



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA. NO. 235 OF 2012

BENJAMIN FURAH DICKSON.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(An Appeal against the conviction and sentence of life imprisonment in CR. 2890 of 2010 for the offence of defilement by Hon. J. OMBURAH (SRM) at MOMBASA LAW COURTS on 18th day of October 2012)

JUDGMENT

1. The Appellant was sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the sexual offences Act No. 3 of 2006.
2. The particulars of the charge are that on 17th day of September 2010 at around 6 p.m at [particulars withheld] area of Likoni District, Mombasa County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of xxx a girl aged 4 years old.
3. The Appellant is facing an alternative charge of indecent Act contrary to section 11 (1) of the sexual offences Act No. 3 of 2006 in that on the same material particulars as in count 1 above, the Appellant intentionally and unlawfully caused his penis to come in contact with the vagina of xxx a girl aged 4 years old.
4. The prosecution evidence in summary was that on the material day (17.09.2010) PW1, the mother of the complainant was with her in her house together with PW2 while the complainant was playing outside at 6 p.m. The father of the complainant sent the complainant to go and throw away some tins but the complainant did not return.
5. After a while a neighbor called PW1 and told her that the complainant had been called into a house and she was crying inside. PW1 rushed to the house and found the complainant lying on a bed with her pant lowered. She was weak and could not talk but was sweating and had visible injuries on her neck. PW1 checked her private parts and found her bleeding and had a scratch.
6. That father of the complainant checked around the house and found the Appellant in the opposite room trying to escape through the wall. The Appellant who managed to scale the wall was chased and arrested.
7. The complainant was taken to hospital and the Appellant to the police station. PW4, a minor who was

playing with the complainant said the Appellant called the complainant to go and take a cake and when the Appellant entered into the house with the complainant PW4 alerted a neighbor who alerted the complainant's mother.

8. The Doctor who testified as PW6 examined the complainant on 17/09/2016 said her hymen was freshly ruptured and there was bleeding and lacerations on the vaginal opening although there were no spermatozoa. He said the complainant also had scratch marks on her right neck region.

9. The Appellant who gave sworn evidence said on 17.09.201, he was in his house when the door was broken and he was arrested and charged with an offence he knows nothing about.

10. The trial court found the Appellant guilty as charged and sentenced him to life imprisonment. The Appellant has now appealed to this court against both conviction and sentence on the following grounds which I now reproduce verbatim :-

(i) THAT the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to life imprisonment without considering that the same was unsafe for the charge of defilement preferred against me by the prosecution was not properly established.

(ii) THAT the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to life imprisonment without considering that the prosecution case was due to fabrication and made up case.

(iii) THAT the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to life imprisonment without considering that the prosecution did not prove their case beyond any reasonable doubt for the same was governed by mass contradictions and SEC. 109, 63 (3) of the evidence Act and SEC. 150 of the criminal procedure code were not considered hence unsafe.

(iv) THAT the learned trial Magistrate erred in law and fact by considering the evidence of PW7 and sentencing the Appellant to life imprisonment by failing to note that this evidence was not safe to be admitted in a court of law to sustain a proper conviction for the same was taken under DURESS contrary to law.

(v) THAT the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to life imprisonment without seeing that the source of the Appellant's arrest was not proved to have had any connection with this offence in question for the evidence made by the prosecution witnesses PW1, PW2 and PW7 concerning his arrest was contradictory.

(vi) THAT the learned trial Magistrate erred in law and fact by not considering the Appellant's reasonable defence statement which was also supported by the prosecution witnesses.

11. The Appellant filed written submissions as follows:-

(i) All the grounds were consolidated and argued together that the trial Magistrate's final decision to convict and sentence the Appellant to life imprisonment was not done within the parameters of the law and further that the age of the victim and penetration were not proved.

(ii) The Appellant also submitted that the evidence adduced by the prosecution was governed by mass contradictions, discrepancies, lies and fabrications.

He submitted that PW1 and PW2 said the child was lying on a bed when she was found while PW7 said she was on the floor.

(iii) The Appellant submitted that members of the public who were mentioned together with the

brother of PW7 A M were not called as witnesses. Also that the under wear and dress of the complainant were not produced as exhibits.

12. The Respondent opposed the Appeal and submitted as follows:-

(i) That the prosecution proved its case to the required standard. The age of the complainant was proved by the clinic card which showed that she was born on 11/10/2006 and she was 4 years old on the date of the incident on 17.09.2010.

(ii) There was evidence of penetration as the Doctor said the hymen of the complainant was freshly ruptured.

(iii) The Appellant tried to escape but he was arrested trying to flee from the scene.

(iv) The evidence of PW4 who was a minor playing with the complainant when the Appellant called the was corroborated by that of PW1, PW2 and PW7 who arrested the Appellant fleeing from the house belonging to PW7.

(v) The Respondent relied on the authority of MM Vs REPUBLIC (CR. Appeal No. 41 of 2013) where the court held that it is not mandatory for the complainant to testify.

13. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”.

14. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. My findings are as follows:-

(i) To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2 (1) (d)** of the **Sexual Offences Act** as

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

I find that although the Complainant did not testify, there is evidence that the Appellant called the Complainant into the house of PW7 and defiled her .PW4 who raised the alarm said the Appellant told the Complainant that he was going to give her a cake. There is medical evidence by the Doctor who testified as PW6 who examined the complainant on 17/09/2010 and said her hymen was freshly ruptured and there was bleeding and lacerations on the vaginal opening although there were no spermatozoa. He said the complainant also had scratch marks on her right neck region.

The medical evidence corroborated that of PW1 and PW2 on the issue of penetration. There is evidence that the complainant was penetrated by the Appellant even though the Complainant did not testify.

(ii) The second element that the prosecution was required to establish is the identity of the perpetrator. PW4 testified that he knew the Appellant prior to the incident. The Appellant was arrested while trying to escape from the scene. The Complainant was rescued by her mother (PW1), her father (PW2) and PW7 who was the landlord. The Appellant did not manage to escape. He tried to run away but was apprehended by PW1, PW2 and PW7 with the aid of members of the public.

(iii) The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2 (1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the prosecution has proved its case to the required standard. The age of the Appellant was proved by production of the clinic card. She was 4 years at the time of the offence having been born on 11/10/2006 and the incident occurred on 17.09.2010.

(iv) From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8 (1)** of the **Sexual Offences Act** to the required standard (beyond any reasonable doubt). The Appellant's appeal on conviction lacks merit and is hereby dismissed.

The conviction is safe and I accordingly uphold it and confirm the sentence.

Delivered and signed at Mombasa this 16th day of November 2016.

ASENATH ONGERI

JUDGE.