



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 138 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 1423 of 2015 of the Chief Magistrate’s Court at Narok – T. A. Sitati, SRM)

Z M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was tried before the Narok Chief Magistrate’s Court for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In that on the 22nd day of August, 2015 at [particulars withheld] trading centre in Narok North Sub County, within Narok County he caused his penis to penetrate the vagina of **M. M.** a child aged 12 years.

2. Following a full trial, he was convicted and sentenced to 20 years imprisonment. Aggrieved by the decision, he filed this appeal and on 31st May filed amended grounds. Grounds 1 – 4 challenge the quality of evidence upon which conviction was based while in ground 5 the Appellant complains that his defence did not receive adequate consideration at the trial.

3. In summary the Appellant’s submissions in support of his grounds challenge the adequacy of the medical evidence, citing lack of competence on the part of the person who assessed the minor’s age and completed P3 forms to do so; and the failure by the prosecution to tender initial treatment notes or clothes worn on the material date by the victim. He takes issue with the evidence of defilement by the victim and her mother and has argued that in light of his relationship with the victim, incest was the more appropriate charge. Finally he complains that the trial court did not give consideration to his defence.

4. Mr. Koima representing the Director of Public Prosecutions opposed the appeal. He argued that the complainant knew and was able to identify the Appellant because the incident occurred in day time. That the victim’s mother found her locked in with the Appellant and noted semen running down her legs while the Appellant hurriedly attempted to dress up. That defilement evidence by the complainant and her mother was confirmed by **PW2**, the medical officer and the age of the victim established as 10 years. He submitted that the charge was proven.

5. The predecessor to the Court of Appeal stated in **Pandya -Vs- Republic [1957] EA 336** with regard to the duty of the first appellate court that:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole

and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

6. The prosecution case was as follows. **M.M. (PW1)** a girl aged 12 years lived at [particulars withheld], Narok with her mother **S.M.W. (PW3)**. **PW3** lived in a customary woman-to-woman marriage with one **Z** under Kuria traditions. **Z**'s husband having died, she had taken on the Appellant as her lover. Thus **PW1** knew the Appellant as her grandfather. The family lived together in one homestead but in separate houses.

7. On 22/8/2014 **PW1** was left by her mother in their home together with other siblings. The mother went off on her own business. At 3.00pm, **PW1** walked over to the house of the Appellant to get some soap. She met the Appellant at home. He locked the door behind her, and after undressing had sexual intercourse with her.

8. But **PW1**'s mother having returned home and noted **PW1**'s absence proceeded to the home of the Appellant after interviewing **PW1**'s siblings. **PW3** found the door locked and knocked. Whereupon **PW1** emerged therefrom and on being questioned by **PW3** claimed nothing was the matter. **PW3** however noted what seemed to be a trail of semen running down **PW1**'s legs and on further checking found the Appellant was inside the house dressing up. She confronted him but he turned violent, chasing her away.

9. **PW3** reported to police before taking the minor for treatment at Narok District Hospital. **Isaac Kenyanya**, a nurse (**PW2**) examined and treated the complainant, confirming defilement. The Appellant was arrested and charged.

10. In his sworn statement in defence, the Appellant testified that he was a farmer at [particulars withheld]. He denied the offence and placed reliance on the medical notes and P3 forms completed in respect of the complainant. His witness **Z N (DW1)** testified that the Appellant was her husband and denied that he had defiled the complainant. She said the complainant is her grandchild and she cared for her and lived with her mother close by. **DW2** was **Ezekiel Muniko** a resident of [particulars withheld] who disputed the possibility that the complainant was defiled by the Appellant albeit admitting that he was not at the home on the material date.

11. There is no dispute that the Appellant is known to the complainant and her mother, both residing at [particulars withheld]. That the complainant was a grandchild of sorts to the Appellant due to his relationship with **Z** and that the defilement issue was raised on 22/8/2015 by the complainant's mother.

12. Concerning the issue of defilement, the prosecution relied on the oral evidence by **PW1** and **PW3** as well as medical examination by **PW2**. **PW1** was forthright concerning the incident, as her mother. **PW3** said that at first, when **PW1** was found in the home of the Appellant, she was reluctant to say what had happened. **PW3** then inspected her upon noticing wetness on her legs. **PW1** also admitted her initial reticence during cross-examination, citing threats by the Appellant in the course of the incident.

13. Hence, nothing turns on assertions by **Z (DW1)** that **PW1** denied the offence had occurred. **PW1** recorded a statement, and her examination on the following day revealed a broken hymen but no blood stains or bruises. Yeast and epithelial cells were noted in the high vaginal swab as per **PW2** both suggestive of infection.

14. The Appellant takes issues with the P3 form and the treatment notes tendered at the trial, citing lack of competence by **PW2**. **PW2** introduced himself at the trial as a nurse and mental health specialist, trauma counselor and specialist in sexual diseases. He did not give his qualifications or otherwise explain how he qualified to prepare the medical report. Although the Appellant did not challenge **PW2**'s qualifications at the trial, it is not possible to tell whether the witness is authorized to practice as a medical practitioner or as a Clinical Officer under the Nurses Act or the Medical Practitioners and Dentists Act.

15. The Appellant's objection on this score is therefore not idle. But contrary to the Appellant's submissions, the alleged failure to prove defilement by the so-called "scientific" method, in this case the impugned medical evidence, does not automatically defeat the prosecution case. Under the proviso to Section 124 of the Evidence Act, a conviction in respect of sexual offence can be based solely on the evidence of the victim. The trial magistrate could therefore have based the conviction herein on the evidence of **PW1** and **PW3** only in this case.

16. The two witnesses gave evidence concerning the defilement. The witnesses remained consistent and were not shaken in cross-examination. It is hard to fathom why **PW1** and **PW3** would have conspired to make false allegations against the Appellant. There is no evidence of pre-existing hostility between them.

17. **PW3** stated in cross-examination:

"I did not scream because you were violent. I just took the girl away to report to police. I have a lot of respect for you. But now I do not as I caught you in the act. I reported to Z but she told me to shut up. She even poured hot tea on me to silence me but I went ahead to tell police."

18. **Z** for her part while admitting being home on the material date merely said that the Appellant did not defile or touch the Complainant indirectly, confirming **PW1**'s presence in the home on the material date. And she also admitted that she was confronted by **PW3** on the same date concerning the defilement. She, like **DW2** added no value to the defence. She was evidently biased and therefore unlikely to give truthful evidence if adverse against her husband. It is hardly unusual for relatives of minor victims of sexual exploitation to hush up the matter. That **PW3** defied **DW1**, refusing to co-operate in covering up the defilement explains the animus shown against her by **DW1**.

19. On my part, having reviewed the evidence tendered, I am of the view that an offence of Attempted Defilement Contrary to Section 9 (1) of the Sexual Offences Act is disclosed. There is no doubt that **PW1** was a child, being a person aged below 18 years, and that the Appellant sexually assaulted her. Consequent to her encounter with the Appellant, she was stained with what was likely semen, and the Appellant was caught while attempting to dress up when the mother of the child knocked on the door. He turned violent when confronted. His reaction was due to the fact that he had been caught in *flagrante delicto*.

20. The Court of Appeal considered the definition of an attempt to commit an offensive in Section 388 of the Penal Code in the case of **Francis Mutuku Nzangi -Vs- Republic [2013] eKLR**, by stating that:

"Our understanding of this provision is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain the objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

21. I find that the available evidence supports a conviction for the offence of attempted Defilement

Contrary to Section 9 (1) of the Sexual Offences Act. I will quash the conviction for Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and substitute therefor a conviction for Attempted Defilement Contrary to Section 9 (1) of the Sexual Offences Act.

22. Accordingly, I also set aside the sentence of 20 years imprisonment and substitute therefor a term of 10 years imprisonment from the date of sentencing (10/9/2015). To that extent, the appeal has succeeded.

Delivered and signed at Naivasha, this **16th** day of **December, 2016**.

In the presence of:-

For the DPP : Mr. Koima

C/C : Barasa

Appellant : Present

C. MEOLI

JUDGE