



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 39 OF 2015

BETWEEN

ANTONY MACHE MALENYA.....APPELLANT

AND

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence of Hon. W. Rading, Resident Magistrate dated 13th March 2015 at Kakamega Chief Magistrates Court in Criminal Case No. 58 of 2013)

J U D G M E N T

1. ANTHONY MACHE MALENYA was charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. The particulars were that on 18th August, 2013 at [particulars withheld] village, Kakamega Central District of Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of VE, a child aged 6 years. He was convicted and sentenced to life imprisonment.

2. The appellant challenges the appeal on basis that the prosecution did not prove the offence. He contended that the case was based on unreliable and uncorroborated evidence. At the hearing of this appeal, Mr. Ng'etich, counsel for the respondent, conceded the appeal on the ground that the DNA evidence produced in court did not implicate the appellant. Despite this concession, I must review the evidence and come to my own conclusion whether to uphold the conviction and sentence.

3. The child (PW 1) testified that on the material day, her mother asked her to have her hair made by another lady. She did not find the lady but instead found the appellant who showed her 10 shillings and asked her to assist in carrying maize. She followed the appellant whereupon the appellant strangled her, removed her underpants by force, tore it, removed his trouser and proceeded to have sexual intercourse with her. Despite her screaming no help was forthcoming. After the appellant left her in distress she went home and told her mother (PW 2) what had taken place.

4. PW 2 waited for long and when she came back from fetching firewood at about 1.00pm, she found PW 1 with muddy clothes and her head and neck were blood stained. PW 1 narrated to her what happened. PW2 immediately reported to a village elder. PW1 told her that the person who assaulted her had a black shirt with a white fold brown and it was the appellant whose she knew. PW 1 also took her to the place she had been assaulted and she saw the place had been trampled on and there were faeces on the ground. PW 2 took the child to hospital. In the meantime, the appellant was found and arrested and identified by

PW 1 at the hospital.

5. The village elder, PW 3, confirmed that he received the report of defilement. He went to the spot where PW1 was defiled and found faeces. He was informed that the appellant had fled to another sub-location so he decided to contact a community policing volunteer. In the meantime, he directed PW2 to hospital. PW 4, the chair of community policing, heard about the incident, he too went to the place where the incident took place and faeces. He looked for the appellant and managed to get him at Malimili market. He told the court that he appellant was taken to hospital after being beaten where PW 1, who was also at the hospital, identified him.

6. The doctor who examined PW 1 at Kakamega General Hospital, PW 6, testified that PW 1 was brought to the hospital on the material day. She complained of pain in the anus and had bruises on the face and neck. Her dress was stained with mud and panty had mud and faeces. Her vagina and anal section were lacerated although her hymen was intact. In cross-examination she stated that the vagina was not bleeding but had some wounds which were fresh. She confirmed that there was penetration.

7. The investigating officer, PW 7, recalled that on 19th August 2013, PW 1 came with PW 2 to the police station to report the incident. She recorded PW 1's statement in which she stated that she saw the appellant in a maize plantation on the previous day and named him as the person who sexually assaulted her.

8. In his sworn defence, the accused stated that on 18th August, 2013, he was at home. He later went to a video shop to watch a football match where some people came and took him to the police station.

9. Having read the evidence above, it is clear from the testimony of PW 1 that she was sexually assaulted. Her description of what took place was clear and precise and she identified the appellant whom she knew. The testimony was corroborated by that of her mother, PW 2, to whom she reported after the incident and who examined her private parts. The fact of penetration was confirmed by the medical evidence of PW 6 who confirmed that there were lacerations on the anus and wounds on the vagina. In addition her clothes, which were produced in evidence, confirmed that she was defiled in the maize plantation where she took her mother to see.

10. Likewise, the identity of the appellant was clearly established. PW1 knew the appellant she described him and named him when she told PW 2. PW 2 told the court that they were related while PW 3 and PW 4 confirmed that he was a villager excluding the possibility that he was a stranger. Taking into account the fact that the incident took place in broad daylight, the level of interaction from the time the appellant lured PW 1 and sexually assaulted her excludes the possibility of mistaken identity. The fact that he was arrested the same day and positively identified by PW1 leaves no doubt as to his identity was established beyond reasonable doubt.

11. According to PW 7, the PW 1 and the appellants blood samples were taken to the Government Chemist together with the PW 1's dress and underpants and appellant's shirt and pair of shorts to confirm the presence and origin of blood stains, semen and spermatozoa. PW 5, a Government Analyst, conducted an analysis of the exhibits and samples and concluded that there was nothing to connect the accused with the exhibits.

12. I hold that the fact that the DNA evidence did not point to the accused does not detract from the evidence of penetration. The Magistrate rightly cited the cases of **AML v Republic [2012] eKLR** where the Court of Appeal held that, "*the fact of rape or defilement is not proved by way of a DNA test by way of evidence.*" The same position was affirmed by the Court in **Kassim Ali v Republic MSA Criminal App No. 84 of 2005 (UR)** where the Court of Appeal held that, "*[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence.*"

13. The age of the child was well established and since she was age 6 years, the proper sentence is life imprisonment.

14. The conviction and sentence are affirmed. The appeal is dismissed

Delivered dated and signed at Kakamega this 30th day of August, 2017

D.S. MAJANJA

JUDGE

Appellant in person

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.