



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 59 OF 2016

YASMIN KOMBOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an Appeal from the Judgment, sentencing and conviction by Hon. B. Kasavuli SRM

dated 11th October 2016 in the Principal Magistrate's Court at Winam, Criminal Case No. 362 of 2013]

JUDGMENT

The appellant was convicted and sentenced to life imprisonment for defilement of a child aged ten years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

His grounds of appeal as set out in the Petition of Appeal are that -

- “1. The Learned Magistrate erred in law and fact by relying on uncorroborated evidence of a minor to convict the appellant, without warning himself of the dangers of doing so and the fact that it would be unsafe to convict under the circumstances.**
- 2. The learned trial Magistrate further erred in law and fact by proceeding to convict the appellant without the evidence of any independent eye witness, yet at least six (6) were mentioned as being present at/near the scene.**
- 3. The Learned trial Magistrate erred in law and fact by failing to consider that the prosecution did not adduce or produce any evidence specifically linking the accused person to the alleged act of defilement of the complainant. In particular, that the appellant was never medically examined nor were any samples taken from him.**
- 4. The Learned Magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.**
- 5. The Learned trial Magistrate erred in law and in fact in convicting the Appellant under Section 8(1) of the Sexual Offences Act as read with Sub Section 4 thereof, without sufficient evidence and without making a specific finding as to whether the appellant in fact defiled the complainant on the date, time and place indicated in the charge sheet.**
- 6. The Learned trial Magistrate erred in fact and in law in failing to consider glaring**

inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.

7. The Learned Trial Magistrate erred in fact and in law in failing to take into consideration the defence put forward by the Appellant. The Trial Magistrate erred in law by not appreciating and disregarding the Evidence of the Defence throughout the case.

8. That the Trial Magistrate erred in Law and in Fact in convicting the Appellant in the absence of compelling Evidence from the prosecution.

9. In whole, the finding and holding of the Learned Trial Magistrate as contained in the judgment delivered on 11th October 2016 is inconsiderate, erroneous, unlawful, biased and untenable in law.”

As the first appellate Court I have reconsidered and evaluated the evidence in the court below so as to arrive at my own conclusion while bearing in mind that I did not have the benefit of observing the demeanour of the witnesses. I have also considered the submissions of the Learned Counsel at the hearing of this appeal.

The proviso to Section 124 of the Evidence Act removed the requirement for corroboration in sexual offences and the court can convict on the evidence of the victim of that offence alone provided it believes her. In this case I believe the Complainant. She testified as PW1 and vividly narrated how on the material day she was left at home with her sister while her parents went away for a funeral; how the appellant who was their neighbour invited her to sleep in their house; how he left with his wife and then returned to the house alone and joined her in the bed he had shown her to sleep. All the while his own children were sleeping on a mattress on the floor; The victim vividly narrated how he touched her on the breast and private parts before inserting his penis into her vagina. She told the Court that she felt a lot of pain and insisted she wanted to go to her house. He followed her wanting to know if she would report him. She did not say anything immediately but later she reported him to her mother (PW2) and her sister C. Both her mother (PW2) and father (PW3) confirmed that on the material day they went to their rural home and left the children together and that they heard of the occurrence from the Complainant. When George Mutai (PW4) a Clinical Officer at Airport Dispensary examined her on 29th April 2013 he noted that she had abdominal pain and lacerations on the labia minora and majora and concluded that penetration had occurred. All this goes to show that the Complainant was a credible witness and as I have stated I believed her. A birth certificate produced as EXB 3 shows she was born on 6th August 2003 hence confirmation that she was ten years old when this offence was committed. The appellant's defence that he was framed because of a grudge he had with the Complainant's mother is not convincing at all and is an afterthought. There is evidence that the Complainant was defiled and the appellant was positively identified by the Complainant as the perpetrator. She knew him well prior to the incident as they were neighbours. She knew his house as they were neighbours and before and even during the incident he spoke to her. The evidence against him was overwhelming and the sentence imposed is lawful. Accordingly I find no merit in this appeal and it is dismissed. The conviction and sentence are hereby upheld.

Signed, dated and delivered at Kisumu this 23rd day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Chelangat for the State

Mr. Otieno D. for the Appellant (Holding Brief for Miss Kagoya)

The Appellant

Serah Sidera – Interpreter