



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 191 OF 2011

FRANCIS MUKHASO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1407 of 2010 of the Senior Resident Magistrate's Court at Kwale – Hon. Usui Macharia - SRM)

JUDGMENT

The Appellant herein was charged Convicted and Sentenced to twenty (20) years Imprisonment for the offence of defilement contrary to Section 8(1) and (3) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge are that:-

“On diverse dated between the months of June, 2010 and September, 2010 at [Particulars withheld] Estate in Kwale Township – Kwale County, he unlawfully and intentionally committed an act which caused his penis to penetrator the vagina of E M a girl aged fourteen (14) years”.

The prosecution had called six (6) Witnesses in support of their case.

The grounds of appeal can be compressed into two main ones.

The first one being that there was no age assessment of the Complainant.

The 2nd one being that the Conviction was against the weight of evidence.

On the first ground, the Complainant at page 2 line 30 of the record of pleadings told the Court,

“ I attend [Particulars withheld] Primary School in Kwale. I am in class six, I am fourteen (14) years old”.

Her guardian – I M (PW 2) did inform the Court, at page 5 line 5,

“Her name is E M. She is fourteen (14) years old in class six Ziwani Primary”.

The investigation officer **PC ERNEST KWAMBOKA** at page 9 line 2 of the proceedings gave the

age of the Complainant as thirteen (13) years old whereas the clinical officer PW 6 gave the age as fourteen (14) years. There is no indication from any of these Witnesses as to the date, month and year of birth of the Complainant.

It is instructive to note that the mother and father of the Complainant did not testify in this case. It was advisable in the circumstances of this case to have taken the child for age assessment more so when there was no documentary evidence in terms of a birth certificate, Baptism card or Ante – natal clinical attendance card.

It is trite law that age in cases relating to sexual offences act age assessment is very essential as it governs the punishment regime of the offenders. Upon a careful evaluation of the evidence before me I do find that there was insufficient evidence on the issue of age assessment.

On the issue of the weight of the evidence before the trial Court. The Complainant herself narrated in detail of how the Appellant who is their next neighbour started seducing her severally upon finding her at the communal washing place for him to take her to the bed for sexual purposes. This happened in the months of June, July, August and September of the same year. It was in the month of September 1st when their relationship came to the fore after the Complainant was found outside her guardians house at the ungodly hour of 4:30a.m. When she was confronted by PW 2 and her husband PW 3 she disclosed her clandestine sexual activities with the appellant and subsequently the appellant was arrested. Before that the Appellant had agreed to solve the matter out of Court after producing a medical chit to the effect that he was HIV -.

In the Judgment the learned trial magistrate at page 15 line 25 had this to say,

“The Complainant also told the Court that her aunt discovered what was happening on 1st September, 2010. She told the Court that she had just come from the Accused's house at 4:00 a.m. when she was discovered. Accused had again had sex with her. I find her evidence supported by that of her Aunt PW 2 and PW 3 that she had been out at night for a long while before she got back. Probably they would never have discovered what was happening had their baby not woken up at that particular time”.

The learned trial magistrate also did consider the ***Alibi*** defence fronted by the Accused analysed it and found it wanting.

The Complainants evidence on penetration is buttressed by that of the clinical officer PW 6 who upon examining her found her outer vagina with shaven hair. The Complainant herself had told the Court at page 4 line 11,

“ He had sex with me. I felt pain. I do not know if I bled. Accused told me to watch out and if I saw hair sprouting on any place of my body I should shave otherwise I would become a witch”.

The clinical officer did a vaginal swab which indicated that she had pus cells. She had a broken hymen.

The Accused was taken to her for examination. His urine had pus cells meaning that he had a sexually transmitted disease like the Complainant.

From the above I am satisfied upon evaluation that the Appellant did penetrate the vagina of the Complainant with his penis.

Section 179 of the Criminal Procedure Code provides,

“When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and the combination is proved

but the remaining particulars are not proved, he may be Convicted of the minor offence although he was not charged with it”.

Having found that the offence of defilement was not proved beyond reasonable doubt on account of failure to prove the age of the Complainant and having considered the other evidence in total I am satisfied that the lesser offence of sexual assault was proved.

Section 5(1) of the Sexual offences Act provides,

“Any person who unlawfully (a) penetrates the genital organ of another person with (i) any part of the body of another or that person is guilty of an offence termed sexual assault”.

The Conviction of the appellant for the offence of defilement for twenty (20) years is substituted with that of the lesser offence of sexual assault contrary to section 5(1) of the sexual offences act and he is Sentenced to ten (10) years imprisonment. To that extent only does his appeal succeed.

Judgment delivered dated and signed this **31st** day of **March, 2014**.

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M. MUYA

JUDGE

31ST MARCH, 2014

In the presence of:-

Learned State counsel Miss Mutua

Appellant present

Court clerk Musundi