view to arriving at its own independent findings, but while bearing in mind the fact that it neither heard nor saw the witnesses testify.

11. In the instant case I find that the age of the complainant was proved through the certificate of birth which showed that she was born on 26th December 2016 while the offence was committed on 17th December 2001 I therefore find that the complainant was 16 years at the time she was defiled thereby falling within the age bracket of a minor within the meaning of the definition of a child as stipulated under section 2 of the Children Act.

12. On penetration, I find that the complainant narrated, in a very consistent and compelling manner the circumstances under which the appellant attacked before sexually assaulting her. The complainant's testimony was corroborated by the testimony of PW6 the medical officer who examined and treated her. PW6 also produced the P3 form in court which showed that the complainant sustained vaginal tears that were consistent with defilement.

13. Turning to the issue of identification of the appellant as the complainant's assailant, I note that the appellant was the complainant's own stepfather and was therefore well known to the complainant who positively identified her as her attacker. PW3, the appellant's own wife testified that she found the appellant lying on the complainant's bed on the morning in question. I am therefore satisfied that the appellant was positively identified as the perpetrator of the offence in question.

14. I have considered the appellants unsworn statement in his defence and I find that it consisted of mere denial of the offence and a claim that he had disagreed with PW3. I find that the appellant's defence did not impeach the otherwise cogent and corroborated evidence of the prosecution which included medical evidence of an independent medical professional and police officer. In sum, I am satisfied that the prosecution's case was proved beyond reasonable doubt.

15. Turning to the appeal on sentence, I note that Section 8(1) of the Sexual Offences Act under which the accused was charged provides:

“ A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 2 of the said Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

16. In the instant case the appellant was sentenced to 20 years imprisonment and I find that the said sentence was lawful and was, in fact, the minimum mandatory sentence that can be passed upon conviction for the said offence. I therefore find that there is no reason to interfere with the sentence passed by the trial court.

17. From the foregoing findings and observations, I find that the instant appeal is not merited and the only order that commends itself to me is the order to dismiss the instant appeal.

Orders accordingly.

Dated and signed at NAIROBI this 6th day of December 2018

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018

OLGA SEWE

JUDGE

In the presence of:

Ms Mumu for the state

Appellant in person