



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 11 OF 2015

GEORGE MALINGE MAUTIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction in Kisii CMCR. NO. 174 of 2014)

(Hon. L. Kaittany, Senior Resident Magistrate)

JUDGMENT

1. **George Malinge Mauti**, is the appellant herein. He appeared before the Senior Resident Magistrate at Kisii charged with defilement, contrary to **S.8(1)** read with **S.8(3)** of the Sexual Offences Act. It was alleged that on the **11th January 2014**, at *[particulars withheld]* Estate Kisii Central District Kisii, he defiled **S K A**, a girl aged twelve (12) years.

2. Alternatively, the appellant was charged with indecent Act, contrary to **S. 11(1)** of the Sexual Offences Act, in that on the material **11th January 2014**, at *[particulars withheld]* Estate Kisii Central District, he rubbed his genital organ against the vagina of the girl **S K A**.

The appellant also faced a second count of assault causing actual bodily harm, contrary to **S. 251** of the Penal Code, in that on the material **11th January 2014**, at *[particulars withheld]* Estate Kisii central District, he unlawfully assaulted the same **S K A** and occasioned her actual bodily harm.

3. After pleading not guilty to all the charges, the appellant was tried and convicted on the alternative count of indecent act upon which he received a sentence of ten (10) years imprisonment. He was however, dissatisfied with the conviction and sentence and decided to lodge the present appeal on the basis of the grounds contained in his petition of appeal dated herein on **16th February 2015**.

4. At the hearing of the appeal, the appellant represented himself and argued his case by way of written submissions which were duly filed. His major complaint was that the trial court convicted him on the basis of evidence which was insufficient, contradictory, uncorroborated and lacking in cogency. He therefore urged this court to allow the appeal by quashing the conviction and setting aside the sentence.

5. The State/Respondent opposed the appeal through the learned Prosecution Counsel, **M/s Mbelete**, who submitted that the appellant was given adequate opportunity to digest the prosecution case and even seek legal representation. That, the three main witnesses (PW 1, 2 & 3) who testified against the appellant were cross examined by him and as such, the trial court did not rely on hearsay evidence.

6. The learned prosecution counsel, further submitted that the appellant's mitigation was given due consideration by the trial court prior to the passing of the sentence which was in any event, lawful.

The learned prosecution counsel, urged this court to dismiss the appeal.

7. Having considered the rival submissions on the basis of the grounds in support of the appeal, the duty of this court was to re-consider the evidence availed at the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **Okeno Vs. Republic (1972) EA 32 and Achira Vs. Rep (2003) KLR 707**).

8. In that regard, the case for the prosecution was briefly that the complainant, **S K (PW 1)**, was at the material time aged twelve (12) years and a primary school pupil at *[particulars withheld]* primary School. She was at home on the material date at about 5.00 pm when she was sent to the shop and on the way met the appellant whom she had previously known as a person called 'Mwislamu'.

9. The appellant told her that there was sugar cane for sale at his home. She was on her way to buy sugar cane so she agreed to accompany the appellant to his home. He confined her in the house during which time he stripped her naked and defiled her. Thereafter, he released her to go home.

10. On arrival home, the complainant found her parents and informed them what the appellant had done to her. She then took them to where the appellant had taken her. Thereafter, she was taken to Kisii general Hospital for examination and treatment.

The appellant was arrested after the matter was reported to the police.

11. The complainant's mother, **Ev G A (PW 2)**, noted that the complainant had arrived home in a hurry and crying and on being questioned she alleged that she had been defiled by the appellant. She was taken to the hospital on the following morning before the matter was reported to the police.

12. **PC Millicent Wagigi (PW 3)**, received the necessary report and proceeded to investigate the matter. In the process, she recorded necessary statements and issued a P3 form. She later charged the appellant with the present offences after his arrest by members of the public.

13. A clinical officer at Kisii Level '5' hospital, **Daniel Nyameno (PW 4)**, examined the complainant on **16th January 2014**, and thereafter compiled and signed the necessary P3 form (P.Ex 1) which showed a negative result with regard to sexual assault but a positive result with regard to assault causing actual bodily harm.

14. The trial court in its consideration of the case for the prosecution ruled that the appellant had a case to answer.

In his defence, the appellant denied the offence and stated that he was on his way home on the **19th January 2014**, when he met three people who alleged that he had committed an offence. The three were joined by a fourth person. They followed the appellant to his home and asked for alcohol. The appellant instead offered them tea. It was then that a woman appeared at the scene and alleged that she had been wronged by the appellant.

15. The group took the appellant to Millimani Kisii where he was pointed out to the complainant who denied knowing him. The group however, insisted that he was responsible for the offence which he knew nothing about.

16. After considering the evidence in its totality, the trial court concluded that there was sufficient evidence establishing that the complainant (PW 1) was at the material time twelve (12) years old but insufficient evidence establishing that she was indeed defiled by the appellant whom she had previously known.

17. However, the trial court found as a credible fact that the appellant committed an indecent act against the complainant. He was therefore convicted and sentenced on the alternative count.

The second count of assault was according to the trial court established but the responsibility of the appellant in that regard was found to be negative.

18. This court on its part, agrees with the trial court that there was insufficient or no evidence at all establishing the fact of penetration and hence defilement.

Although the complainant indicated that the appellant defiled her when she went to his home to purportedly buy sugar cane, the medical evidence by the clinical officer (PW 4) disproved her story.

19. The medical examination report (P3 form) overruled the suspected fact of penetration of the complainant's sexual organ by a male sexual organ.

However, the report showed that there was a strong possibility that the complainant was occasioned actual bodily harm on the neck and head region after being assaulted.

20. Since the complainant most likely than not came into contact with the appellant on the material date despite his denial, it was highly probable that he was the person responsible for assaulting and causing her actual bodily injury. His acquittal by the trial court on the second count was in error.

The trial court appreciated that the complainant and the appellant were known to each other and actually met on the material date when the complainant was harmed.

It was therefore ironic for the trial court to absolve the appellant on the basis that the complainant did not state that she was not held by the neck or scratched by the appellant at the material time of the incident or that the complainant's mother (PW 2) did not mention seeing visible marks on the complainant.

21. It is this court's opinion that the offence of assault causing actual bodily harm contrary to **S. 251** of the Penal Code was fully established against the appellant. His acquittal in that regard by the learned trial magistrate is therefore invalidated and substituted herein by a conviction.

22. With regard to the conviction on the alternative count, this court holds the opinion that the evidence was not sufficient and credible to sustain the charge. This is because the medical report did not establish any form of sexual offence and if the fact of defilement was disproved it would follow that the complainant was less than candid in relating the appellant to the alleged violation of her sexual organ by way of rubbing his male sexual organ against her.

23. The conviction of the appellant was therefore unsafe and is hereby quashed with the result that the sentence of ten (10) years imprisonment imposed on the appellant by the trial court is set aside. It is to that extent that this appeal partly succeeds.

Otherwise, the appellant is now sentenced to serve two (2) years imprisonment with regard to the second count of assault causing actual bodily harm effective from the date of judgment of the trial court i.e 3rd February 2015.

Ordered accordingly.

[Delivered and signed this 27th day of October 2016.]

J.R. Karanjah

Judge

In the presence of

Njoroge CC

Mr. Muhindi – State Counsel

Appellant – Present in person