



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 4 OF 2013

BETWEEN

H M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being appeal from original conviction and sentence of Hon. Maloba, SPM,
dated 24th January, 2013 in Kisii CM's Court Criminal Case No.512 of 2012).*

JUDGMENT

The appellant H M was charged with defilement of a child below twelve years of age contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on 20th day of October 2011 in Kisii South District within Kisii County intentionally and unlawfully penetrated the vagina of SMM a girl aged 12 years using his genital organ namely penis.

He pleaded not guilty was tried, convicted and sentenced to 25 years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds in his petition of Appeal:-

- a) *He was framed up by his wife the mother of the minor.*
- b) *The prosecution case was not proved beyond reasonable doubt.*
- c) *His defence was dismissed without given reasons thereof.*

When this appeal came up for hearing before me, Mr. Majale appeared for the state and opposed the appeal while the appellant who was unrepresented filed a supplementary memorandum of appeal and written submissions.

SUBMISSIONS

It was submitted by the appellant that there was contradiction in the prosecution evidence as regards the date of the alleged offence and that one vital witness the mother of the complainant was never called to testify. It was further submitted that the appellant's right to fair trial was violated by the trial court by reopening the prosecution case and that his defence was unfairly rejected and that the trial court shifted the burden of proof upon the appellant.

On behalf of the respondent it was submitted that the evidence of the minor victim was corroborated by the medical evidence and that under **Section 164** of the **Evidence Act** the evidence of the victim is enough to secure conviction and therefore there was no need to call the mother.

This being a first appeal, the court is required to re-evaluate the evidence on record afresh and to come to its own conclusion, though taking into account the fact that it did not unlike the trial court have the advantage of seeing and hearing witnesses.

On behalf of the prosecution PW1 a minor aged 12 years a pupil at [Particulars Withheld] primary school testified that on 20th October 2010 the appellant who is her father having chased away the mother went to the place where she was sleeping with her young brother and sister, removed her clothes and defiled her and that he defiled her twice. When she told her mother she took no action. The second time she informed her Aunt, who also took no action. So on the third occasion she told her teacher who took her to the chief and thereafter to the doctor for medical examination.

The witness explained that her father the appellant slept on top of her and inserted his penis in her vagina and that this he did after chasing the mother of the complainant. PW2 JOHN ONGORO NYANGARA the area assistant chief testified that he received a call from [particulars withheld] primary school from the head teacher that the complainant had told her that she had been defiled by her father to which he advised that the same be taken to hospital for examination which was done. Thereafter PW1 and her mother disappeared from home.

It was PW2's evidence that in March 2012 a lady called Stella Oanda called him and informed him that PW1 had been spotted and subsequently the appellant was arrested. PW3 EDMOND OYUNGE RATEMO a clinician testified that he examined the complainant on 22nd March 2012 and that she had in October 21, 2011 been taken to Kisii Level 5 where examination revealed that her hymen was broken.

PW4 P L K the head teacher of the complainant's school testified that on 22nd November 2011 the complainant did not report to school and when she inquired, she was told that she had ran away from home due to some problems. When she was interrogated by deputy teacher one J M she told her that her father had defiled her and upon inquiry by PW4, PW1 informed her that the appellant had been defiling her since she was in class II and when she called the complainant's mother she told PW4 that the appellant had been defiling PW1 over time whenever they had a dispute and that he had earlier defiled and impregnated his elder daughter.

PW5 PC JULIA LOWOI stated that on 22nd March 2012 she received PW1 at the police station with PW2 and she told her that on 19th October 2011 the appellant came home while drunk and chased away her mother before defiling her and that she had been treated at Kisii Level 5 on 20th October 2011 which she confirmed from the print out though the report to the police station was made on 22nd March 2012.

When put on his defence the appellant gave unsworn statement and stated that he had not defiled PW1 on 20th October 2012 and explained that on the day he was arrested a lady called Stella phoned him and said he was wanted at home. He was thereafter taken to Gesonso police station and subsequently charged. It was his evidence that his wife was a drunkard and that he had problems with her due to her drunkardness.

The issue for determination therefore is whether the minor was defiled and if so by the appellant. From the proceedings and the evidence of PW1 she clearly stated that the appellant defiled her and explained that he undressed her, slept on her top and inserted his penis into her vagina. She also told PW4 that the appellant had been defiling her since she was in class II which information was confirmed to PW5 by the complainant's mother. PW1 also made a report to PW5 that the appellant had defiled her on 10th October 2011.

The said act of defilement was confirmed by the evidence of PW3 by way of P3 form and

treatment notes. The age of the complainant was confirmed by Dr. George Barasa. The evidence of the prosecution was very consistent noting that the appellant though under no obligation to do so did not account for the date of defilement but only gave evidence as regards the date of his arrest.

I am not persuaded by the appellant's submission that he was framed up by his wife noting that the report against him was not made by the wife but by PW4.

I therefore find that the prosecution case against the appellant was proved beyond reasonable doubt and therefore his conviction was safe and therefore dismiss the appeal herein.

From the evidence tendered the appellant should have been charged under **Section 20 (1)** which would have attracted imprisonment for life but since the same was not put on notice I will not interfere with the sentence given to the same.

Delivered, signed and dated at Kisii this 28th day of May 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Miss. Boyon for Respondent

In person for Appellant