



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 243 OF 2011

(From original conviction and sentence in Criminal Case No. 1173 of 2010 of the Principal Magistrate's Court at Makindu, N. N. Njagi, P. M.)

MUTISYA MUTINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Mutisya Mutinda was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence state that on the 7th day of September 2010 in Nzau District within Eastern province, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of RMM a child aged 6 years.

2. The Appellant was also charged with a second count 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 offence are that the Appellant on the 7th day of September 2010 in Nzau District within Eastern Province, intentionally and unlawfully touched the vagina of RMM a child aged 6 years with his penis.

3. The Appellant pleaded not guilty and the case proceeded to a full hearing. The prosecution case was that on the material day at about 6.30 p.m., the complainant, PW1 RMM, a six year old girl was at home with her grandmother, PW2 MNM. The grandmother left the complainant eating and went to water some trees. The Appellant who was the grandmother's domestic employee went to where the complainant was, grabbed her by the neck, warned her to keep quiet or be killed. The Appellant then removed the complainant's trouser, removed his clothes and lay on the complainant and inserted his penis into her vagina.

4. The grandmother heard the complainant's scream and went to check what was going on. She found the Appellant lying on the bed naked while holding the child. The complainant was holding his clothes and was in shock and could not talk. The Appellant ran away. The scared grandmother locked herself and the complainant in the house. The following day the matter was reported at Sultan Hamud police station. The complainant was issued with a P3 form and taken to hospital for examination and treatment. The Clinical Officer, PW3 Andrew Muia found bruises on the complainant's genitalia. The Appellant was arrested and charged with the offence herein.

5. In his defence case the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that he was at home when he was arrested for some unknown reason and then

brought to court. The Appellant denied the offence.

6. The trial magistrate convicted the Appellant for the offence of attempted defilement and sentenced him to ten (10) years imprisonment.

7. The Appellant was dissatisfied with 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 conviction was based on contradictory and uncorroborated evidence.

(c) That the Appellant's defence was dismissed without any reasons being given.

8. During the hearing of the appeal, the Appellant relied on written submissions. The said submissions essentially expound the grounds of appeal. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

9. This being the 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**.

10. The complainant testified after the trial magistrate carried out a *voir dire* and was satisfied that the complainant was intelligent enough to testify and understood the meaning of oath. The complainant's evidence leaves no doubt that she was defiled. The offence took place at about 6.30 p.m. This is during the day. The complainant's evidence is that she knew the Appellant as he was employed by his grandmother.

11. The complainant's evidence was corroborated by that of her grandmother (PW2). The grandmother's evidence shows that she found the complainant and the Appellant naked with the Appellant holding the child. The grandmother's evidence further corroborated the complainant's evidence that the Appellant was her employee.

12. Both the complainant's evidence and that of the grandmother is that of recognition during day time. There is therefore no possibility of mistaken identity.

13. The Clinical Officer's (PW3) evidence was that the complainant had bruises on her genitalia. The P3 form produced by the Clinical Officer describes the complainant's genitalia as having a "*bruised vulva*". The Clinical Officer estimated the complainant's age as six years and reflected the same in the P3 form.

14. PW4 PC Benjamin Makau gave evidence that confirmed that the matter was reported at Sultan Hamud police station and investigations carried out.

15. The Appellant's position that he was arrested for an offence that he did not commit is not believable in view of the strong prosecution case. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the complainant. Having re-evaluated the evidence, I have no reasons to differ with the findings of the trial court.

16. On whether the charge sheet is defective because of stating S. 9(1)(2) of the Sexual Offences Act instead of Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006, the error is curable under Section 382 of the Criminal Procedure Code. No prejudice was suffered by the Appellant due to the said error.

17. With the foregoing, I find no merits in the appeal. The sentence is within the law. The appeal is

dismissed.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of June, 2015

.....

B. THURANIRA JADEN

JUDGE