



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CRA NO.62 OF 2013

(Appeal arising from the conviction and sentence of Hon. L. Gicheha in Malindi Cr. Case No.783 of 2012)

J K K.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant 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 the appellant, on the 16/11/2012 at [Particulars withheld] Village, Malindi District within Kilifi County, intentionally and unlawfully caused penetration of his penis into the vagina of the complainant, a girl aged 15 years old.

The appellant was convicted and sentenced to serve twenty (20) years imprisonment. The grounds of appeal are that the medical evidence was of no probate value, that the appellant was not furnished with witness statements, that only members of one family testified, that the arrestors did not testify and that his reliable defence was not considered.

In his written submissions, the appellant contends that the complainant bathed once, was taken to hospital one day after the incident yet the medical officer alleged to have noted spermatozoa on her private parts. It is the appellant's position that the evidence is not believable. The medical officer testified that if one takes a bath, the sperms may not be seen. There was also no evidence to show that the blood on the alleged PW1's clothes was that of PW1. No blood samples were taken from the appellant. The owner of the sperms found in PW1's private parts was not known.

The appellant further contends that he requested for witness statements and an order was issued to that effect. However, no statements were given to him contrary to the provisions of article 50 (2) of the Constitution. It is also submitted that there are people who went to his house and arrested him. They were not called to testify.

Miss Mathangani, prosecution counsel, opposed the appeal. Counsel submitted that all the ingredients of the offence were proved. The complainant reported to her mother immediately after she was defiled. PW1's evidence was consistent with that of his mother. PW1's clothes were full of blood. The appellant's wife confirmed that the appellant escorted the complainant. Medical evidence showed that PW1 had been defiled and her age was assessed.

Before the trial court, PW1 was the complainant. She testified that the appellant is her brother in law. She was a class two (2) pupil at [Particulars withheld] Primary School. On 16/11/2012, she went to school. At lunch time she visited her sister and they had lunch. She stayed upto about 7.00 p.m. the appellant offered to escort her back home and on the way he defiled her. The appellant threatened to kill her if she informed anyone. It was her first time to have sex and bled. Her clothes were full of blood. She started vomiting and her stomach was painful. She went home and informed her mother (PW2). She was taken to Ngongoni Hospital and treated. Her P3 form was filled. The matter was reported to the police.

PW2, F N is PW1's mother. Her evidence was that PW1 went home on 16/11/2012 at about 7.00 p.m and informed her that she had been defiled by her brother in law. It is her evidence that PW1 was 12 years old. She checked PW1's private parts and noticed blood coming out. Her daughter, Mary is married to the appellant. PW1 was taken to Ngogono Hospital and later to Malindi Hospital. The appellant was arrested and charged. **PW3, M J** is the appellant's wife. Her evidence is that PW1 went to their home on that day at 1.00 p.m. She stayed there upto 7.00 p.m. The appellant escorted her home while holding a slasher. The appellant went back home and took super. Shortly people went to their home and alleged that the appellant had defiled PW1.

PW4, Ibrahim Abdullahi is a Clinical Officer who was based at Malindi Hospital. He examined PW1 on 19/11/2012 and filled her P3 form. There were treatment notes from Ngogoni Health Centre. PW1's age was assessed and she was found to be 15 years. Bleeding was noted on PW1 and her hymen was broken. Spermatozoa was also noted. PW4 concluded that PW1 had been defiled.

PW5, PC Philip Ndora Mulwa was stationed at Marereni Police Station. The case was reported on 17/11/2012. He produced PW1's blood stained clothes. PW1's age was assessed and found to be 15 years old.

The appellant was put on his defence. In his unsworn testimony, he stated that PW1 went to their home on 16/11/2012. He had spent the morning at his farm. He took lunch and slept. He was woken up by his wife at 3.00 p.m to go and work. He later escorted PW1 home. On the way, PW1 entered her uncle's house. He went back to his home and took super. PW1's parents went there and asked for money to buy flour. Shortly, some people went there and started beating him. He was taken to the police station and charged with the offence. He denied defiling PW1.

This being the first appeal, it is my duty to evaluate the evidence afresh and find out whether the prosecution proved its case beyond reasonable doubt. The evidence on record does prove that PW1 was indeed defiled. The medical evidence shows that there was spermatozoa on her private parts. She was also bleeding. PW2 checked on her and noticed that she was bleeding. Although PW1 took a bath, it is clear from the evidence that medical tests showed that she was still bleeding and sperms were noticed. I do concur with the findings of the trial court that PW1 was defiled.

The next issue is whether, it was the appellant who defiled PW1. The evidence shows that PW1 spent the day at her sister's place. She knew the appellant. The appellant himself admitted having escorted PW1. There was no grudge between the two families. Shortly, after she was defiled, PW1 informed her mother PW2. According to the evidence, it is the appellant who escorted PW1 while holding a slasher. There is the contention that PW1 entered her uncle's house. The name of the uncle is not given. There is no reason as to why PW1 would mention the appellant as the defiler if indeed he was not the one. There is no evidence that PW1 was defiled by someone else other than the appellant. The evidence is direct. Those who arrested the appellant took him to the police station. The Investigation Officer testified. The medical evidence is in line with the evidence of PW1 and PW2.

In the end, I do find that it was the appellant who defiled PW1. The defence evidence does not raise any doubt on the prosecution case. The trial magistrate made the correct findings. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 28th day of October, 2015.

SAID J. CHITEMBWE

JUDGE