



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 227 OF 2013

(From original conviction and sentence in Criminal Case No. 186 of 2012

of the Principal Magistrate's Court at Kajiado, M. A. Ochieng (Mrs) SRM)

MICHAEL MAPESA MAKHOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Michael Mapesa Makhokha was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 14th day of February 2012 in Kajiado District of the Rift Valley Province, intentionally caused his penis to penetrate the vagina of SK a child aged 12 years.

2. The Appellant pleaded not guilty and the case proceeded to a full trial.

3. The case for the prosecution was that on the material day at about 5.00 p.m., the complainant, PW1 SK, a 12 year old Std 6 girl was alone at home washing utensils. Her mother had gone to church. She was pushed from behind and fell on the bed. She then saw the Appellant who was her neighbour. The Appellant removed her inner wear then removed his inner wear and the trouser. The Appellant then had sexual intercourse with her while holding her mouth and threatened to kill her if she screamed. The Appellant then left.

4. The complainant got up and continued with her chores. The following day the complainant went to school. The complainant had bled a bit from her vagina which was also painful. The complainant reported the matter to her teacher. A report was made to the police station and the complainant was taken to hospital for examination and treatment. The medical examination confirmed the complainant had been defiled. The Appellant was subsequently arrested and charged.

5. When placed on his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant stated that he was arrested and escorted to Kitengela police station where he was informed of the defilement. The Appellant was shocked by the allegations. He denied having defiled the complainant. The Appellant's further statement that he was a neighbour to the complainant's mother at the same plot and that they both worked at the same place. That the complainant's mother had an affair with him and when the Appellant's wife came from the village the complainant's mother threatened him with dire

consequences. That the Appellant was employed on permanent basis but the complainant's mother was employed on contract. That the complainant's mother was laid off from work she threatened to make good her threats. The Appellant blamed this case on the existence of a grudge between him and the complainant's mother.

6. The trial court found the Appellant guilty of the offence of defilement and convicted him accordingly. The Appellant was sentenced to 20 years imprisonment.

7. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. That the trial magistrate was biased against the Appellant.
- b. That the conviction was against the weight of the evidence.
- c. That the prosecution evidence was contradictory.
- d. That the prosecution case was not proved beyond reasonable doubt.
- e. That no DNA tests were carried out.
- f. That the defence case was not considered.

8. During the hearing of the appeal, the Appellant relied on his written submissions which I have duly considered.

9. The learned counsel for the State orally submitted on the sufficiency of the prosecution evidence.

10. This being the 1st appellate court, 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**.

11. The complainant's (PW1) evidence was that she was defiled by the Appellant. According to the complainant's evidence, the Appellant inserted his penis into her vagina. The complainant's evidence is that of recognition of the Appellant in broad daylight. It was the complainant's evidence that she knew the Appellant by the name Maperera as a neighbour who lived in the same plot and worked at EPZ. The complainant gave the time of the offence as about 5.00 p.m.

12. The complainant's evidence that the Appellant was their neighbour and worked at the EPZ was corroborated by that of her mother, PW2 CK. The complainant's evidence in court is consistent with the report she gave to her teacher, PW3 Dorcas Njeri Theuri and to her mother (PW2) soon after the incident.

13. PW5 Geoffrey Wagura a Clinical Officer at Kitengela Health Centre gave evidence that confirmed the defilement. According to the evidence of the Clinical Officer, the complainant had tears on the vaginal walls. The Clinical Officer produced a P3 form which gave the age of the complainant as 12 years. The age estimated by the Clinical Officer is consistent with the age given by the complainant and her mother.

14. PW4 Cpl. Muthoni Francis and PW6 PC Samuel Kirui both of Kitengela Police Station gave evidence that confirms the report of the defilement, the arrest and the investigations carried out.

15. The defence case by the Appellant boils down to that of frame-up by the complainant's mother due to a grudge. The issue raised by the Appellant in his defence concerning a love affair gone sour and the complainant's mother having been laid off from work appear to be an afterthought. These issues were not raised when the complainant's mother testified. The defilement was real as confirmed by the Clinical Officer. There are no allegations of any grudge with the complainant. The trial magistrate who saw the witnesses testify and observed their demeanour believed the complainant. I have found no reasons to

differ with the finding of the trial magistrate. I have found no basis for the allegations of bias made against the trial magistrate.

16. On the issue of DNA tests, the failure to carry out the same is not fatal to the prosecution case. The proviso to **section 124** of the **Evidence Act** stipulates as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. After evaluating the evidence on record, I am satisfied that the conviction is based on sound evidence. The sentence is within the law. Consequently, I find no merits in the appeal and I hereby dismiss the same.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 28th day of October, 2015

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B. THURANIRA JADEN

JUDGE