



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 8 OF 2009

BETWEEN

SHIHEMI CHITAI SHIKOKOTI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from Judgment of Hon. M.C. CHEPTSEBA (MRS) Ag SPM delivered on 30th
November, 2007 in Kakamega CMC Cr. Case No. 197 of 2007)

J U D G M E N T

Introduction

1. The appellant herein was tried, found guilty and convicted of the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Penal Code. The particulars of the offence were that on the 16th day of January, 2007 at [*particulars withheld*] Village Shitoli Sub-Location in Kakamega District within Western Province, unlawfully had carnal knowledge of J.M, a girl aged 7 years. The appellant denied the charge, as a result thereof, the prosecution called 4 witnesses to support its allegation against the appellant.

The Prosecution Case

2. From the record, the prosecution case was that on 16.01.2007 at about 6.00pm, the complainant herein and her younger sibling were at home. Their mother, P.K was still at the market where she had gone to work as a tailor. P.K testified as PW2. The appellant herein, who was a neighbour went to the complainant's home and bought milk for five shillings. After he drank the milk, it started raining, so he entered the house together with the complainant and the complainant's younger sibling. The appellant ordered the complainant to remove her underpant and to lie on the sofa. The appellant then removed his penis and thrust it into the complainant's vagina, thereby defiling her. Though the complainant felt pain and bled, she did not cry. After the ordeal, the appellant left.

3. When PW2 returned home that evening, the complainant did not tell her what had happened to her. Until 18.01.2007, PW2 did not know that the complainant had been defiled. On 18.01.2007 at around 6.00pm, PW2 wanted the complainant to go to the shop and buy some items for her but instead of undertaking the errand, the complainant started crying, and though PW2 tried to force the complainant to go to the shop, she (PW2) observed that the complainant was walking with some difficulty. That is when the complainant's younger sibling revealed to PW2 what had happened to the complainant on 16.01.2007. The complainant also confirmed to PW2 that the appellant had indeed defiled her on

16.01.2007.

4. On receiving the information, PW2 examined the complainant's private parts and found the complainant's genitals swollen and she also had a discharge. PW2 reported the matter to the Assistant Chief who gave her a letter to take the complainant to Provincial General Hospital Kakamega. She also reported the matter to Isulu Police Post who issued her with a P3 form. PW2 identified the P3 form – PMFI – 1. The appellant was arrested while PW2 had taken the complainant to Kakamega Provincial General Hospital. The report to Isulu Police Patrol Base was received by No. 44008 Corporal Walter Ingati on 19.01.2007 at about 5.00pm. The complainant was accompanied by her father, the village elder her mother PW2, other members of the public and the appellant.

5. Upon receipt of the report, Corporal Ingati who testified as PW3 arrested the appellant and subsequently charged him with the offence of defilement. The P3 form issued by Corporal Ingati to PW2 was returned to the police post on 22.01.2007. According to PW3 he did not verify the age of the child.

6. PW4 was Reardon Lidolo, a Clinical Officer at the Kakamega Provincial General Hospital. He examined the complainant on 19.01.2007. The complainant who was 7 years old was said to have been defiled on 16.01.2007. On examination, PW4 established that the complainant's labia minora had lacerated wounds which were unhealed. The hymen was also torn and there were streaks of blood in her vagina. The urine examination was normal and since 3 days had already passed since the defilement, it was not possible to determine presence of spermatozoa. PW4 also testified that the physical tests he carried out confirmed that the complainant had been defiled through forceful penetration. PW4 produced both the P3 form and laboratory medical results as PExhibit 2 and PExhibit 3 respectively.

The Defence Case

7. At the close of the prosecution case, the appellant was put on his defence. He elected to give unsworn evidence and stated that he was arrested on 19.01.2007 as he returned from making bricks. He was taken to Isulu Police Post before being escorted to Kakamega Police station on 23.01.2007. He denied committing the offence. He however testified that he went to buy milk at PW2's home but did not know that she was not at home. He stated that he was served by another child who was older than the complainant. He drank his milk and went away. It had rained.

Judgment of the Trial Court.

8. After carefully considering the both the prosecution and the defence cases, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. She found the appellant guilty as charged convicted him and sentenced him to life imprisonment as provided under Section 8(2) of the Sexual Offences Act, number 3 of 2006.

The Appeal

9. Being dissatisfied by both conviction and sentence, the appellant filed this appeal in January, 2008. He complained that his fundamental rights were infringed when he was locked up in police cells for more than one month before being arraigned in court. That both conviction and sentence were illegal. That the learned trial Magistrate failed to appreciate that crucial witnesses were not called to testify as a result of which he was convicted on flimsy, inadequate and inconclusive evidence. That his conviction was against the weight of evidence and therefore that the conviction was not safe. He wants the conviction quashed and the sentence set aside.

10. This being a first appeal this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering that it has to act with caution in this regard as it neither saw nor heard the witnesses who testified during the trial. Generally see **Okeno – vs – Republic [1972]EA 32 and also Mark Oiruri Mose – vs - Republic [2013]eKLR.** I have carefully considered the evidence, the submissions made on appeal and the law.

11. In carrying out the above stated duty, this court must satisfy itself as to the ingredients of the offence of defilement namely proof of complainant's age, proof of penetration and proof that it was the appellant who perpetrated the crime.

Analysis and Determination

a) Whether the age of complainant was proved

12. The complainant who gave unsworn evidence told the court that she was 6 years old and a standard one pupil at **[particulars withheld]** Primary School. This was on 16.03.2007. It is to be noted that during voir dire examination when the complainant was asked for her age, she stated that she was 6 years old, but the court noted the complainant appeared not to be sure of what she was stating.

13. At the conclusion of PW1's testimony, the prosecutor stated as follows:-

“ I pray for adjournment for the subject/victims card, a document to prove age. She forgot today”

14. The case was adjourned as prayed. The complainant's mother finally testified on 19.03.2007 and stated

“ I recall on 18th January, 2007 at about 6.00p.m, I was in my house preparing to cook. I tried to send my daughter J.M. aged 7 years to the shop but she started crying.”|

15. Surprisingly, PW2 was not led to produce the baptismal certificate/Card to support the fact of the complainant's age but she told the court the child was 7 years old.

16. Pw4, the Clinical Officer told the Court that the complainant was 7 years old, though there is no indication that the complainant had been taken through an age assessment process.

T17. aking all the above evidence together and further considering the provisions of Rule 4 of the Sexual Offences Rules, and further considering that the mother of the complainant testified and told the Court that the complainant was 7 years old, I am satisfied that the age of the complainant was proved, for who could know the age of a child better than the mother of such a child?

b) Was there penetration

18. Section 2 of the Sexual Offences Act defines penetration in the following terms:-

“the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

19. What is critical from the above definition is that even partial insertion will suffice for purpose of establishing whether or not there was penetration. There was a good reason for this kind of definition. As was clearly stated in the **Mark Oiruri Mose case** (above),

“.....many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....”

20. The question is; was there penetration in the instant case? In her evidence in chief, the complainant stated in part;-

“He told me to remove my panty and he lay on me. We were inside our house. We were with one of our children younger to me. He ordered me to lie on the sofa set (large seat) and I complied. I lay facing upwards and he lay on top of me. He made me feel pain here (pointing to her vagina

area). I just persevered. I did not scream. He then dismounted. I was bleeding from my private part.....”

21. Though the complainant did not mention the fact of the appellant inserting his penis into her vagina, she talks of bleeding from her private parts and pain. PW2 stated that when she interrogated the complainant, the complainant told her that the appellant “ordered her to remove her panty and lay on her and pushed something he removed from his trouser into her vagina which she did not describe and she felt a lot of pain. I examined her vagina and genitals and they were swollen and she had a discharge.” It is to be noted that the genitals of 7 year olds do not get swollen for no reason, nor is it usual for 7 year olds to have a discharge

22. PW4 fortified the complainant’s testimony and that of PW2 on the issue of penetration when he testified thus;

“ I examined her and her Labia Minora had lacerated wounds not healed. The hymen was also torn. There were some streaks of blood in her vagina.”

23. Clearly, the tearing of the hymen of a 7 year old can only mean that there was intrusion into her private parts. The presence of blood in her vagina also means that there was intrusion because no one expects a 7 year old girl to have a torn hymen and blood in her vagina.

24. Based on all the above evidence, I am satisfied that penetration as an ingredient of defilement was proved beyond any reasonable doubt.

Is it the appellant who was the perpetrator of the offence.

25. I am aware of the fact that the only direct evidence on this issue is that of the complainant. The appellant, at ground 5 of appeal complained that the evidence which led to his conviction was doubtful. His concerns are valid if it can be shown that he was not properly identified. The complainant told the court that the appellant was their neighbour. She even knew his name and gave it to the court. She also stated that the appellant went to their home to buy milk and that she is the one who sold the milk to him. In his defence, the appellant does not deny his presence at the scene at the material time, except that he alleged to have been served by the complainant’s older sibling. Taking into account the provisions of Section 124 of the Evidence Act, Cap 80 Laws of Kenya, I am satisfied that the evidence of the complainant was sufficient to support a conviction of the appellant. At the earliest opportunity on 18.01.2007, the complainant gave the name of the appellant to her mother, and it was that information which led to the arrest of the complainant.

Was the sentence excessive

26. It is trite that an appellate court will not interfere with the sentence imposed by a trial court unless the sentence is too excessive or too low in the circumstances or unless in imposing the sentence, the trial Court applied the wrong principles. In the instant case, the trial court imposed the minimum sentence prescribed by law. I see no reason to interfere with the same.

Were the appellants’ constitutional rights infringed

27. The appellant contends that because he was locked up in police cells between 19.01.2007 and 24.2.2007, his appeal should be allowed. I do not think so. All that the appellant can do is to sue the state for damages if he can prove that indeed he was locked up for that length of time. It is however instructive to note that the appellant did not raise the issue of infringement of his constitutional rights at the earliest opportunity, during the trial. He has only brought up the complaint on appeal I therefore find no merit in the complaint and consider it as an afterthought.

Conclusion

28. The conclusion of this matter is that there is no merit in the appellant's appeal on both conviction and sentence. The appeal is accordingly dismissed. Right of appeal within 14 days

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 26th day of October 2016

RUTH N. SITATI

JUDGE

In the presence of;-

Present in person for Appellant

Mr. Oroni (present) for Respondent

Mr. Erick Court Assistant