



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.33 OF 2015

TITUS SAKONG MOSES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant in this matter Titus Sakong Moses was initially charged before the Principal Magistrate's Court in Sirisia; Criminal Case No.272 of 2014, with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on the 17th of March, 2014 at 1800 hours at [particulars withheld] village, Chongeiwo location in Cheptais within Bungoma County he penetrated the vagina of S.C a child aged 16 years.

3. After the trial the Appellant was convicted and sentenced to 10 years imprisonment. Being aggrieved with the judgement he moved this Court on appeal. At the hearing he relied on amended grounds of Appeal as follows;

I. The trial Magistrate convicted the appellant despite the Prosecution failing to meet the conditions set out in Section 8(1)(4) of the Sexual Offences Act.

II. The trial Magistrate erred in Law and fact when he failed to find that the charges were preferred, instituted and prosecuted by an incompetent person.

III. The learned Magistrate failed to consider the Provisions of Section 124 of the Evidence Act.

IV. The P3 form was completed by an unauthorized person.

V. The sentence was harsh.

4. The Prosecution Case in brief is that the Appellant a neighbor of the Complainant's family defiled the Appellant on the 17th of March, 2013 in a thicket, the two were caught in the act by members of the public where the appellant was roughed up.

5. PW1 & 3 did not witness the act but found a crowd that formed near the scene of crime alleging that the appellant had defiled the Complainant.

PW2 the Complainant testified that she met the accused on her way from the posho mill on 17/3/2014 at

6p.m. The appellant escorted her to a forest 300 meters away and had sexual intercourse with her for 3 minutes before her brother and a crowd gathered around them. It was her evidence in cross examination that people found them laying on the ground.

PW4 John Keya a Clinical Officer from Kapsiro Health Centre examined the Complainant on 18/3/2014. He found her pant to have a whitish discharge with seminal smell. The genitalia were greenish, labia minora tender and the hymen broken. He found features of penetration. Using the dental formula he assessed the age as 16 years.

6. When placed on his defence the appellant admitted meeting the Complainant on the material day but denied the allegation of defilement. He alleged that he had a grudge with the Complainant's brother which led to him being framed.

7. Having considered the evidence the issues for consideration are;

I. Age of the Complainant

II. Whether she was defiled

III. Whether there is evidence linking the appellant to the offence.

8. The Complainant stated that she was 16 years. The Clinical Officers ascertained the age using dental formula. No issue was not raised in regard to the age and at the hearing, I therefore take it that age was a non issue and find that the Complainant was indeed a minor.

9. A crowd formed alleging the Complainant had been defiled. PW3 and PW1 found the crowd. They were not eye witnesses. The only defect evidence of the defilement is from the Complainant herself. This is corroborated by PW4 who examined the Complainant a day after and found evidence of penetration. I equally find as a matter of fact that the Complainant was defiled.

10. The next question is whether there was evidence linking the appellant to the offence. None of those who "caught" them lying on the ground testified.

The only available evidence is that of the Complainant. **Section 124 of the Evidence Act** requires corroboration save in Sexual offences. The Proviso to the Section states;

"Provided that where in a Criminal Case involving a Sexual Offence, the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the Court is satisfied that the alleged victim is telling the truth".

11. From the record the Complainant was shy to narrate her evidence in open however when her evidence was taken in camera she gave an account of the incident which indeed finds similarity with what PW1 and PW3 narrated to the Court. She stated that her brother and the crowd fond them in the act. I find the Complainant to be a truthful witness. Consistent and clear in what took place. I believe her evidence against the denial by the appellant and find the same safe to be relied upon in arriving at a conviction thus concurring with the trial Court in convicting the Appellant.

12. **Section 8(4) of the Sexual Offences Act** provides the punishment for defiling a child between 16-18 years should not be less than 15 years. The trial Court sentenced the appellant to 10 years this is below the prescribed term and cannot therefore be said to be harsh.

13. The Appellant alleged violation but failed to show the alleged violation under **Section 8(1)4 of the Sexual Offences Act** as there was proof of defilement and the girl's age was assessed at 16 years an issue that was not disputed at trial.

14. It is true that Prosecution lies with the D.P.P. and he may delegate this duty to designated Officers. however even if the charge brought against the appellant were done irregularly in my view irregularity if any can be cured by **Section 382 of the Criminal Procedure Act**, Secondly this issue ought to have been raised at the 1st opportunity during trial which did not happen. The appellant fully participated in the proceedings. Thirdly the proceedings were fairly conducted and the mere fact that the charge sheet was signed by a police Officer cannot be said to have caused a miscarriage of justice against the Appellant. This is a mere technicality that did not go to the merit of the case – **Section 382 of the Criminal Procedure Code** ably deals with this situation it provides as follows;

“subject to the provisions herein contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error; omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an early stage in the proceedings (emphasize provided).

See also the case of **Fappyton Mutuku Ngui Vs R Criminal Appeal No.32 of 2013.**

15. As to the filing of the P3 form by a Clinical Officer guided by the **Flappton Mutuku Ngui’s** Case above mentioned I find that form to was filled by a competent person. In the said case the Court of Appeal in a similar situation stated as follows;

“We do not think much turn’s on the appellant’s complaint that PW5 was not competent to fill in a P3 form under Section 48 of the Evidence Act. PW5 is a Clinical Officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matri District hospital. In our opinion a Clinical Officer is qualified to fill a P3 form. This is an area of his competence (See Raphael Kavoi Kiilo Vs Cr. Appeal No.198/2008; Section 2 of the Clinical Officer’s Act (Training, Registration and licensing) Act, Cap 260”

16. In his submissions the defence Counsel raised the issue of a DNA test. This was not raised in the lower Court, does not form a ground of appeal not to mention that it is not a viable ground.

In **Ami V R (2012)e KLR (Mombasa) Court of Appeal** stated in reference to **Kassim Ali V R Cr. Appeal No.84 of 2005**

“...(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.”

The evidence of PW2 was clear as to who defiled her.

17. For the above reason I do concur with the findings of the trial Court. The appeal stands dismissed.

DATED and DELIVERED at BUNGOMA this 19th day of October, 2017

ALI-ARONI

JUDGE