



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 31 OF 2016

JULIUS MUTATI KAESA.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 2350 of 2013 – H. M. Nyabari – Ag.SPM).

JUDGMENT

The accused was charged in the Magistrate’s Court at Mwingi with attempted defilement contrary to section 9 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 11th May 2013 at Mwingi Town within Kitui County attempted to cause penetration of his male genital organ namely penis into female genital organ namely vagina of JM a child aged 8 years. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (2) of the Sexual Offences Act. The particulars of the offence were that on the same day and place committed an indecent act which caused contact of his male genital organ namely penis with the female genital organ namely vagina of JM a child aged 8 years.

He denied both charges. After a full trial, he was convicted of the alternative charge of indecent act and sentenced to serve 10 years imprisonment. He has now appealed to this court against both conviction and sentence. He filed initial grounds of appeal on 14th October 2014. However before the hearing of the appeal he filed an amended petition of appeal as well as written submissions. The grounds and in the amended petition of appeal are as follows:-

1. That the magistrate erred in convicting him without considering that he was a minor of 17 years at the time of the alleged offence.
2. The sentence imposed was not in accordance with the Children’s Act and was harsh and excessive.
3. The magistrate erred in convicting him without considering that the prosecution evidence failed to prove the charge of indecent act.
4. The trial magistrate erred in convicting him without considering that very crucial witnesses were not summoned to unravel the truth of the case.
5. That there was a vendetta between him and the complainants mother.

During the hearing of the appeal, the appellant relied on his written submissions which I have perused. He

also emphasized orally that PW1, 2 and 3 evidence was not trustworthy as they came from the same family. He urged the court to weigh the evidence which he gave in his defence.

Learned Prosecuting Counsel Mr. Okemwa urged the court to go through the record. Counsel submitted that the prosecution evidence on record appeared to be inconsistent. Age was proved through the immunization card and the complainant was aged 11 years. Counsel submitted however that the prosecution evidence was contradictory in that PW2 had initially to be stood down, and the doctor gave contrary evidence to the allegation of the complainant that there was defilement. Counsel urged the court to look at the evidence on record critically.

In brief the prosecution evidence was that on 11th May 2013 the appellant who was a neighbour of the mother of the complainant, called the complainant into his room. PW3 Damaris Kavethe King'ora arrived at a neighbouring room, and heard screams from room 6 of someone saying I am feeling pain and knocked at room number 5, whereupon the appellant emerged wearing a lessa around his waist. Shortly thereafter the complainant emerged from the same room without clothes and

directed her to go back and pick the clothes. PW3 then interrogated by the complainant PW2 who informed her that she had been defiled by the appellant.

The matter was then reported to the mother of the complainant PW1 A M M. A report was made to the police and the appellant was arrested and charged with the offence.

When put on his defence, the appellant stated that he was born in 1996 and was thus 17 years of age at the time of the incident. He stated that the mother of the complainant went to his house at 9pm and they ate together and she asked him to sleep in her house but he refused. She later that night came with the police who arrested him.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact – see the case of ***Okeno –vs- Republic (1972) EA 32***.

I have evaluated the evidence on record. The complainant PW2 was categorical that the appellant had sexual intercourse with her. The medical evidence produced by Dr. Joseph Mutua PW4 was that there was no evidence of penetration as the hymen of the complainant was intact and there was nothing to show that sexual activity had occurred.

More importantly however, was the fact that PW3 Damaris Kavethe who stated that she opened the door and busted the complainant and the appellant in the room of the appellant, stated that the incident occurred at 2pm. All the other evidence is that the incident occurred at night around 7pm. That in my view is not a minor contradiction.

PW2 the complainant clearly stated that it was in the evening and night had set in when the incident occurred. As such therefore one or the other of these two witnesses are not saying the truth and the benefit of the doubt has to be given to the appellant. I will give the benefit to the appellant.

In addition to the above, the complainant PW2 stated that she was lured and given Kshs 10/= by the appellant to buy straw berry. There was not further mention of that Kshs 10/= in evidence. In my view, if indeed the complainant was given 10/=, that money should have been referred to in the prosecution case. The complainant should have explained where the 10/= was. She did not do so. This gap also weakens the prosecution.

In totality, I agree with the Prosecuting counsel that the prosecution evidence was contradictory and failed discharge the burden of proving the case against the appellant beyond any reasonable doubt.

The benefit of doubt has thus to be given to the accused which I hereby do.

Consequently I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 11th day of October 2016

GEORGE DULU

JUDGE