



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 183 OF 2012

N M K APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. M.O. Kizito Senior Resident Magistrate delivered on 6/5/2013 in Makindu Principal Magistrate Criminal Case No. 939 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, N M K was charged with the offence of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 31st day of August 2011 at around 11.00 a.m. in **Kibwezi District** of the **Eastern Province** intentionally and unlawfully caused his male organ namely penis to penetrate the female organ namely vagina of C N a child aged 13 years.”

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences act No.3 of 2006**.

The particulars of the offence were that “on the 31st day of August 2011 at around 11.00 a.m. in **Kibwezi District** of the Eastern Province intentionally and unlawfully touched the genital organ of a girl namely vagina of C N a child aged 13 years”.

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

4. The prosecution case was that on the material day at around 11.00 a.m, the complainant, PW3 C N, a thirteen (13) year old standard 7 pupil went to the house of the Appellant to borrow a spade. That the Appellant who is a cousin to the complainant showed her a pornographic movie on his mobile phone. The Appellant then grabbed her and took her to his bed, removed her panty and biker, unzipped his trouser and defiled her. The complainant who was in pain and was bleeding from her female genitalia. She went home after the Appellant had released her after warning her not to tell anybody what had transpired and promised to give her some money.

5. The complainant informed her aunt, PW1 **A N N** what had transpired. The aunt screamed and members of public came to their home in response to the screams. The Appellant was arrested and tied up with a rope and escorted to the police station. The complainant's mother, PW2 **D M K** who was attending a church meeting was telephoned and informed of the matter. The mother returned home and escorted the complainant to the hospital. The doctors confirmed that the complainant had been defiled. The Appellant was subsequently charged.

6. In his defence, the Appellant gave sworn evidence. He called one witness. The Appellant who described himself as a school dropout stated that the complainant is his cousin. That his relationship with the complainant was not cordial. That his father died and his mother was chased away from home and went to live in **Sultan Hamud**. That the complainant's mother did not want to see their family at home and she is the one who forced them to move. The Appellant termed the charge a frame up.

7. DW2 **F M M** a brother to the Appellant gave evidence. He stated that there was a grudge between the complainant's family and his family due to a land dispute. He also termed the charge a frame-up.

8. The trial magistrate found the Appellant guilty in the main count of defilement. The Appellant was sentenced to twenty (20) years imprisonment.

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

a. That the charge sheet was defective.

b. That the Appellant's fundamental rights and constitutional rights were infringed.

c. That some crucial and independent witnesses were not summoned by the prosecution to testify.

d. That the evidence of the prosecution witnesses was full of contradiction.

e. That the defence case was not considered.

10. During the hearing of the case, the Appellant relied on his written submissions. The said submissions essentially reiterate the grounds of appeal.

11. The appeal was opposed. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.

12. The complainant (PW3) gave evidence which established that she had been defiled. The complainant described the act constituting the offence. The complainant's evidence was that the Appellant caused his male genitalia to penetrate her female genitalia. Her evidence left no doubt that she knew the Appellant as her cousin. Her evidence is that of recognition in broad daylight.

13. The complainant's evidence is corroborated by that of her aunt PW1 **A N K** and that of her mother, PW2 **D M K**. It was the evidence of these two witnesses that they checked the complainant and observed that she was bleeding from her private parts and that her underpants and the biker that she wore at the material time were blood stained. Their evidence also shows consistency between the version of events narrated to them by the complainant at the material time and the complainant's evidence in court.

14. PW4 **Dr Hannington Mibei** assessed the complainant's age at 13 years and confirmed the defilement. It was the doctor's evidence that the complainant had lacerations on her female genitalia, was bleeding and the hymen was torn. The doctor produced a P3 form which reflects the complainant's name as **C N**. The reflection of the complainant name in the doctor's evidence in

court as **E N** could be either a slip of the tongue or a slip of the pen and the same did not prejudice the Appellant.

15. The evidence of PW5 **M N** and PW6 **CPL. Elizabeth Kombe** confirms the report made and the investigations carried out.

16. The defence by the Appellant and his witness is that this case is a frame up due to family differences due to a land dispute. However, the defilement was real. The land dispute issue is an afterthought. The same was not raised when the complainant, her aunt and the mother testified.

17. Having evaluated the evidence on record, I am satisfied that the Appellant was convicted on sound evidence. The trial magistrate who saw the witnesses testify and observed their demeanour believed the prosecution witnesses. I have found no reasons to differ with the findings of the trial magistrate.

18. 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.”

19. I have looked at the charge sheet I have found no defects in the same. The issue raised that the charge sheet is defective has no merits.

20. The Appellant complained that his constitutional rights were infringed due to overstay in police custody. On the issue that the Appellant’s rights were violated due to overstay in police custody, the Appellant’s remedy lies in a civil action (See for example **Julius Kamau Mbugua – vs- Republic - Criminal Appeal Nrb. 50 of 2008**).

21. On the issue that the prosecution failed to call crucial witnesses, the answer is found in the following dicta from the case of **Bukenya & Others –vs- Uganda (1972) EA 549, at page 550** where the **Court of Appeal for East Africa** stated:-

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.”

22. In conclusion, I find no merits in the appeal. The sentence is within the law. Consequently, the appeal is dismissed.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of March 2015.

.....

B. THURANIRA JADEN

JUDGE