



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 81 OF 2013

KATANA NGALA SIRYA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 85 of 2012 of the Principal Magistrate's Court at Kaloleni – **Hon. S.R. Wewa - PM**)

JUDGMENT

KATANA NGALA SIRYA hereinafter referred to as the appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual offences Act.

The particulars being that:-

“On diverse dates between the 30th day of March, 2012 and 3rd April, 2012 at– Kilifi County he unlawfully and intentionally caused the penetration of his male organ namely penis into a female organ namely vagina of Constance K K a child aged sixteen (16) years”.

The prosecution in this case called five (5) Witnesses. The appellant gave unsworn statement and did not call any other Witnesses.

There are two main ingredients in this charge of defilement facing the appellant.

1. Age assessment
2. Penetration

Age assessment

In her evidence in chief the complainant testified to be aged sixteen (16) years and was a class seven (7) pupil at Primary School [Particulars withheld – Kilifi County.

Her father (PW 3) W K did testify to the effect that his daughter PW 1 was born on 19th October, 1995. Birth certificate was produced as exhibit No. 3. It showed the date of birth as 19th October, 1995.

The Court is satisfied that there was proper age assessment in this case.

Penetration

The Appellant allegedly eloped with the complainant a standard seven pupil at Primary School on 30th March, 2012. She had gone to Kizurini for games together with other school pupils. She did not go back home or back to school till the time she was found in the house of the appellant on 3rd April, 2012.

It is her evidence that during that period she had sexual intercourse with the appellant for more than nine (9) times. PW 2, PW 3 found the Complainant in the appellants house where she had been staying.

The clinical officer (PW4) who examined the Complainant found that her hymen was broken (not intact). There were no visible injuries noted.

The grounds of appeal are that the complainant deceived the appellant that she was over eighteen (18) years old.

During cross-examination of the complainant the issue of deception did not arise.

Further in his defence in the lower court he denied having known the complainant.

Section 8(5) of the Sexual offences Act provides,

“It is a defence to a charge under this section if -

(a) It is proved that such child, deceived the Accused person into believing that he or she was over the age of eighteen (18) years at the time of the alleged commission of the offence; and

(b) The Accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in section 5(b) is to be determined having regard to all circumstances, including any steps the Accused person took to ascertain the age of the complainant”.

The prosecution case is that the appellant eloped with the complainant when she was still in school and when her school had gone to Kizurini for school games. The complainant was still in school uniform and the first thing to note was that he was dealing with a primary school pupil. When he later got wind that her parents were searching for him he went into hiding and he had to be sought for. His conduct was not consistent with innocence.

This ground of appeal appears to be an afterthought as the appellant did not allude to the alleged deception in his defence in the lower court.

The appeal has no merit and its dismissed. Conviction and sentence upheld.

Judgment delivered, dated and signed this **21st** day of **September, 2015**.

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M. MUYA

JUDGE

21ST SEPTEMBER, 2015

In open Court in the presence of:-

Learned Counsel for prosecution Mr. Wangila

Appellant present

Court Assistant Musundi

M. MUYA – JUDGE