



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 90 OF 2014

DAVID KISUI KIETI ALIAS KISUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. E.M. Muiru RM

delivered on 20th June 2013 in Criminal Case No. 1102 of 2012 in the Principal Magistrate's Court at Makindu)

JUDGMENT

On 20th November 2012 at around 4pm, M W (PW1) who was 17 years old and in class 7 arrived home from school, and found that her parents were not in as they had gone to fetch relief food. She put her bag in the kitchen as the main house had been locked. The Appellant herein then called her from his house which was 5 metres away, asked her to remove her underpants which she did, he removed his and inserted his penis in her private parts. The two were caught by PW1's grandfather, P W M (PW2), and the Appellant fled.

PW2 on his part arrived home, found his granddaughter's bag in the kitchen and heard the radio at the Appellant's house, which is when he decided to go there. When he looked through the door, he saw the Appellant get up from on top of PW1 and put on his trousers. He asked the Appellant why he was raping his child and the Appellant did not respond and instead escaped. The Appellant was however caught by PW2'S son who gave chase with a bicycle, and taken to the police station.

On 21st November 2012 at 7.30 pm, PC Samson Mailu (PW3) received a call and was informed of a defilement case and that the accused had been escorted to the station by members of the public. He then went to the station together with one PC Ngare, and took the Appellant together with the complainant to the hospital where they were examined and treated. Dr. Hannington Mibei (Pw3) examined PW1 on the same date, and filled a P3 form.

It is on the basis of the above events as narrated by the named witnesses during their testimony in Court, that the trial court found that the Appellant had a case to answer and put him on his defence. The Appellant chose to give unsworn testimony, and he stated that he had been charged with an offence he had no knowledge of. He also stated that he had told the child's father to confirm whether the girl had been defiled, but he refused and beat him up.

The Appellant who had when taking plea pleaded not guilty, was thereupon convicted and sentenced to serve 20 years imprisonment for the offence of defilement , contrary to section 8(1) as read with section

8(3) of the Sexual Offences Act. The particulars of the offence were that on the 20th November 2012, at [particulars withheld] within Makueni County the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of M W a girl aged fourteen (14) years.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition of Appeal and Memorandum of Appeal filed in Court on 7th April 2014. In summary the Appellant alleges that the trial magistrate relied on the evidence of a hostile witness; the prosecution failed to avail a crucial witness; the trial magistrate failed to consider that there was a grudge between the Appellant and the complainant's family; and that the Appellant's defence was not considered.

The Appellant availed written submissions to the Court dated 7th June 2016, wherein he argued that according to the testimony of PW3, there was no evidence of whether the victim's hymen was broken or not. He thus stated that the prosecution had failed to prove that there was penetration, and relied on the case of **Fappyton Mutuku Ngui vs Republic**. He submitted that the case had not been proven beyond reasonable doubt as the laws required and cited the cases of **Woolmington vs D.P.P. (1935) A.C 462** and **Peter Mwangi Muthanya vs R, Nakuru H.C CR Appeal No. 154 A of 2005**. He further submitted that the doctor had misled the court into arriving at a decision which was unjustified and unsatisfactory.

The Prosecution opposed the appeal by way of submissions dated 19th January 2015 filed in Court by Maureen Wambogo, the learned prosecution counsel. It was argued therein that there was no hostile witness on record, and that all witnesses were competent hence the evidence adduced by them was admissible. It was submitted that the Prosecution had called three witnesses who corroborated the evidence of PW1 and had established the case. On the issue of the existence of a grudge between the Appellant's family and the complainant's, it was pointed out that PW1 had confirmed that her grandfather had no motive to frame the accused. Further, that the Appellant did not produced evidence to establish the existence of a grudge.

It was further submitted that PW3 had testified that after examining PW1's genitalia he classified the injuries as defilement. Finally, it was submitted that section 169(1) was duly complied with, and if there were any discrepancies in the judgment and conviction of the Appellant, it was not fundamental as to cause prejudice to the Appellant.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments by the Appellant and Prosecution, and find that the issues for determination by the court are firstly, whether the Appellant's conviction for the offence of defilement was based on satisfactory and sufficient evidence, and secondly, whether the judgment of the trial court conformed to section 169 of the Criminal Procedure Code.

On the first issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In the present appeal, the Appellant did not identify the hostile witness gave evidence that was relied on by the trial magistrate, nor the crucial witness who was not called by the prosecution. As regards the evidence that was adduced by the prosecution witnesses as regards penetration, PW1 testified that the Appellant inserted his penis in her private parts which she used to urinate. Further, that she felt pain and that sperms came out of her private parts. PW2 corroborated this testimony as he saw the Appellant get up from on top of PW1 and put on his trousers. Both PW1 and PW2 knew the Appellant who was their neighbor, and the alleged defilement took place during the afternoon of the material day, during daylight.

The medical evidence by PW3 has been disputed by the Appellant as having not proved any penetration. The said evidence was that PW1’s external genitalia had no abnormality, and that there was suprapubic tenderness and pus on the examining finger. I agree with the Appellant that this evidence does not prove that there was penetration of PW1’s genitalia. However, the evidence of such penetration given by PW1 is sufficient on its own under section 124 of the Evidence Act, provided that the Court has no reason to doubt her testimony. PW1 was in this regard consistent as to the events of the material day even under cross-examination, and there is no reason to doubt her credibility. In any event her testimony was corroborated by PW2 as shown in the foregoing ,and was to this extent sufficient to prove penetration.

This Court however notes that there was contradictory evidence about the age of PW1. In her testimony PW1 stated that she was 17 years old and in class 7. The P3 form produced by PW3 showed that PW1 was 14 years old. The trial Court relied on the medical document. However, there was no basis given by PW3 in his testimony for the age given in the P3 form, and no document was produced as an exhibit to show when PW1 was born.

It is apparent and not contested that PW1 was a minor and that she was still in primary school in class 7. This conflict as to the age of PW1 can only be resolved in favour of the Appellant, and since the age of the victim is only relevant when it comes to the sentence meted out for the offence of defilement, this Court will adopt the age which attracts the lesser penalty for the Appellant, which is 17 years.

On the second issue raised, it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with because his defence was not given due regard. The said section 169 provides as follows:

“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

I have examined the judgment by the learned trial magistrate, and I find that the Appellant’s claim is not supported. The trial magistrate set out the unsworn statement given by the Appellant in page 3 said judgment, and found that the prosecution had proved its case beyond reasonable doubt. I have examined the said evidence, and find that all that the Appellant did in his defence was to deny that he committed the offence, as he stated that he did not know about the offence that he was accused of, and that he was not caught defiling PW1. This Court has in this regard found in the foregoing that there was sufficient evidence to show that the Appellant defiled PW1.

The Appellant in addition did not testify as to any grudge between him and PW1's family as he alleges in the appeal, and therefore did not also give the prosecution the opportunity to cross-examine him on the same. The issue was raised by the Appellant during his cross-examination of PW1 and PW2, who confirmed that they regarded him in bad light, not because of any grudge, but because he committed the alleged offence, which in my opinion did not shed any doubt on the prosecution's case. I therefore find no reasons to interfere with the trial magistrate's finding in this regard.

The prosecution therefore proved all the elements of the offence of defilement, and I find that the Appellant's conviction was safe and on the basis of sufficient evidence. However, in light of the conflicting testimony as regards PW1's age, this Court will exercise the power given to it under section 354 of the Criminal Procedure Code upon hearing an appeal, to reduce the sentence without altering the findings.

The Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(3) of the Sexual Offences Act, which provides as follows:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years..”

Given that the Court has found PW1's age to be 17 years, the applicable punishment is in section 8(4) of the Sexual Offences Act which provides as follows:

“ A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

It is to be noted from the said provisions that the offence the Appellant is convicted of attracts a minimum sentence of 15 years. While sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (4) of the Sexual Offences Act, and substitute the sentence imposed upon the Appellant with a sentence of imprisonment of fifteen (15) years that shall run from the date of his conviction by the trial Court.

It is so ordered.

DATED AT MACHAKOS THIS 20TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE