



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA NO. 8 OF 2016

REGINA MUTHENGI.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(An Appeal against the judgment, conviction and sentence of 10 years

imprisonment in CR. CASE No. 970 of 2011 by Hon. J. GANDANI (SPM)

on 19/02/2016 at Mombasa Law Courts)

JUDGMENT

1. The Appellant was convicted with the offence of sexual assault contrary to section 5 (1) as read with section 5 (2) of the sexual offences Act No. 3 of 2006 and she was sentenced to 10 years imprisonment.
2. The particulars of the offence are that on 18th day of March 2011 and 21st March 2011 at [particulars withheld] Academy in Likoni area within Coast Province, the Appellant intentionally and unlawfully used her fingers to penetrate the vagina of XX, a girl aged five years.
3. The prosecution evidence is that the Appellant followed the complainant to the toilet, removed her panty and inserted her fingers in the complainant's vagina. She did it on Friday and Monday. The complainant told her mother and the matter was reported to the police.
4. The Doctor who examined the complainant (PW3) said her hymen was ruptured and she had hyperemia (reddening after trauma on the body) of the vulva. A vaginal swab was taken which showed that the complainant had bled. The Doctor said the injuries may have been caused by a blunt object.
5. The Appellant said she was a caretaker at the school where she had worked for 10 years at the Nursery section. She said on the day she is alleged to have assaulted the complaint, she had not seen her. She said the primary toilets were far from those of the Nursery section and she was not allowed to go to the primary section.
6. The court found the Appellant guilty and sentenced her to 10 years imprisonment. The Appellant has appealed against sentence and conviction on the following grounds:-

(i) THAT the honourable trial court erred in law and fact by failing to objectively analyze the evidence tendered on record and failing to resolve the obvious inconsistencies manifest in the evidence to the appellants favour;

(ii) THAT the honourable trial court in failing to properly analyze the facts and evidence on record, arrived at erroneous findings of fact and law as the evidence on record does not disclose the offence of sexual assault;

(iii) THAT the honourable trial court erred in law by convicting the appellant on the uncorroborated evidence of a minor and which evidence was not tendered under oath and which evidence was also most unbelievable;

(iv) THAT the honourable trial court erred in law by failing to objectively apply its mind to the defence of alibi tendered by the appellant and corroborated by the appellant's witness and which testimonies were made under oath and were not controverted or at all;

(v) THAT the honourable court erred in law in failing to appreciate that the medical evidence on record did not support the facts of the case nor the charges against the appellant;

(vi) THAT the honourable trial court erred in law by failing to call crucial witnesses and which witnesses would have assisted the court arrive at a fair outcome;

(vii) THAT the honourable trial court erred in law in reaching a finding that the offence had been proved beyond a shadow of doubt;

(viii) THAT the trial court wrongly analyzed and interpreted the definition of penetration as *per Section 2 of the Sexual Offences Act in relation to the offence of sexual assault as read together with Section 5 (2) of the said act* thereby occasioning a miscarriage of justice to the Appellant;

(ix) THAT the learned trial Magistrate erred in law by failing to note that the conduct of the appellant at the time of the allegation, arrest and trial did not portray a guilty mind or at all;

(x) THAT the trial court erred in law in failing to find that it was highly suspect that the investigating officer did not take the appellant statement either under caution or otherwise before charging her and had he done so, he would not have charged the appellant with the said offence;

(xi) THAT the trial magistrate failed to note the suspect acts of the complainant and her witnesses which raised doubt as to the occurrence of the said offence if at all.

7. The Appellant submitted through her counsel as follows:-

(i) That there were contradictions in the prosecution evidence. That the complainant said on page 8 of the record of Appeal that she screamed loudly but on page 12 the mother of the complainant said the complainant told her she did not scream at all.

(ii) That there were also contradictions concerning the pants the complainant was wearing. The mother of the complainant said the pants were blood stained but the complainant's teacher said the child went home without pants.

(iii) That the trial court dismissed the Appellant's defence without giving it consideration. That the Appellant gave sworn evidence and called a witness and further that the defence evidence demonstrates the kind of person the Appellant is.

(iv) That the prosecution did not call the other children as witnesses and that the trial court relied on the incredible testimony of the complainant alone.

(v) The Appellant also submitted that fingers are not included in the definition of genital organs.

8. The Respondent opposed the Appeal and submitted as follows:-

(i) That the contradictions in the prosecution case were not material and they did not shake the prosecution case.

(ii) That the Appellant was convicted under section 5 (1) of the sexual offences Act and that the prosecution proved that the Appellant used her fingers to penetrate the complainant.

(iii) That the trial Magistrate was right in convicting the Appellant as the prosecution proved its case to the required standard.

9. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in Line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

“An appellant on a .dust appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”.

10. My findings are as follows:-

(i) The prosecution was required to prove the three ingredients of defilement to the required standard. The three are penetration, the identity of the perpetrator and the age of the victim.

(ii) On the issue of penetration and the identity of the perpetrator, the trial court relied on section 124 of the Evidence Act to convict

the Appellant. However, that section deals with a situation where the court finds that the minor reliable and records the reasons.

(iii) I find that in the current case, the minor in this case gave unsworn evidence and her testimony was contradictory.

The minor told the teacher and her mother different versions of the incident. For example on page 8 of the proceedings she said:-

"I screamed and madam teacher heard me scream"

However, on page 12 the Complainant's mother said:-

"L said she had not screamed. I asked L whether she had screamed. She said she had not."

(iv) I find that it is unsafe to rely on the evidence of the Complainant alone in view of the discrepancies and in the light of the fact that the evidence is unsworn and it is not corroborated.

(v) In the circumstances I allow the Appeal and set aside both the conviction and sentence.

(vi) I further order that the appellant be set free unless lawfully held for any other reason.

Dated, Delivered and signed at Mombasa this 21st day of June 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.