



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 182 OF 2013

J M KAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1106 of 2011 by Hon. P. N. GESORA, SPM on 15/8/13)

J U D G M E N T

1. **J M K**, the appellant was charged with the offence of **attempted defilement contrary to section 9(1) as read with section 9(2) of the sexual offences Act.**

Particulars of the offence were that *on the 21st day of July 2011 at [particulars withheld] in Mwala District within Eastern Province, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of M M a girl aged 5 years.*

2. In the alternative he was charged with **indecent act contrary to section 11(1) of the sexual offences act No. 3 of 2006.** Particulars were that *on the 21st day of July 2011 at [particulars withheld] in Mwala District within Eastern province, unlawfully and intentionally touched the private part (vagina) of M M using his penis.*
3. Facts of the case were that on the 21st July 2011, PW2 L N N the mother of PW1, M W K, the complainant and wife of the appellant was at home with their three (3) children, PW1 being the eldest. At about 7.00 a.m. PW2 went out of the house to fetch firewood. She returned to the house to find the appellant lying on PW1. His pair of trousers was unzipped and he was attempting to penetrate her.
4. On examination of PW1's private parts she noted some discharge on her thighs while her vagina was reddish. She reported the matter to the police and took PW1 to hospital for treatment. On examination by PW3, Mary Musau, a Clinical Officer it was established that she had laceration on her labia majora but there was no evidence of penetration. Investigations carried out culminated into the arrest of the appellant who was subsequently charged.
5. When put on his defence the appellant denied having committed the offence. He stated that PW1 was his step-daughter. He had a sour relationship with PW2 whom he accused of engaging in extra-marital affair. On the 18th July 2011 they disagreed and PW2 left with their children. On the 21st July 2011 he was arrested. He called his mother

DW2 as a witness who stated that she did not witness the incident but PW2 did not inform him of what had transpired.

6. The trial magistrate evaluated evidence adduced and reached a finding that the appellant committed the offence. He convicted the appellant and sentenced him to serve ten (10) years imprisonment.
7. Being aggrieved by the conviction and sentence thereof the appellant appealed on grounds that:-
 - **The medical evidence was unsatisfactory as it was adduced by a clinical officer who legally is not a medical officer.**
 - **The charge sheet was invalid as the maker did not countersign it after the amendment, therefore, he was not accorded a fair trial as per the provisions of Article 25(c) of the constitution.**
 - **The prosecution's case was not proved beyond any reasonable doubt.**
8. The appellant canvassed the appeal by way of written submissions.
9. In response thereto the State through learned counsel Mr. Mwangi opposed the appeal. He stated that evidence of the child was confirmed by that of PW2 her mother who found the appellant in the act of attempting to insert his penis into PW1's private parts. The laceration sustained by the complainant was evidence of the attempt. He called upon the court to uphold the conviction and sentence.
10. This being the first appellate court, it has the duty to subject evidence adduced at trial to fresh and exhaustive examination so as to reach its own independent conclusion as to the guilt of the appellant. (*See Okeno versus Republic (1972) E.A. 32*).
11. PW3, Mary Musau who examined the complainant and subsequently filled the P3 form was a Clinical Officer being a holder of a diploma in Clinical Medicine and Surgery. Her competency to fill the P3 form has been challenged on appeal. It is now settled that a Clinical Officer is qualified to fill a P3 form as this is an area of his/her competence (See **Raphael Kavoi Kiilu v Republic Cr. App. No. 198 of 2008**;

Section 2 of the Clinical Officers Act (Training, Registration and licensing) Act Cap. 260 Laws of Kenya; **Fappyton Mutuku Ngui –vs- Republic (2014) eKLR**).

12. Article 25(c) of the constitution provides:-

“25. Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited:-

(c) the right to a fair.”

It is argued by the appellant that he was prejudiced as the investigating officer did not countersign the amended charge sheet. It is a requirement for a complaint to be signed by the complainant. (see section 89(3) of the Criminal Procedure Code). The formal complaint or accusation is normally reduced into writing in what is known as a charge. An amended charge sheet must therefore, be signed by the person lodging the complaint. The Republic/State which has the mandate to institute the charge acts through persons/agents which include the police as in the instant case where the police present the charge they will be required to sign it.

13. In this case the amended charge sheet was presented in court on the 18th September 2011. It was duly signed by the officer in charge of Masii Police Station on whose behalf the charge was presented to court by the prosecutor. The magistrate also signed the charge. The investigation officer was not required to countersign the formal charge. In the premises the appellant was not prejudiced. His right to a fair trial was not contravened.
14. The appellant was convicted of the offence of attempted defilement. The victim was a child aged 5 years. The prosecution adduced evidence of a birth certificate No. [particulars withheld]. It was proof of the fact of birth of the complainant. She was born on the 12th December, 2006. On the 21st July 2011 when the offence was alleged to have been committed she was 5½ years old hence a child of tender age. (**Vide Section 2 of the Children Act**).
15. The prosecution had a duty of proving that the appellant attempted to commit an act that would

- cause penetration with the child.
16. The victim (PW1) was taken through *voire dire* examination by the trial magistrate who opined that she understood why she was in court but did not understand the nature of oath. Therefore he directed her to give unsworn evidence. In her evidence she stated how the appellant, her step father lay on her. Her mother found them in the same state. Her inner part was on the floor and she was injured on her private part.
 17. Her evidence was confirmed by that of PW2 who found them in the position alluded to. She checked the child and noted some discharge. She took the child to hospital. Medical evidence adduced by PW3 confirmed some interference with the child's vagina. She was in pain at the time of examination. Vaginal discharge was evidence and there were bruises on the labia majora. There was no evidence of penetration but a sexual assault was revealed.
 18. Denying having committed the offence the appellant stated that he was framed up by PW2 because of their disagreement following her infidelity. In his testimony he states that he suspected their last born child was not his. As a result they disagreed and PW2 left their matrimonial home on the 18th July 2011. This was tantamount to alleging that he could not have committed the offence as the child was not at his home on the material date. His mother (DW2) however argued that the incident could not have happened since she did not hear anything and no complaint whatsoever reached her; stating that her house is 3-4 metres away from the appellant's house, she said that on the material night she heard PW2 and the appellant quarrelling.
 19. DW3 E S M introduced in evidence an allegation that he slept with the appellant at a lodging and he left him (appellant) sleeping on the morning of 21/7/2008. This was contradictory evidence. The learned trial magistrate was correct in reaching a finding that the defence put up was disjointed hence weak.
 20. Evidence adduced by the prosecution did establish the fact that the appellant was lying on the victim (PW1) with his pair of trousers unzipped. His penis came into contact with her vagina an act that made her sustain bruises/lacerations. There was no penetration because PW2 interrupted him. It is apparent that his action as described by witness and confirmed by medical evidence amounted to preparation to commit an offence of defilement.
 21. In the result, the learned trial magistrate did not err in reaching his decision. In the premises the appeal lacks merit. It is dismissed in its entirety.
 22. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 18TH day of JUNE, 2015.

L. N. MUTENDE

JUDGE