



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 258 OF 2013

J M

NAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. M. Ochieng Ag. Ag. Senior Resident Magistrate delivered on 23/10/2012 in Makueni Principal Magistrate Criminal Case No. 48 of 2012)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **J M N** was charged with the offence of “defilement of a girl between the age of 12 and 15 years”.

The particulars of the charge were that “on the 21st day of January 2012 in **Makueni District** within **Makueni County** unlawfully caused penetration with his male genital organs to **A N S** a girl between the age of 12 and 15 years”.

2. In the alternative, the accused was charged with the offence of “indecent assault with a girl contrary to **section 11 (A) of Sexual Offences Act No. 3 of No. 2006**”.

The particulars of the offence were that “on the 21st day of January 2012 in **Makueni District** within **Makueni County** unlawfully indecently assaulted **A N S** by touching her private parts.”

3. The Appellant pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that on the material day at about 10.00 a.m. the complainant, **A N S** was collecting firewood in front of the house. She then saw the Appellant jump over the fence and approach her. That the Appellant then held her hand and forced her to the bush. That the Appellant then undressed himself and also undressed the complainant then defiled her. The complainant screamed. PW3 **M P M** heard the screams and ran towards the complainant’s home while calling the complainant’s name. The complainant then came from the bush while crying and informed him what had transpired. PW3 saw some blood stains at the back of the complainant’s dress. PW3 took a bow and arrows and went to where the Appellant was and chased him up to the road.

5. The complainant made a report to her grandmother, PW2 **M W K**. The grandmother checked the complainant's private parts and noticed some tears and blood stains. The grandmother also observed that the complainant was walking with an awkward gait. The grandmother reported the matter to the village elder, PW4 **Miriam Mule Mulungye**. Efforts made to resolve the matter at home failed. A report was made to the Assistant Chief, PW6 **Alex Kyalo Kingoa** who referred the complainant and the grandmother to the police station. The complainant was issued with a P3 form and escorted to hospital for examination. The Clinical Officer, PW5 **Joseph Kiptoo Biwott** confirmed that the complainant had been defiled. The Appellant was arrested and subsequently charged with the offences herein.

6. In his defence case, the Appellant gave sworn evidence and called one witness. The Appellant stated that on the material day at about 8.00 a.m., he went to work at his tomato farm with DW2 **Thomas Thiwa Maswili** and one **Bernard Muthini**. That the said farm is far from the complainant's home. The Appellant stated that he was at the farm from 10.00 a.m. to 3.00 p.m.

7. That the Appellant later heard about the complainant herein when the complainant, her uncle and grandmother who were in the company of three men went to their home with the allegations of defilement. The Appellant denied the defilement but he was subsequently arrested. He was escorted to the police station and locked in. The Appellant was later escorted to the hospital for examination and the results were negative. The Appellant was later arraigned in court.

8. The Appellant termed the prosecution evidence as a fabrication. He blamed this case on differences with the complainant's uncle (PW3) who had earlier on been found half naked in their compound at about 2.00 a.m. That PW3 could not give a definite reason for his presence in their compound and they tied him up but later released him following the pleas from PW3's grandmother.

9. At the conclusion of the case, the Appellant was found guilty and sentenced to serve twenty (20) years imprisonment. The lower court record does not reflect whether the sentence is in the main count or the alternative count.

10. The Appellant was aggrieved by both the conviction and the sentence and he appealed to this court on grounds that can be summarized as follows:-

- a. **That the complainant's age was not ascertained.**
- b. **That the prosecution evidence was doubtful, inconsistent and contradictory.**
- c. **That the medical evidence defied known and established scientific principles.**
- d. **That the prosecution case was not proved beyond reasonable doubts.**
- e. **The defence of alibi was not displaced by the prosecution.**

11. The appeal was canvassed by way of written submissions which I have carefully considered.

12. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*

13. The complainant's (PW1) evidence is that of recognition during broad daylight. The complainant's evidence is that the Appellant's home was across the river and she knew his name as **M**. During cross examination by the defence counsel, the complainant explained that she lived with her grandmother who had gone to the *posho* mill.

14. The complainant's evidence was that the Appellant penetrated her "by removing his organs into mine". The complainant further testified that she bled and screamed which attracted the attention of her uncle (PW3).

15. PW3's evidence corroborated PW1's evidence. According to PW3, he heard the screams and responded. That the complainant informed him of the defilement and he took a bow and arrows and chased the Appellant away. Although PW3 did not witness the actual defilement, his evidence places the Appellant at the scene. During cross-examination, PW3 testified that he saw the Appellant jumping over

the fence and chase the complainant. The evidence of PW3 is also that of recognition in broad daylight. During cross-examination, PW3 denied the existence of any differences with the Appellant.

16. The grandmother (PW2) gave evidence that reflects consistency between the report made to her by the complainant and the complainant's evidence in court. The grandmother's evidence also shows that the Appellant is their neighbour and a relative. I have seen no material inconsistencies or contradictions between the evidence of PW2 and PW3. The evidence of both PW2 and PW3 reflects that they saw the Appellant jumping over the fence and that PW3 also heard the complainant screaming.

17. The report of the defilement is confirmed by the evidence of the village elder (PW4) and the Assistant Chief (PW6). The evidence of PW7 S. **Sgt. Joel Mbinda** and **PW8 PC Ann Wangui** confirms the arrest and the investigations carried out.

18. The Clinical Officer, PW5 **Joseph Kiptoo Biwott** gave the medical evidence. His evidence is that he examined the complainant. He gave the complainant's age as 14 years. His evidence was that the complainant's hymen was perforated. That the complainant had a bacterial infection and there was presence of spermatozoa. The Clinical Officer concluded that penetration had occurred. He produced a P3 form in support of his findings. The P3 form gives the complainant's age as 14 years. This is conclusive evidence on the complainant's age.

The Clinical Officer also produced the treatment notes made earlier on by a colleague who had first seen the complainant at the hospital. It was the Clinical Officer's evidence that he also examined the Appellant and all the tests including tests for Sexually Transmitted Diseases were negative.

19. The Clinical Officer during cross-examination further testified that the complainant had gonorrhoea, a sexually transmitted disease. However during cross-examination, the Clinical Officer explained that the incubation period for the said disease is 7 – 10 days in males and 10 - 14 days in female. He also explained that the hymen's perforation was an old one and not a new one. This explains the positive findings of the Sexually Transmitted Diseases on the complainant and the absence of the same from the Appellant at the time of the examination which the Clinical Officer gave as 26/1/2012, which is five (5) days from the material date.

20. The defence by the Appellant is that he was away working in his farm at the material time. However, according to his witness (DW2) there was a time the Appellant took tomatoes to his house where he stayed for more than ten minutes then returned at 11.00 a.m. This contradicted the Appellant's evidence that he was at the farm from 10.00 a.m to 3.00 p.m. The alibi was displaced by the strong prosecution evidence.

21. The trial magistrate believed the complainant hence the conviction. The proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya** provides as follows:-

“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

22. Having combed through the entire evidence on record, I find no reasons to differ with the findings of the trial magistrate who had the benefit of seeing the witnesses testify and observing them as they testified.

23. The particulars of the offence in the main count (defilement) however reflect that the Appellant **“caused penetration with his male genital organs to A N....”** The particulars fail to reflect which part of the complainant's body was penetrated. **Section 2** of the **Sexual Offences Act** defines penetration as follows:-

“the partial or complete insertion of the genital organs of a person into the genital organs of

another person”

The charge sheet in the main count was therefore defective as it lacked an essential ingredient of the offence.

24. In the alternative count, the Appellant was charged with the offence of indecent act with a girl contrary to **section 11 A** of the **Sexual Offences Act**. As analyzed above, there is evidence on record that established the commission of this offence beyond any reasonable doubts. **Section 11A** provides for a sentence not exceeding five (5) years. Consequently, the Appellant is found guilty and convicted in the alternative count. I substitute the sentence of twenty (20) years with a sentence of five years. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of March 2015.

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B. THURANIRA JADEN

JUDGE